

# Tough competition?

## David Corker responds to the criminal cartel offence reform proposals

**D**rastic change to the UK competition regime was proposed by the government in its March 2011 consultation paper. In relation to the criminal cartel offence under the Enterprise Act 2002 (EnA 2002), the government set out four options for reform, all of which included the removal of the dishonesty requirement from the offence in order to make it easier to prove in court. But is this the best approach and is it too soon to be proposing such a radical change?

### Prosecutions to date

Eight years after the commencement of the criminal cartel regime, only two cases have come to court. The first prosecution, *Marine Hose* [2010] 4 CMLR 148, posed no legal or evidential difficulty for the Office of Fair Trading (OFT). All the defendants had already committed and bound themselves to an antecedent US plea agreement in relation to every aspect of their criminality, even to the extent that their defence met with the disapproval of the Court of Appeal. The Court said “we have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represents their clients in a UK court”. So *Marine Hose* was a pushover for the OFT and, as such, offers no guidance whatsoever for any issue concerned with the nature of the offence and the ability of the OFT to act as an effective prosecutor.

The second prosecution, the *BA/Virgin* case (*R v George* [2010] EWCA Crim 1148, [2010] 4 All ER 984), is the first and only occasion that the OFT has prosecuted the cartel offence without a guilty plea. The trial, scheduled to open in April 2010, would therefore have been the first opportunity for a judge and jury to consider the issue of dishonesty in the context of the offence. But within a month of the trial’s opening the OFT’s case spectacularly collapsed. The cause of this setback was nothing to do

with any difficulty of evidence or with the wording of the offence. Since then the OFT has stated that it has other criminal cartel investigations underway although none of these has yet reached the courts.

### Lack of experience

This paucity of forensic experience was not anticipated when the then government heralded the enactment of the cartel offence in 2002. It was said then that prosecutions in respect of it would send out a strong message to would-be perpetrators. Furthermore that certain types of “hard-core” if not really hard-core cartels were so nefarious that such conduct should constitute a very serious offence for which the sanction of prison was necessary.

Another, often overlooked, enforcement innovation which EnA 2002 awarded to the OFT was the power to seek a bespoke directors disqualification order (a competition disqualification order (CDO)) for up to 15 years in respect of complicity in a cartel. It is not necessary for the OFT to prove dishonesty when seeking a CDO. If our research is accurate, since the OFT was vested with the power to seek a CDO in June 2003 it has neither obtained nor ever sought a CDO. Section 204 of EnA 2002 has never been used.

In the light of this history it is surprising that the government, instead of exhorting the OFT or SFO (which can also prosecute the offence but has never actually done so) to do more and gain some experience of prosecuting contested trials, is proposing a watering down of the offence by means of removing the need to prove a defendant’s dishonesty. The justification for this being that the dishonesty element has made the offence too hard to prosecute.

### Dishonesty element

In response to this proposal, the first question which should arise is whether,

at the level of principle, the element of dishonesty should form part of the offence. Of course when the offence was first mooted by government and later considered during the Act’s legislative passage, this element and the rationale for its inclusion in the new offence attracted considerable attention and debate. It did not slip into the Act during a late night parliamentary sitting or, like the Serious Organised Crime and Police Act 2005 which created the now to be abolished Serious Organised Crime Agency, get nodded through in a parliamentary rush on the eve of a general election. The case for change as now advocated should begin with the issue of whether it is proper in relation to an offence which alleges serious criminality and in respect of which the maximum penalty is five years that there should no longer be any need to establish an accused’s dishonesty.

If a reworded cartel offence did not include the requirement to prove dishonesty, this would constitute a remarkable and troubling exception to the tradition of English criminal law when serious criminal conduct is involved. In economic crime, the offences applicable to the serious criminal conduct of individuals created either by the common law (such as conspiracy to defraud and offences or cheating the public revenue) or by statute (such as the Fraud Act 2006 (FrA 2006)) have all included an element of conscious impropriety. While this mental element may be expressed in slightly different terms in the calendar of offences falling within the rubric of economic crime, essentially they mostly require proof of dishonesty. One cannot defraud or cheat by mere recklessness or negligence. Of course there are offences of strict liability applicable to individuals as well as companies but these tend to be summary only offences where the conduct is not nearly so serious as in the more serious offences such as criminal cartel activity.

The creation of new criminal offences has usually been preceded by a public consensus that the conduct to be criminalised is that which the majority of the public regard as nefarious or seriously



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harmful to the public interest. If those in officialdom contend that a criminal offence needs to be made easier to prove because a jury will otherwise not convict, the first question to ask is surely whether such reluctance reflects a widespread perception that the conduct should not be prosecuted at all. So in the case of the cartel offence, is the perceived difficulty about proving dishonesty rooted in a fear that the public generally believe that anti-competitive activity is best sanctioned by the civil and not criminal law? Without a jury ever having had the opportunity to consider a verdict in respect of this offence, this question remains a real one.

The proper interplay between cartel-like conduct which classically is secret price-fixing and dishonesty has, moreover, become something more rather than less important since the offence was enacted. In the conjoined appeals of

*Norris v Government of the United States of America* [2008] UKHL 16, [2008] 2 All ER 1103, and *R v Goldshield Group plc* [2008] UKHL 17, [2009] 2 All ER 737, the House of Lords rejected the prosecutor's submission that secret price-fixing necessarily amounted to a conspiracy to defraud. While neither appeal was concerned with the cartel offence *per se*, the House nonetheless observed that "there are problems with the notion that mere secrecy can of itself render the price-fixing agreement criminal". There are thus substantial grounds for contending that even so-called hard-core cartels may be regarded by a jury as not satisfying the high threshold needed in order for the conduct to be rightly criminalised.

#### Time for more road-testing

Before calling for a change so fundamental as to delete the dishonesty element in order to secure some convictions, what is urgently needed is that the OFT gains some experience of prosecuting a contested trial and that there is some "road-testing" of the offence by a judge and jury. There is considerable potential for the OFT to

sharpen the tools available to it and for it and the SFO to consider whether the alleged conduct could, for example, be better prosecuted under the FrA 2006 on the ground of an abuse of position or a misrepresentation. It would be a matter of great regret that the offence was diluted in order to pander to some political impulse (whether in the UK or the US) that a need to secure a few convictions trumps the tradition and values of our criminal law. A prosecution of any individual is a very serious matter. A prosecution of an executive for cartel conduct is very likely to terminate their career, win or lose, and risks severe personal and family repercussions. If the offence is as serious as the last government and this one contend, it should not be diluted but should stand as a true deterrent to those bent on real criminality. It is quite wrong to criminalise mere negligence or even sharp practice where the existing civil sanctions for undertakings and disqualification for individuals are a sufficient penalty. **NLJ**

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