

Criminal sanctions

Criminal Sanctions : An overview of EU and national case law

Anticompetitive practices, Sanctions/Fines/Penalties, Criminal sanctions, Foreword, Liability (personal), All business sectors

Note from the Editors : although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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Introduction

It is, perhaps, time to take stock of the issue of 'criminal antitrust' in the EU. In recent years there has been a greater focus on the criminalisation of competition law, in particular in respect of cartels, in numerous jurisdictions around the world. The US has long advocated criminalisation and regularly sends individuals to jail for cartel conduct. Moreover, the majority of the twenty eight EU Member States currently have the ability to impose criminal penalties for some types of antitrust violations [1]. While actual enforcement of these powers has to date been thin on the ground, this does not exclude the possibility that enforcement could become more active in the future - after all, actual criminal enforcement did not become commonplace in the US until many years after the criminal legislation was enacted. Some EU countries are clearly putting criminalisation high on their agenda as an enforcement tool against cartels. For example, the UK has changed its legislation with respect to the 'criminal cartel offence' with the express purpose of increasing the number of criminal prosecutions. In contrast, at EU level, there does not appear to be any political appetite to introduce EU criminal sanctions for a number of reasons explained below. Is this the right approach, or should the EU go down the path of criminalisation ?

The US Perspective vs. the historic EU perspective

The modern proliferation of criminal sanctions for antitrust infringements was instigated by the US many years ago. Section 1 of the Sherman Act 1890, 15 U.S.C § 1, criminalises agreements in restraint of trade. Both corporations and individuals are subject to criminal prosecution for cartel conduct including price fixing, bid rigging, and horizontal market allocation. However, though cartels were criminalised in the US in 1890, it was not until over seventy years later that jail time for offenders started to become common, largely triggered by the Electrical Equipment (GE/Westinghouse/Bradley et al) indictments. This case exposed a broad range of conspiracies in the

US that resulted in electrical utilities overpaying for equipment and hence customers paying too much for electricity from rate-based regulated utilities [2]. Additionally, as the years passed, the maximum penalties increased - the Antitrust Criminal Penalty Enhancement and Reform Act 2004 increased the maximum individual fine from USD 350,000 to USD 1 million, and increased the maximum prison sentence from three to ten years. In recent years the individuals prosecuted by the DoJ are being sent to prison with increasing frequency and for longer periods of time - in fiscal year 2012 the US courts imposed 45 prison terms with an average sentence of just over two years per defendant as punishment for cartel involvement [3].

The former Deputy Assistant Attorney General of the US Department of Justice Scott Hammond summed up the US view as follows : "*Cartels have no legitimate purpose and serve only to rob consumers of the tangible blessings of competition... participation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly*" [4].

Cartels have therefore long been viewed as a serious crime in the US. However, a similar mind set has not been prevalent in other jurisdictions where cartel conduct has not historically been perceived as problematic or harmful. In the early part of the twentieth century, cartels were widespread and even encouraged by some governments as is evident, for example, by the international steel cartel agreement of 1926 signed by major steel producers in Germany, France, Belgium and Luxembourg (Entente Internationale de l'Acier). A similar tolerance of cartels was seen in the UK. For example, in *Adelaide Steamship*, a case concerning price-fixing, the Privy Council stated :

"..no contract was ever an offence at common law merely because it was in restraint of trade... The right of an individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others [5]."

In 1955 the UK government rejected a recommendation by the Cairns Committee report that cartels should be treated as a criminal offence and instead accepted the minority view that criminalisation was inappropriate because some cartels operated in the public interest [6]. Criminal sanctions for cartel activity were therefore not introduced into the UK until the Enterprise Act 2002 was enacted. More recently, in 2007 a report found that only around six in ten people in Britain believed that price-fixing is dishonest and two in ten people believed that it is not [7]. The historic tolerance of cartels under the common law was highlighted by the House of Lords in *Norris v United States* [8] , where secret price-fixing was found not to amount to a conspiracy to defraud unless accompanied by other aggravating features [9]. The House of Lords said that '...unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, [cartel] agreements were not actionable or indictable' [10].

Increasing Use of Criminal Sanctions Globally ?

However currently a number of competition regimes around the world include criminal sanctions,

such as Brazil, Mexico, Canada, Australia, Israel and India. There are a number of reasons why there is some momentum behind the geographic expansion of criminal antitrust. The driving force behind criminalisation is a recognition (or belief) that the threat of sanctions against an individual could be a more effective deterrent than the threat of corporate sanctions [11]. The risk of personal punishment (especially jail time) could also encourage individuals to resist corporate pressure to enter into unlawful activity [12]. Criminal penalties also make, perhaps, greater headlines in the media, and so may be viewed as a good way to publicise the fact that cartels harm consumers and have severe consequences for the individuals involved. Furthermore, the threat of personal liability may make it easier for competition authorities to detect cartels, particularly as most countries which have personal criminal penalties also allow individuals to utilise leniency programmes for their own benefit.

Criminal sanctions have also gradually crept into the antitrust enforcement regimes of many European countries. A number of EU Member States are increasingly focussing on individual liability for competition law infringements, particularly cartels. In Austria and Germany, individuals can be sent to prison for entering into bid-rigging arrangements [13] and in France, individuals can face fines of up to EUR 75,000 and prison for up to four years [14]. Some regimes also create incentives on the individuals to whistleblow, or at least cooperate. For example, in the UK it is possible for an individual to obtain a no-action letter from the competition authority as part of the leniency system. This means that the authority will not criminally prosecute that individual provided that the conditions for leniency are satisfied [15]. Similar systems also apply in other jurisdictions, such as Austria and the Slovak Republic [16].

However, a closer look at the various EU jurisdictions reveals that criminalisation is not necessarily a clear cut enforcement tool. A number of countries criminalise cartels in a tenuous manner such that the offence relates more to fraud alone than a cartel offence and hence is much narrower than a true notion of criminal antitrust. Examples of such regimes include France, Greece, Romania, and those countries which apply criminal penalties to bid-rigging offences only (Austria, Germany, Hungary, Poland, Italy). In practice, criminal sanctions are imposed on individuals relatively rarely in all Member States. This is possibly due to the fact that many authorities/courts are still reluctant to punish an individual for a crime that ultimately benefits the company, which can be subject to heavy financial penalties - or that the relevant authorities still display some reluctance to bring charges. This may be due to lack of experience or a cultural factor. An alternative explanation could be that the mental element to the offence, be it fraud or dishonesty, represents an additional hurdle on enforcers, that is, it requires evidence of more than the mere violation of competition law. (This was the view repeatedly stated by OFT officials when lobbying for changes to the UK criminal regime.)

Nonetheless, it is possible that criminal enforcement at the Member State level could take off in the future. In the past year, a number of Member States have ramped up their criminal antitrust regimes. For example, the UK has recently taken steps to reform its criminal cartel offence in order to make it easier to successfully prosecute individuals by removing the requirement for the competition authority to show dishonesty. Individuals guilty of the criminal cartel offence in the UK can face up to five years in prison, unlimited fines and be disqualified as directors for up to fifteen years [17].

Furthermore, notwithstanding the rationale behind the changes to the UK regime, a criminal

prosecution has been brought in relation to a galvanised steel tanks cartel [18]]. In Ireland, since July 2012, individuals that enter into cartels can be jailed for up to ten years (previously it was five years) [19]. This amendment was a result of the EU and IMF requiring Ireland to "introduce reforms to legislation to empower judges to improve fines and other sanctions in competition cases in order to generate more credible deterrence" [20]. It has been said that the fact that the maximum penalty was doubled, rather than increased by two to three years, could be interpreted as an acknowledgment by the legislature of the harmfulness of cartels and of the need for a very serious legal response to their occurrence [21]. In March 2013, the new Danish Competition Act came into force which enables individuals to be imprisoned for up to 18 months for participating in serious cartel infringements. The object of the new legislation was to increase the fines for companies and individuals and to introduce custodial sentences in cartel cases [22].

The EU Perspective

At the EU level, Regulation 1/2003 EC introduced a decentralised system of antitrust infringement, giving the European Commission and Member State national competition authorities the power to enforce EU competition law. However, Regulation 1/2003 does not harmonise sanctions for violations of competition law. Both the European Commission and individual Member States can fine undertakings, but Member States remain free to introduce other penalties for antitrust infringements. Accordingly, the individual Member States have the ability (but are not required) to introduce individual sanctions for violations of competition law. The EU competition law regime itself, unlike the US regime, and the regimes of a number of EU Member States as indicated above, focusses solely on competition law infringements committed by undertakings and not by individuals and such investigations lead only to administrative and civil law sanctions. Consequently, only undertakings can be penalised and the EU legal framework does not provide for any individual criminal sanctions at EU level. Indeed, Article 23(5) of Regulation 1/2003 EC expressly provides that fining decisions taken by the European Commission in respect of infringements of EU competition law are not of a criminal law nature (albeit they can be quasi-criminal for some purposes).

It has been suggested that Article 83 of the Treaty on the Functioning of the European Union ("TFEU"), which allows for the adoption of substantive criminal law measures, opens up the possibility of harmonisation and hence some type of "EU criminal antitrust" [23]. Where Article 83 TFEU is reserved for the tackling of serious crimes with a cross-border element, such as money laundering, it is argued that the European Council has the option of adopting a decision identifying other areas of crime, such as cartels. However, this is far from clear. Some argue that criminalisation of competition law at EU level would only be possible by amending Article 83 TFEU [24]. This is because Article 83 only provides for the use of directives in adopting such measures. As directives only bind i>Member States, Article 83 TFEU excludes the possibility of introducing criminalisation of competition law at EU level. According to that view therefore a Treaty amendment is necessary for the competence to criminalise competition law to exist.

Even setting aside such legal and constitutional complexities, at present there does not appear to be any appetite at EU level to introduce criminal sanctions for violations of EU competition law. Indeed, it has been suggested that the introduction of individual criminal sanctions in the EU system may lead to fewer successful cartel investigations since it would provide individuals with higher incentives to obstruct inspections and destroy evidence [25]. However this view seems difficult to reconcile with the US Department of Justice's track record of successful cartel prosecutions [26].

Rather, the European Commission seems to prefer to send a message that it will not tolerate cartels solely by imposing significant fines on companies. For example, it recently fined eight international banks a record EUR 1.71 billion for participating in cartels in markets for interest rate derivatives [27]. This is as "criminal" as EU antitrust needs to be - although the European antitrust enforcement system is by nature administrative, the levels of fines imposed are substantively akin to criminal penalties - a fact recognised by the European Court of Human Rights, which has found that a fine imposed for the infringement of competition law can be of a criminal nature [28].

It appears that some European Commission officials largely consider that the existing system of administrative sanctions against undertakings is a sufficiently strong deterrent. The hefty financial penalties are heavily publicised and can be expected to have an impact on the share value of the company in question, as well as an impact on the company's public image. It is argued that this is enough to dissuade individuals from entering into cartels, not to mention the possibility of the company taking disciplinary action against employees involved in infringements, as well as the resulting damage to reputation [29]. The European Commission and most national competition authorities regularly impose significant administrative penalties on undertakings (some countries, such as Belgium, Germany and the Netherlands, also impose administrative (rather than criminal) fines on individuals). For example, the current Director General for Competition of the European Commission has publicly stated that he considers that the combination of corporate administrative fines with the Commission's cartels leniency programme is an effective deterrent, and that this has been successful in increasing the number of cartel decisions (on average the Commission issues five decisions per year) [30].

Further, another official at the European Commission has previously indicated that enforcement becomes more complicated where the system involves individual sanctions, particularly custodial sanctions [31]. He suggests that criminalisation can only be effective if the criminal legislation is adequately enforced. This requires a number of criteria such as the need for adequate investigative powers; well-resourced and dedicated enforcement agencies; the willingness of judges to convict; and, in particular, the existence of an immunity or leniency programme for individuals. He also suggests that if leniency is not available to individuals, corporate applications may be inhibited, leading to under-enforcement of antitrust violations [32]. He is not alone in this view. Some individual EU countries, for example Sweden, have decided against the introduction of criminal sanctions due to a concern that this could have a negative impact on leniency [33].

However, whilst it may be true that individual sanctions can add a layer of complexity, it would appear that the EU already has some of the features that have been identified as necessary for effective criminalisation. In particular, the European Commission has significant investigative powers at its disposal and has certainly shown itself willing to use those powers to detect and punish cartels. Of course, the ability for an individual to obtain leniency is of importance, as it would give the offending individual an incentive to confess to his crime without fear of personal sanctions, but this could be easily introduced.

Nevertheless, it should be noted that there has been a deliberate attempt by some to delineate any criminal offence from EU/"national competition law" within the meaning of Regulation 1/2003. It is important that the criminal cartel offence is distinct from national competition law so that criminal cases can be pursued in a Member State even if there are parallel civil proceedings at the EU level [34]. The UK is an example and a jurisdiction where the issue has been judicially considered, with the

UK Court of Appeal confirming that the UK cartel offence is not "national competition law" [35]. The Court found that the test for what constitutes national competition law is whether the national law in question had the objective of applying Articles 101 or 102 TFEU (i.e. deciding substantively whether those provisions had been infringed), rather than whether it pursued the overall objective of preventing anti-competitive practices. The Court concluded that the question of the validity of agreements does not arise within the context of the offence, since the UK criminal cartel offence is aimed at the conduct of individuals. Accordingly, the Court of Appeal found that the UK can bring criminal proceedings in respect of individuals involved in cartels which are subject to parallel proceedings at the EU level for infringement of EU competition law.

The Challenges of Criminal Enforcement

Nevertheless, if a large number of Member States have some form of criminal sanctions, there may be no real need for introducing criminal sanctions at the EU level, particularly given the current lack of cases. In contrast with civil penalties, which are regularly imposed at EU and national levels, criminal sanctions (whether imprisonment or individual fines) are in fact rarely imposed by Member States.

For instance, in Ireland there have only been three cases since 2002 where individuals have been given (suspended) prison sentences for cartel conduct [36]. In France, criminal sanctions are applied on rare occasions [37]. This picture suggests that, in reality, there is not a great difference between the EU and national systems as the primary focus is in fact on civil sanctions.

This may beg the question whether criminal penalties can really be an effective deterrent if they are rarely enforced in practice. Experience has shown that the criminal enforcement of competition law infringements can face significant hurdles. An often cited example is the fact that the UK has had a criminal cartel offence for ten years but this has resulted in only one successful criminal prosecution [38]. The collapse of the UK Office of Fair Trading's ("OFT") trial in *BA/Virgin Passenger Fuel Surcharges* [39] in 2010 is cited by some as demonstrating the difficulty of criminal enforcement, particularly in the context of leniency applications in parallel civil and criminal investigations, although many would argue that this prosecution was simply mishandled, a point of view given credence by the OFT's own report, where it acknowledges that it had made mistakes [40]. Since then, measures have been implemented to strengthen the regulator's criminal enforcement capabilities, such as the recruitment of experienced criminal investigators. Furthermore, and as noted above, the OFT recently announced that it is criminally prosecuting an individual with dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage, so criminal prosecution is clearly still a priority [41]. It remains to be seen whether the removal of the dishonesty element from the criminal cartel offence will make it easier to bring successful criminal prosecutions [42].

Conclusion

It is unlikely that there will be any proposals in the near future to grant the European Commission the power to impose criminal sanctions for antitrust violations, not least due to the legal difficulty in introducing such powers. However, the absence of such competence is clearly not preventing the European Commission from its mission of detecting and stamping out cartels, as evidenced by the

number of large fines that it has imposed on undertakings in recent years (nearly EUR 2 billion in 2013) [43]. This suggests that at present, perhaps, there is no real need to introduce "EU criminal antitrust". The threat of corporate punishment is undoubtedly a deterrent, even though unaccompanied by personal criminal sanctions.

Nonetheless, the lack of desire for criminalisation at EU level is not stopping individual Member States from pursuing their own initiatives to introduce or strengthen their criminal enforcement powers in respect of competition law, alongside civil penalties for companies. A number of jurisdictions are slowly drifting towards increased use of criminal enforcement. It may be some time before Member States start using their criminal powers with the same zeal and confidence as their US counterpart and hence for criminalisation to be viewed as a truly effective form of deterrence. Perhaps what is needed is a "trigger event" which would push them into utilising their criminal powers, as was the case in the US with the Electrical Equipment indictments. The slow drift may then gather pace, such that criminal antitrust in EU Member States becomes a reality.

[1] The following EEA countries currently impose criminal sanctions for antitrust infringements : Austria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Malta, Norway, Poland, Romania, Slovak Republic, Slovenia, UK.

[2] *United States v. General Electric Company et al* (Cr. No. 20401) and ultimately upheld : *In re GRAND JURY PROCEEDINGS United States of America*, 309 F.2d 440, 1 November 1962

[3] See statistics published by DoJ, available at : <http://www.justice.gov/atr/public/d...>

[4] Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett, *Deterrence and Detection of Cartels : Using All the Tools and Sanctions*, 26th Annual National Institute on White Collar Crime, Miami, Florida, 1 March 2012, available at <http://www.justice.gov/atr/public/s...>

[5] *Attorney General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, at 797.

[6] Collective Discrimination : A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices' Cmd 9504 (HMSO, London 1955) at 242-259 <http://www.competition-commission.o...> See also Andreas Stephan, The UK Cartel Offence : Lame Duck or Black Mamba ? ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, November 2008. Note, in 1948 the Restrictive Practices Act created the Monopolies Commission. This body was required to report on whether only certain cartels and monopolies referred to it by the Secretary of State operated against the public interest. As Wilks noted, it was not really "anti" anything - see Wilks, *In the Public Interest : Competition Policy and the Monopolies and Mergers Commission* (Manchester : Manchester University Press, 1999).

[7] Stephan, A. (2007) *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain* ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia.

[8] *Norris v Government of the United States of America and others* [2008] UKHL 16

[9] [Marie-Charlotte Rouzier, The UK House of Lords establishes that the conspiracy to defraud offence may not replace the cartel offence, for facts before 2003, where no deceit, misrepresentation](#)

[nor lies are involved \(Norris\), 12 March 2008, e-Competitions Bulletin March 2008, Art. N° 19957](#)

[10] [Norris v Government of the United States of America and others \[2008\] UKHL 16](#)

[11] See Wouter Wils, *Is Criminalisation of EU Competition Law the Answer ?* [2005] World Competition 17.

[12] OECD Policy Roundtable : *Cartel Sanctions against Individuals* [2003].

[13] [Stefan Thomas, Germany : The role of criminal and administrative sanctions in German competition law-enforcement, 15 septembre 2006, Bulletin e-Competitions, September 2006, Art. N° 13325 ; Christina Hummer, The Austrian Parliament issues new leniency provision covering criminal sanctions, 1er janvier 2011, Bulletin e-Competitions January 2011, Art. N° 33579](#)

[14] [Eric David, The French criminal supreme court upholds sentences inflicting prison, fines and damages for bid-rigging \("Le Havre lighting"\), 22 October 2003, e-Competitions Bulletin October 2003, Art. N° 13709 ; Eric David, A French court overturned criminal sentences on the grounds that the undertakings did not play a decisive role and that the collusion did not produce a significant effect \(AP-HP\), 2 mai 2002, Bulletin e-Competitions Criminal sanctions, Art. N° 37896](#)

[15] [Martin Favart, The UK Office of Fair Trading publishes revised guidance on applications for leniency and no-action in cartel cases, 8 juillet 2013, Bulletin e-Competitions July 2013, Art. N° 56896](#)

[16] [Christina Hummer, The Austrian Parliament issues new leniency provision covering criminal sanctions, 1er janvier 2011, Bulletin e-Competitions, January 2011, Art. N° 33579](#)

[17] [Marie-Charlotte Rouzier, The UK Office of Fair Trading issues the first imprisonment and director's disqualification orders against individuals prosecuted for criminal cartel \(Marine Hoses Cartel\), 11 juin 2008, Bulletin e-Competitions Criminal sanctions, Art. N° 23567 ; Maria Kamnaki, The UK OFT secures the first ever criminal convictions against individuals for cartel offences : A milestone in antitrust enforcement \(Marine Hoses Cartel\), 11 juin 2008, Bulletin e-Competitions June 2008, Art. N° 20497](#)

[18] [See <http://www.offt.gov.uk/news-and-upda...> , 27 January 2014.

[19] [Bruce Wardhaugh, The Irish Parliament amends the competition act strengthening competition law enforcement by providing new and increased sanctions and penalties, 3 juillet 2012, Bulletin e-Competitions July 2012, Art. N° 50366](#)

[20] EU/IMF Programme of Financial Support for Ireland, 16 December 2010 available at <http://137.191.228.14/documents/publications/reports/2011/euimfrevised.pdf>

[21] P.Whelan, *Ireland Offers a Glimmer of Hope for European Cartel Criminalisation*, UAE Competition Policy Blog, 26 July 2012.

[22] GCR, The European Antitrust Review 2014.

[23] Ingeborg Simonsson, *Criminalising Cartels in the EU : Is There a Case for Harmonisation ?*

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Beaton-Wells & Ezrachi : Criminaling Cartels [2011].

[24] Gurgen Hakopian, *Criminalisation of EU Competition Law Enforcement - A possibility after Lisbon ?* (2010) 7 (1) CompLRev

[25] Speech by Cecilio Madero Villarejo at IBA/KBA Competition Law Conference, 28 April 2011, *Introductory Remarks for Panel Session*.

[26] For example, note that in 2013 the DoJ imposed criminal antitrust fines of USD 1.1 billion. See statistics, available at : <http://www.justice.gov/atr/public/c...>

[27] [Article from European Competition Network Brief, The EU Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry \(Barclays, Deutsche Bank, RBS and Société Générale\), 4 décembre 2013, Bulletin e-Competitions January 2014, Art. N° 62161](#)

[28] *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.

[29] Speech by Alexander Italianer at IBA Annual Conference, 9 October 2013, *Fighting Cartels in Europe and the US : different systems, common goals*.

[30] *ibid*.

[31] Speech by Cecilio Madero Villarejo at IBA/KBA Competition Law Conference, 28 April 2011, *Introductory Remarks for Panel Session*.

[32] *ibid*.

[33] [Irina Göransson, A Swedish committee issues a report paving the way to reform of the Competition Act \(Legal Review Committee 2006 Report\), 29 novembre 2006, Bulletin e-Competitions November 2006, Art. N° 13300](#)

[34] Under Article 3 of Regulation 1/2003 EC, where a Member State applies its national competition law to conduct to which EU competition law applies, the Member State must also apply the relevant EU competition law provisions. Under Article 11(6) of Regulation 1/2003 EC, the commencement of enforcement action by the European Commission has the effect of relieving Member States of their competence to apply EU competition law to the same conduct.

[35] *IB v R Court of Appeal - Criminal Division* [2009] EWCA Crim 2575.

[36] [Orla Lynskey, An Irish criminal court imposes criminal sanctions to a cartel in the oil market \(Dalton and Corrib Oil\), 24 janvier 2007, Bulletin e-Competitions Criminal sanctions, Art. N° 23978](#) - ; [Orla Lynskey, An Irish court sentences an individual to a suspended prison sentence for price-fixing \(Citroen dealer\), 8 mai 2008, Bulletin e-Competitions Criminal sanctions, Art. N° 23265](#) ; The Irish Public Prosecutor brings criminal charges against a businessman alleged to have taken part in a price fixing agreement (IFDA-Ford), 19 April 2006.

[37] [Marie-Charlotte Rouzier, The French Competition Council makes use of criminal proceedings to heavily sanction major anticompetitive practices in the course of public tendering \(Ile-de-France secondary schools public works\), 9 mai 2007, Bulletin e-Competitions Exchange of information, Art.](#)

N° 44022 ; [Marie-Charlotte Rouzier](#), [The French Supreme Court makes an another step towards criminalization of anticompetitive practices \(Paris high-schools public markets\)](#), 20 février 2008, [Bulletin e-Competitions Public procurement](#), Art. N° 40752 ; [Eric David](#), [The French Criminal Supreme Court upheld sentences inflicting prison, fines and damages for bid-rigging \("Isère tarmac"\)](#), 16 mai 2001, [Bulletin e-Competitions Criminal sanctions](#), Art. N° 23997

[38] See footnote 18, *supra*.

[39] [Marie-Charlotte Rouzier](#), [The UK OFT announces criminal charges in the airline fuel surcharges cartel case \(British airways\)](#), 7 août 2008, [Bulletin e-Competitions Transport](#), Art. N° 23788 ; [Marie-Charlotte Rouzier](#), [The UK OFT concludes the promising criminal case brought against the main national airline's executives \(British Airways\)](#), 10 mai 2010, [Bulletin e-Competitions May 2010](#), Art. N° 34782

[40] OFT Report, Project Condor Board Review, October 2010. See also J. Joshua, *Shooting the Messenger : Does the UK Criminal Cartel Offense Have a Future ?* The Antitrust Source, August 2010.

[41] <http://www.oft.gov.uk/news-and-upda...>

[42] The OFT has argued that the requirement for it to prove dishonesty is too high a burden in practice and this has made it difficult for it to bring prosecutions. One could respond that it is difficult to substantiate this claim, given that the issue of dishonesty has not been put to the test in front of a jury to date. The removal of "dishonesty" change may create an additional issue and cause the Court of Appeal case referred to above to be revisited. As of 1 April 2014, the UK cartel offence will no longer include the requirement to show dishonesty. Arguably the loss of dishonesty could bring the offence closer to national competition law, as dishonesty is an element that differentiates the offence from the civil prohibition on anti-competitive agreements. At the end of the day, the practical effect of the UK criminal cartel offence (irrespective of the dishonesty element) is - as is national competition law - to prohibit the underlying agreement between the undertakings, even though the offence is strictly speaking targeted at individuals. If a court were to rule that the cartel offence is a national competition law, the UK competition authority would not be able to bring criminal proceedings in respect of a cartel that was the subject of civil enforcement at EU level.

[43] Cartel penalties statistics available at <http://ec.europa.eu/competition/car...>

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