

Redefining the criminal cartel offence

Removing the need to prove dishonesty looks superficially attractive but may not make things better

by **David Corker***

In March 2011, the UK government published a lengthy consultation paper which set out proposals for a wide-ranging reform of the UK competition regime. One section of this consultation paper was devoted to the criminal cartel offence under the Enterprise Act 2002. The government argued that the need to prove dishonesty as an element of this offence had made prosecutions too difficult and, in consequence, the introduction of the offence in 2003 had not had the intended deterrent effect. The paper puts forward four options for a new model offence, with a preference for the one which would criminalise secret price-fixing agreements with no requirement to prove dishonesty as a specific ingredient of the offence. But is this the right approach and is it too soon to be proposing such a radical change?

The government's proposals attracted a large number of responses. A quick survey shows them to be uniformly hostile to the removal of the dishonesty element. They almost all make the same central point: paucity of cases is not necessarily an indication that the regime is not functioning well. To put this another way, there is insufficient evidence to establish that the dishonesty element has led to otherwise strong cases not being brought to court.

The mediocre record to date of the UK's Office of Fair Trading

Plainly, the OFT's performance in relation to prosecutions of this offence is a matter of legitimate public concern. In the last eight years, there have only been two prosecutions. And in the only one of these which was contested (BA-Virgin or *R v George*), the OFT's case collapsed because of its inadequate capability to deal with certain investigatory procedures. So, on the face of it, enforcement of this offence is not working out as the government intended.

However, a fair appreciation of the OFT's record needs to take account of three important factors – all of which work against the bringing of prosecutions. First, in the realm of competition law enforcement generally, the main weapon available to regulators is leniency. In common with the US approach, the OFT believes that the best means to achieve compliance is a clear policy that encourages cartel participants to report themselves. This is underpinned by the opportunity to achieve a non-prosecution outcome in some cases. So a lack of prosecutions may, in fact, be a measure of the OFT's success. In order to determine this fairly, what is needed is an evaluation of the leniency applications made since 2003 to see

how many of them were made partly out of a desire to limit the threat of a prosecution.

Second, as the international record of criminal cartel enforcement demonstrates, the majority of alleged cartels which are selected for prosecution are, for reasons beyond the scope of this article, bipartite ones. Unlike civil litigation, prosecutions tend to be of one set of participants connected to company A, with the other set connected to Company B being immunised prosecution witnesses, as in the BA-Virgin case. As any prosecutor knows well, a case built on the purported credibility and honesty of witnesses from A whose evidence has only been obtained as a result of an immunity deal – and whose conduct was the same as the accused from B – will always be a risky one. The witnesses may turn sour on the prosecutor and the court may regard the prosecution with distaste, taking account of the fact that pragmatism has apparently scored over principle and that the accused have palpably been singled out for prosecution while the others happened to do a deal that meant they escaped justice so long as they heaped blame on the accused. Although these problems may also infect a more multiparty case, the mirror-image issue is unlikely to be as pronounced.

Third, the likelihood is that most cartel investigations are multijurisdictional, with the implication that what one enforcer does in one country is likely to shape the approach of others. A decision made in, for example, the US by the cartels section of the Department of Justice to settle a case via a non-prosecution agreement is likely to fetter the ability of the OFT to prosecute anyone concerned in the same alleged cartel. So an antecedent and often uncoordinated decision by one prosecutor to extend leniency can lead to other prosecutors having to accept they must act likewise. This is not a problem confined to cartels; much of the SFO's work concerning overseas corruption has been stymied by an announcement made in Washington DC that the criminal investigation there is all over.

Rather than considering changes to the offence itself, it may be better to look instead at measures designed to improve the OFT's capacity to bring cartel prosecutions successfully. Indeed, this in essence was the conclusion reached by the OFT itself in its Project Condor board review published in December 2010. Undoubtedly, the OFT has sought to implement many of its recommendations and some time must elapse before they bear fruit. Criminal cartel investigations take a long time, as the subject-matter is invariably complex.

* *David Corker is a partner at Corker Binning*

For example, on 4 October this year, the OFT announced it had dropped its probe of a company executive (just one) in the automotive components industry, having first arrested him in February 2010.

Why the dishonesty element of the offence is worth preserving

When the offence was first mooted by government and later considered during the Act's legislative passage, this dishonesty 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 that there should no longer be any need to establish an accused's dishonesty when it comes to an offence that alleges serious criminality and carries a maximum penalty of five years' imprisonment.

If a reworded cartel offence did not include a 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 of cheating the public revenue) or by statute (such as the Fraud Act 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. However, these tend to be summary-only offences where the conduct is not nearly so heinous 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 something that the majority of the public regards as nefarious or seriously harmful to the public interest. If the government contends that a criminal offence needs to be made easier to prove because a jury will otherwise not convict, one must ask 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 believes that anticompetitive activity is best punished 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 proposals also fail to take into account the detailed consideration given to the reform of the law on fraud by the Law Commission in its 2002 report, which gave rise to the Fraud Act 2006. Instead, it refers to an earlier 1999 Law Commission report. In its 2002 report, the Law Commission found that the *R v Ghosh* definition of dishonesty is

unproblematic for jurors – a vital element of a large number of criminal offences – and that to abandon it would have a significant impact on the criminal justice system.

The government's four options for reform

While it is argued that none of these proposals for reform are superior to the current offence, each of the following requires a brief mention:

- Reliance on prosecutorial guidance. The DPP's recent guidance on prosecuting cases of assisting suicide may be analogous. But do we want to rely on prosecutors to tell us what should be a tort and what should be an offence? It becomes very difficult for a prosecutor to distinguish fairly one form of alleged hardcore cartel behaviour from another, and so decide which to take no action against and which to prosecute. Surely it is preferable that the statute defines the offence and that the current formula of requiring cogent evidence of dishonesty is a suitable way of discriminating one alleged cartel from another?
- Excluding the offence for a list of virtuous or "whitelisted" price-fixing agreements. It is difficult to see how such an approach would avoid the vice of uncertainty. Surely any purportedly benign agreement would be procompetitive not anticompetitive and establishing this would invite a plethora of expert evidence into the criminal courtroom. Moreover, the burden of proving this would inevitably be cast onto the accused.
- A secrecy criterion. Such an element would be a novel one for our criminal jurisprudence in contrast to the settled law on dishonesty. Distinguishing legitimate confidentiality in commercial transactions from the concept of secrecy would seem to be a difficult test to apply in reality and thus allow for lawyers to argue endlessly that it is the former rather than the latter. And why should secrecy be the proper moral foundation for distinguishing civil from criminal conduct?
- Defining the offence to exclude agreements made openly. But "openly" in relation to whom? The immediate customer, who may be another wholesaler that is able to absorb a price increase by passing it on, or the ultimate retail customer, who is unable to do so easily? Surely the kinds of cartels which most deserve prosecution are those which harm individual consumers, in relation to whom the concept of agreements between suppliers made openly (or not) has no application.

Conclusion

There is plenty of cartel activity around the world but national and regional competition regimes vary considerably in the enforcement tools available to them.

Criminal penalties do operate as significant deterrents if they are backed up by real cases coming to court. In the UK at least, the criminal cartel regime needs time to develop with more resources for investigation and prosecution. Removing dishonesty as an element of the cartel offence is an easy option but it may not speed up investigations or make prosecutions before juries easier. The government may have its work cut out to come up with a better regime than the one we have at present.