

## BEIS – Modernising Consumer Markets: Green Paper

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I welcome the opportunity to respond to this consultation and limit my contribution to, ***Question 19: Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?***, focusing on the sanctions available to tackle cartels.

I recommend that the range of penalties available to the CMA be widened, to include individual fines against persons responsible for the creation or administration of any arrangement involving price fixing, bid rigging, market sharing and output restriction between competitors.

### **Why aren't the current tools sufficient?**

The current regime allows for corporate fines (civil) of up to 10% of worldwide turnover to be levied against undertakings under either Chapter I of the Competition Act 1998, or of Article 101 of the Treaty on the Functioning of the European Union (TFEU). The CMA or Serious Fraud Office can bring a case under the cartel offence (criminal), under s.188 Enterprise Act 2002, as amended by s.47 Enterprise and Regulatory Reform Act 2013. Finally, they can apply for a disqualification order (civil) against a director, for a period of up to 15 years (Competition Disqualification Order) under sections 9A-E Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002.

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As was acknowledged by the 2001 White Paper that preceded the Enterprise Act, corporate fines alone are unlikely to sufficiently deter cartel arrangements.<sup>2</sup> They do not directly punish the individual decision makers responsible for the cartel, many of whom may have left the company by the time the penalty is imposed.<sup>3</sup> This is important as cartels are not generally operated within the institutional framework of the firm and meetings are more likely to occur using clandestine means and in locations away from corporate premises.<sup>4</sup> There is extensive empirical evidence to suggest that current levels of cartel fines do not outweigh the expected illegal profits from a cartel.<sup>5</sup> It is also unclear, the extent to which these high fines are being passed on to consumers through higher prices, or whether there are internal consequences for the individual employees responsible for an infringement. Anecdotally, it would appear individuals are able to leverage significant protection in return for helping their employer apply for leniency.

The criminal offence undoubtedly has the power to be significantly deterrence enhancing. The inclusion of *dishonesty* in the original offence was intended to draw direct parallels with theft and fraud and send out a clear message to businesses and members of the public, that cartel conduct was harmful and carried sufficient moral opprobrium to be treated as crime.<sup>6</sup> However, this set the bar too high, as demonstrated in *R v Dean and Stringer* (Galvanised Steel Tanks),<sup>7</sup> where the jury appeared to struggle to understand how the CMA's case demonstrated dishonesty, despite detailed evidence that the cartel practices did indeed take place.<sup>8</sup> Most welcomed the removal of the dishonesty requirement in 2014, to be replaced by a series of carve-outs and defences where the defendant can demonstrate they did not hide or intend to hide the arrangement.<sup>9</sup> While these reforms take effect, the rate of successful prosecution remains very low and the failure of the *British Airways*<sup>10</sup> case by the CMA's predecessor, the Office of Fair Trading (OFT), demonstrated the steep learning curve that a predominantly civil enforcement authority must undertake, if it is to be effective when turning its hand to criminal prosecutions.

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<sup>2</sup> Department of Trade and Industry (DTI) White Paper, *A World Class Competition Regime* (CM 5233) 2001, para. 7.33.

<sup>3</sup> See A Stephan, 'See no Evil: Cartels and the Limits of Antitrust Compliance programs' (2010) *The Company Lawyer*. 31(8), pp. 231-239.

<sup>4</sup> *Ibid*

<sup>5</sup> See, for example: E Combe and C Monnier 'Fines against hard core cartels in Europe: the myth of over enforcement' (2011) 56 *Antitrust Bull* 235; PL Ormosi 'A tip of the iceberg? The probability of catching cartels' (2014) 29(4) *J Appl Econometrics* 549-566.

<sup>6</sup> Joint Treasury/DTI Report *The UK's Competition Regime* (2001); OFT 'Proposed criminalization of cartels in the UK', a report prepared for the OFT by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM (November 2001)

<sup>7</sup> *R v Dean and Stringer* (2015) Southwark Crown Court, unreported.

<sup>8</sup> I have intimate knowledge of this case because I acted as an expert adviser to Mr Dean's defence team.

<sup>9</sup> A Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) *Crim. L. Rev.*, Vol. 6, pp. 446-455; A Stephan, 'The UK Cartel Offence: A Purposive Interpretation?' (2014) *Crim. L. Rev.*, Issue 12, pp. 879-892.

<sup>10</sup> *R v George, Crawley, Burns and Burnett* [2010] EWCA Crim 1148.

Competition disqualification orders allow for the punishment of individuals through a civil procedure, that circumvents the costs and uncertainties associated with a criminal process. Despite a number of recent CDOs successfully applied for by the CMA, this sanction has been underutilised. This is mainly due to the longstanding CMA and OFT policy that a CDO will not be sought against any current director of a company that has benefited from leniency.<sup>11</sup> This means that it is not available against the directors of the majority of infringing firms, as they do engage with the CMA's leniency programme. There are other problems associated with CDOs too, such as the fact they only apply to directors and are not enforceable outside the UK.<sup>12</sup>

### **Why do some competition lawyers fear a 'chilling effect' from individual sanctions?**

This relates to a company's willingness to come forward and report a cartel under the CMA's leniency programme. Certainty and predictability are thought to be important characteristics of leniency and the uncertainties of whether individual sanctions will be imposed, and who they might be imposed on, are thought by some to make self-reporting less likely.<sup>13</sup> This is reflected in the policy of not seeking CDOs in connection with companies that have benefited from leniency. At the heart of this 'chilling effect', there is also a perception that individual sanctions are incapable of adequately rewarding self-reporting parties who are not first through the door. For example, uncertainty as to whether a rival cartel member's employees have already secured 'no action letters', may encourage a company to simply wait and see if the CMA will detect the infringement at all. The CMA may be very sensitive to such concerns, as most cartels are now brought to the attention of competition authorities through a leniency programme.<sup>14</sup>

More research is needed on the extent to which this chilling effect is discouraging leniency applications. Both the criminal offence and CDOs are capable of being applied proportionately, to reflect the level of cooperation offered by individuals and their employers. This is done through sentencing (for the criminal offence) or the length of the disqualification sought (for the CDO). For example, in the Galvanised Steel Tanks case, there

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<sup>11</sup> Office of Fair Trading, *Director disqualification orders in competition cases: an OFT guidance document* (2010) at 4.13; See also CMA, *CMA secures director disqualification for competition law breach* (December 2016) FN 4.

<sup>12</sup> See A Stephan, 'Disqualification Orders for Directors Involved in Cartels' (2011) *Journal for European Competition Law and Practice* 2(6), pp. 529-536.

<sup>13</sup> For an academic discussion of this, see: C Harding *et al*, 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing, 2015); A MacCulloch and B Wardhaugh, 'The Baby and the Bathwater – The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency policy'. (2012) Unpublished manuscript.

<sup>14</sup> A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing, 2015).

was a third defendant (Nigel Snee), who cooperated with the CMA, pled guilty to the cartel offence and agreed to act as a witness for them at the trial of Dean and Stringer. He received a six-month suspended sentence to reflect this cooperation.<sup>15</sup>

### **Should the criminal offence be abandoned?**

No. A series of survey studies undertaken by this author in 2007 and 2014, suggest that there is a strong case for criminalisation, based on public opinion.<sup>16</sup> Three quarters of the UK public in these surveys showed an understanding that cartels were harmful and demonstrated support for a range of punitive sanctions, despite being given no information about how cartels were in fact treated in law. Significantly, the 2014 UK survey also showed that two thirds of Britons expect businesses they buy from to set their prices independently of each other.<sup>17</sup> This might be seen as a vindication of the decision to re-design the cartel offence around secrecy under ERA 2013. If competitors actively hide their collusive practices from their customers, the presumption of competitive prices means their actions amount to a deception and are therefore deserving of criminal enforcement. Although the 2014 survey showed that support for imprisonment of cartelists was low, it grew significantly as compared to 2007 (27% of those who felt cartels were harmful, as compared to 11% in 2007).

There are further reasons to retain the criminal offence. It is worth noting that there is a marked trend towards cartel criminalisation globally and that even jurisdictions that have not criminalised their cartel laws, often have criminal offences relating to bid-rigging.<sup>18</sup> Furthermore, the cartel offence is still in its relative infancy and it is too early to evaluate the effectiveness of the changes made in 2014, as conduct occurring before then is still subject to the old offence based on dishonesty. Finally, if UK Competition Law is freed from its obligations under Regulation 1/2003, when the UK leaves the European Union, BEIS may wish to consider wider models of cartel criminalisation that are not currently possible. For example, there may be benefits in engaging with both undertakings and individuals through a common criminal offence, as is typical in other jurisdictions.<sup>19</sup>

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<sup>15</sup> CMA, 'Director sentenced to 6 months for criminal cartel' (14 September 2015).

<sup>16</sup> See A Stephan, 'Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA' CCP Working Paper 15-8. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2642181](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642181) and A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' CCP Working Paper 07-12, available: <http://competitionpolicy.ac.uk/documents/8158338/8256114/CCP+Working+Paper+07-12.pdf>

<sup>17</sup> See A Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (2017) *Legal Studies*, 34(4), pp. 621-646.

<sup>18</sup> Germany is a good example of this. See F Wagner-von Papp, 'What if all bid riggers went to prison and nobody noticed? Criminal Antitrust Law Enforcement in Germany' in C Beaton-Wells and A Ezrachi, 'Criminalising Cartels: Critical Studies of an International Regulatory Movement' (Hart, 2011).

<sup>19</sup> See B Lyons, D Reader and A Stephan, 'UK Competition Policy post-Brexit: taking back control while resisting the siren calls' (2017) *Journal of Antitrust Enforcement* 5(3), pp. 347-374, available as open access on the journal's website.

## **A New Enforcement Tool: Individual Administrative Fines**

My key recommendation is that, in addition to the tools discussed above, the CMA's (Civil) powers to impose corporate fines should be extended to also include individual fines. This would bring a number of benefits:

1. **Ensuring Individual Accountability** – fining individuals responsible for cartels does not have the same deterrent effect as the label 'criminal', or the prospect of gaol. They would nevertheless constitute an important acknowledgement of the individual decision making that led to the cartel infringement taking place. Individual fines would allow the CMA to publically identify those responsible, in a manner that will adversely affect their reputation and make it more likely the company and industry will take its own action against those individuals, regardless of whether they are still employees of the infringing firm.
2. **Overcoming the 'Chilling Effect' problem in leniency** – if individual fines are capable of being calculated alongside corporate fines, any benefits provided by the leniency programme can be clearly mirrored or extended to those individuals, providing the same level of certainty. The fact individual fines provide a lower threat to one's career, as compared to a criminal record, incarceration or disqualification, also means they are less likely to discourage cooperation between the individual and their employer for the purposes of preparing a leniency application. Indeed, as with criminal regimes that engage both the individual and the firm, both will have an interest in settling liability in a timely manner and are less likely to contest the existence of the infringement.
3. **A half-way sanction to criminal enforcement** – The availability of individual fines will create a useful step between the two extremes that currently, exist where a CDO is not appropriate. Those responsible either face no personal consequences at all, or face the very serious prospect of a criminal trial. Individual fines will therefore allow the CMA to deal with cases where the criminal offence is not appropriate, but where there would be significant deterrent benefits in identifying the role of individuals.
4. **Public Support** – The survey work discussed above suggests there is good support for individual fines among members of the public, especially if they were combined with some form of public naming and shaming.<sup>20</sup>

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<sup>20</sup> See Stephan (2015) n 17, above.

Individual fines are not without shortcomings. There is a possibility they will be indemnified by the employer or used to deflect responsibility away from senior staff and onto individuals who, are either scapegoated, or who put themselves forward to show their dedication to the firm. There are also evidentiary and procedural issues that I will not go into in this response.

Despite these weaknesses, individual fines have the prospect of significantly enhancing the deterrent effect of the CMA's cartel enforcement work, where they feel a criminal prosecution or CDO is not appropriate.