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CRIMINAL CARTEL OFFENCE IN THE UK 10 YEARS AFTER THE AMENDMENT. EFFECTIVE REFORM OR FURTHER IMPEDIMENT TO PROSECUTION?

Abstract

The article describes the operation in practice of UK regulations that stipulate grounds of criminal liability for the cartel offence for which the court may impose prison sentences and/or fines under the Enterprise Act 2002. Particular attention is paid to assessing the changes to the description of this offence introduced by the Enterprise and Regulatory Reform Act 2013, which came into force on 1 April 2014. The first fundamental change to this description was to eliminate the element of “dishonesty” in the description of the cartel offence. That change was due to the difficulties involved in proving the “dishonest” nature of the actions of those alleged to have committed the act. Most of the subsequent proceedings involving cartel conspiracies, even when hard-core cartels were alleged, crashed against these problems. The second fundamental change was the introduction into the cartel offence regulation of three types of circumstances giving grounds for finding that an act does not constitute an offence and three possible “defences” against allegations of the cartel offence. The article assesses to what extent these new regulations are able to ensure in practice an effective fight against cartel offences and to what extent they constitute a further impediment to this task. The article also describes the director’s disqualification measure applied under the Company Directors Disqualification Act 1986.

KEYWORDS

cartel, offence, director's disqualification, defence, dishonesty, competition

SŁOWA KLUCZOWE

kartel, przestępstwo, dyskwalifikacja dyrektora, obrona, nieuczciwość, konkurencja

I. INTRODUCTION

It will soon be ten years since the UK Enterprise Act 2002 was amended by the Enterprise and Regulatory Reform Act 2013, which came into force on 1 April 2014¹. One of the significant changes introduced by this Act concerned the definition of the grounds of criminal liability for the cartel offence covered by section 188 of the Enterprise Act 2002².

The inspiration for those amendments was a sense of the **ineffectiveness** of provisions as a basis for criminal liability for the cartel offence, whose elements included the “**dishonesty**” of the perpetrator's conduct. It was emphasised at the time that it was this element of the description of the cartel offence that underpinned the blame of the former Office of Fair Trading³.

Fundamental changes were then made to the grounds of criminal liability for the cartel offence, for which the court may impose prison sentences and/or fines.

The first fundamental change to this regulation was to eliminate the “dishonesty” element in the description of the cartel offence. This change was due to the difficulties involved in proving the “dishonest” nature of actions of those alleged to have committed the act. It was emphasised, that it was precisely this element of “dishonesty” that underpinned the blame of the former Office of Fair Trading. Most of the subsequent proceedings involving cartel conspiracies, even when hard-core cartels were alleged, crashed against these problems.

The second fundamental change was the introduction into the cartel offence of the regulation of three types of circumstances giving grounds for finding that

¹ https://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf.

² <https://www.legislation.gov.uk/ukpga/2002/40/section/188/enacted> (text of the Enterprise Act in its original version); <https://www.legislation.gov.uk/ukpga/2002/40/section/188> (text of this Act in its current version).

³ A. Stephen, *The UK Cartel: UK Cartel Offence: Farewell Dishonesty...*, CCP, 19 March 2012, <https://competitionpolicy.ac.uk/blog/the-uk-cartel-offence-laying-the-dishonesty-requirement-to-rest/> (accessed 15.07.2023), p. 8.

an act does not constitute an offence and three possible “defences” against the allegation of the cartel offence.

I had the opportunity to write about those amendments to the law at a time when the legislative work was just about to be completed⁴. Already at that time, this amendment raised concerns as to whether the new shape of the provisions defining the grounds for criminal liability for the cartel offence would really be an effective instrument in the fight against the most serious competition violations, which included cartel collusion.

Now, almost ten years after the amendment of the provision defining the cartel offence the concerns of that time are certainly a good incentive to return to this topic and describe the functioning of these amended provisions in practice.

The purpose of this study is to answer the question whether, almost ten years after the entry into force of the above-mentioned amendments concerning the cartel offence, these changes have affected the practice of applying criminal liability for this offence. Have the changes, as declared, facilitated the application of this type of responsibility?

II. AT THE ORIGIN OF THE AMENDMENT CONCERNING THE CARTEL OFFENCE

1. The fundamental amendment to the Enterprise Act 2002 made with effect from 1 April 2014 by way of the Enterprise and Regulatory Reform Act 2013 concerned the basis for criminal liability for the cartel offence. As already mentioned, it consisted of the **abandonment** of the premise for the imputation of this liability, which was that the offender’s conduct was of a “**dishonest**” nature. The previous existence of a provision encompassing this prerequisite generally gave rise to insurmountable difficulties in proving this “dishonesty” in the conduct of persons alleged to have committed a cartel offence.

If there was a conviction, which occurred in extremely rare cases, it was only as a result of a confession from perpetrators to the cartel offence⁵.

2. Before describing the effects that this amendment has had in practice, it is worth looking into the original wording of the cartel offence provision as it was given by the Enterprise Act 2002.

⁴ See M. Król-Bogomilska, *Najnowsze zmiany w brytyjskim prawie antymonopolowym – nowe oblicze przestępstwa kartelowego*, (in:) Z. Jędrzejewski, Z. Wiernikowski, S. Żółtek, M. Królikowski (eds), *Między nauką a praktyką prawa karnego. Księga Jubileuszowa Profesora Lecha Gardockiego*, Warsaw 2014, p. 199 ff.

⁵ See on this topic: A. MacCulloch, *The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure*, (in:) B. Rodger, P. Whelan, A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective*, Oxford 2021, pp. 337–358.

The initial wording of this provision assumed that an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings:

- (a) directly or indirectly fixing a price for the supply of a product or service;
- (b) limiting or preventing supplies of a product or service;
- (c) limiting or preventing production;
- (d) dividing the supply of a product or service to a customer or customers;
- (e) dividing customers for the supply of a product or service, or
- (f) bid-rigging arrangements⁶.

From the beginning – to the present day – this offence – under Section 190 of the Enterprise Act 2002 – is punishable by imprisonment for a term not exceeding five years or by a fine (unspecified in amount) or by both.

Judgements are delivered by the courts. The Competition and Markets Authority (CMA) has investigatory and prosecutory powers. In respect of the criminal cartel offence, CMA shares its powers with the Serious Fraud Office in England, Wales and Northern Ireland, and with the Lord Advocate and the National Case-work Division in Scotland⁷.

3. Difficulties in proving the “dishonesty” of perpetrators alleged to have committed cartel offences resulted in convictions in only one case between 2003 and 2012. There were only convictions in cases against individuals involved in a marine hoses cartel who pleaded guilty to the offence under a plea bargaining procedure applied while these managers were in the US. This case concerned a cartel agreement in the market for the supply of flexible hoses for marine applications⁸. The success in this case was determined by the spectacular action of officers from **the National Criminal Division of the Antitrust Division of the US Department of Justice**⁹, who entered the hotel rooms with guns and, following a plea bargaining procedure, obtained a confession from three managers involved in this case and their agreement to have prison sentences imposed on them. In the further course of the case, these managers were transported to Lon-

⁶ See the wording of Article 188 of the Enterprise Act as it stood prior to 1 April 2014, <http://www.legislation.gov.uk/ukpga/2002/40/section/188> (accessed 15.07.2023).

⁷ L. Wright, E. Hammond, *Cartels in the United Kingdom*, Lexology, 1 May 2021, p. 2 <https://www.lexology.com/library/detail.aspx?g=d4316853-89c6-4781-b49c-3354a68756b7> (accessed 15.07.2023).

⁸ See on this topic: M. Furse, *The Criminal of Competition in the UK and in the US. Failure and Success*, Cheltenham, UK, Northampton, MA, USA 2012, p. 202 ff.; S. Ince, G. Christian, *The Marine Hose Cartel: A New Era in International Co-operation*, ‘Competition Law Insight’ 2 February 2008, pp. 9 ff., <http://www.mondaq.com/article.asp?articleid=57462> (accessed 25.01.2013). See also: P. Pascal Wirz, *Imprisonment for Hard Core Cartel Participation: A Sanction with Considerable Potential*, ‘Bond Law Review’ 2016, Vol. 28, p. 94.

⁹ The National Criminal Enforcement Section of the Antitrust Division of the U.S. Department of Justice.

don. The case ended with convictions in the UK. The three managers were sentenced to prison terms (two were sentenced to three years' imprisonment and the third one was sentenced to two and a half years) by a 2008 judgment. A director disqualification order was also applied to them (for two managers, for a period of seven years, and for the third, for a period of two years and six months). On appeal, the Court of Appeal upheld the conviction, mitigating it only slightly¹⁰.

4. However, in other cases involving acts committed during the period of the provision defining the cartel offence with the inclusion of the "dishonesty" element the evidence failed to confirm the dishonest nature of the alleged actions. For example, there was a case in the UK against the managers of British Airways and Virgin Atlantic Airways, which concerned the fixing of passenger fuel charges. In May 2010, as a result of a failure to prove dishonesty on the part of the perpetrator in this case, it was decided to discontinue these proceedings¹¹.

III. MAIN CHANGES IN THE CRIMINALISATION OF THE CARTEL OFFENCE

1. The failure of attempts to apply criminal liability for cartel offences in practice generally led to the abandonment of this premise of liability as "dishonesty" on the part of the perpetrator.

However, the amendment by way of the Enterprise and Regulatory Reform Act 2013 concerning the grounds for criminal liability for the cartel offence did not simply abandon the aforementioned element of "dishonesty".

2. In addition to the abandonment of the element of "**dishonesty**", new sec. 188A and sec. 188B by way of an amendment made to the Enterprise Act at that time was also added. This amendment introduced into that Act **three types of circumstances** giving rise to a finding that an offence had not been committed and **three possible "defences"** against the alleged cartel offence.

Namely, according to sec. 188A(1) of the Enterprise Act, it was assumed that, **an offence does not occur**, if:

- (a) under the arrangements customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected, or

¹⁰ See on this topic: M. Furse, 2012, *op. cit.*, p. 202 ff. and M. O'Kane, *Does Prison Work for Cartelists? The View from Behind Bars. (Cartels Penalties: Effective Deterrents or License Fees?)*, 'Antitrust Bulletin', 22 June 2011, <http://business.highbeam.com> (accessed 24.02.2014).

¹¹ <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/criminal-cartels-completed/> (accessed 24.02.2014).

- (b) in the case of bid-rigging arrangements, the person requesting bids was given relevant information about them at or before the time when a bid is made, or
- (c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

This regulation (sec. 188A(2)) of the Enterprise Act indicates that the notion of “relevant information” includes the names of the undertakings involved in the agreement, an indication of the good or service covered by the agreement and a description of the nature of the agreement.

In addition, sec. 188A § 3 of this Act indicates that an individual does not commit an offence covered by section 188 § 1, if the agreement is made in order to comply with the legal requirement¹².

Another change was the addition of a new sec. 188B to the Enterprise Act, which identifies three possible “defences” against the allegation of cartel offence:

- (a) “defence” by showing that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.
- (b) “defence” by showing that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.
- (c) “defence” by showing that, before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

At that time, a new provision, sec. 190A, was also introduced, which provided for the preparation and publication by the CMA of Guidance on the Cartel Offence Prosecution. Such Guidance was published on 12 March 2014. The principles contained in this Guidance apply in determining whether proceedings for the cartel offence under Article 188 should be carried out against an individual¹³.

¹² Under section 188A(5) of the Act: the term: “legal requirement” has an analogous meaning to that in section 5 of that part of the Competition Act 1998, which is called Schedule 3. The provision refers to requirements imposed: (1) by or under legislation in force in the UK; (2) by or under the TFEU or the Agreement on the European Economic Area having legal effect in the UK; (3) by or under law in force in a Member State and having legal effect in the UK.

¹³ CMA, Cartel Offence Prosecution Guidance, March 2014, CMA9 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9_Cartel_Offence_Prosecution_Guidance.pdf (accessed 5.07.2023).

IV. UNFULFILLED HOPES

1. The new provisions were met with great criticism already at the stage of their enactment and entry into force. Their content raised concerns expressed by authors pointing to the high probability that these new regulations regarding the circumstances giving rise to the finding that an offence was not committed and describing three possible “defences” against the allegation of the cartel offence would effectively make it difficult or even impossible to convict for cartel offences committed after the provisions of the Enterprise and Regulatory Reform Act 2013 came into force on 1 April 2014¹⁴. In the opinion of Whelan, the authorities in the UK now have at their disposal an offence which is **“fundamentally flawed and unworkable”** in practice¹⁵.

Jones and Williams pointed out as early as 2014 that even the government acknowledged that the new definition of the cartel offence did not have the desired deterrent effect. These authors also pointed out that the government has not yet taken sufficient steps to establish the belief that moral condemnation and criminalisation of cartel behaviour are justified¹⁶. The lack of public conviction that cartel violations are morally wrong behaviour was also highlighted by May Michels¹⁷.

From the very beginning, particular criticism has been levelled at the amendment made with regard to the definition of the possible three **“defences”**. In particular, O’Kane and Nakhwal emphasised the defectiveness of the definition of **“the defence”**, which, according to the added sec. 188B of the Enterprise Act 2002, is to plead that, at the time of entering into the agreement, the person

¹⁴ See on this topic: P. Whelan, *Does the UK’s New Offence Contain a Devastating Flaw?*, CPB, <http://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/> (accessed 5.07.2023), and H. Cartlidge, *The UK Criminal Cartel Offence – a Bad Reform Becomes Even More Complicated*, <http://www.olswang.com/articles/2012/10/the-uk-criminal-cartel-offence-%E2%80%93-a-bad-reform-becomes-even-more-complicated/> (accessed 24.02.2014). See also M. Garcia, *Will a New Approach Lead to More UK Criminal Cartel Prosecutions?*, *Fraud Intelligence*, August/September 2013, Stephenson Hardwood, http://www.shlegal.com/Asp/uploadedFiles/File/Newsletters/2013_newsletters/08_13/08_13_Fraud_Intelligence.pdf (accessed 24.02.2014).

¹⁵ P. Whelan, *Section 47 of the Enterprise and Regulatory Reform Act 2013: a flawed reform of the UK cartel offence*, *Legislation and Reports*, ‘Modern Law Review’ 2015, No. 78(3), pp. 1 ff., <https://eprints.whiterose.ac.uk/94448/3/MLR%20Article%20%28PWhelan%29.pdf> (accessed 15.07.2023). See also L. Danagher, *The Convergence of Past and Present Challenges to the Criminal Cartel Law of the UK*, 305 ‘European Competition Law Review’ 30 June 2015, No. 36(7), pp. 4–5, available at SSRN: <https://ssrn.com/abstract=2723520>.

¹⁶ A. Jones, R. Williams, *The UK Response to the Global Effort Against Cartels: is Criminalisation Really the Solution?*, ‘Journal of Antitrust Enforcement’ 2014, Vol. 2(1), p. 26.

¹⁷ E. May Michels, *The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support*, ‘Global Antitrust Review’ 2014, pp. 78 ff., <http://www.icc.qmul.ac.uk/media/icc/gar/gar2014/2---May-Mitchels.pdf>.

took **reasonable steps** to obtain advice from a professional legal adviser as to the nature of the arrangements before entering into them or before implementing them. These authors pointed out that this defect consists in allowing the offender to escape criminal liability regardless of whether the offender actually obtained advice from such a legal adviser and even where the offender, having obtained advice recommending refraining from entering into a cartel agreement, simply ignored that advice¹⁸. Anyway, any such advice should be protected by the LPP and should not be subject to disclosure¹⁹.

Getting to know the practice after the implementation of the described changes does not give cause for optimism.

In one of the sources describing the functioning of the provisions underpinning liability for the cartel offence in practice in light of the latest data in Global Legal Insights – United Kingdom Chapter – Cartels Law and Regulation 2023, Warrington and Cannon point out that even though the changes to the law were made, there have been no convictions for cartel offences. What is more, currently there are even no merely commenced proceedings²⁰.

These authors point out that recent convictions for cartel offences – apart from the aforementioned Marine Hoses cartel case – have only occurred in two more cases. They were the Precast Drainage Products case and the Galvanised Steel Tanks case. Also in these two cases, the application of the pre-amendment cartel offence provision, with the inclusion of the **“dishonest”** nature of the perpetrator acting, was made possible by the guilty pleas of the perpetrators. Significantly, in both of these cases the infringements took place before 1 April 2014, so in these cases the provisions from the period before the amendment were applied²¹. The last sentence was issued in 2017. One person was sentenced to two years’ imprisonment suspended for two years after pleading guilty to “dishonestly” agreeing

¹⁸ M. O’Kane, J. Nakhwal, *Changes to the Cartel Offence by the Enterprise and Regulatory Reform Act 2013*, ‘Practical Law Company’, 1 May 2013, p. 9, [\(https://uk.practicallaw.thomsonreuters.com/1-530-5199?transitionType=Default&contextData=\(sc.Default\)\)](https://uk.practicallaw.thomsonreuters.com/1-530-5199?transitionType=Default&contextData=(sc.Default)) (accessed 15.07.2023). See on this topic: P. Whelan, 2015, *op. cit.*, pp. 1 ff.

¹⁹ Ashurst *Quickguides*. *The UK Criminal Cartel Offence*, 17 October 2019, Ashurst, p. 4, <https://www.ashurst.com/en/insights/quickguide-the-uk-criminal-cartel-offence/> (accessed 15.07.2023).

²⁰ G. Warrington, R. Cannon, *United Kingdom Chapter – Cartels Laws and Regulations 2023*, ‘Global Legal Insights (GLI)’ 2023, para. 11, <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations> (accessed 15.07.2023).

²¹ *Ibidem*. The sentencing of the perpetrator of the cartel offence in the 2017 Precast Drainage Products case to a two-year prison term with a conditional suspension of that sentence for two years is also referred to in the study: M. Readings, R. Noorali, *United Kingdom Chapter – Cartels & Leniency Laws and Regulations 2023*, ‘International Comparative Legal Guide (ICLG)’ 2023, para. 3, <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/united-kingdom> (accessed 15.07.2023).

on the allocation of supplies and customers and price fixing of precast concrete drainage products²².

Thus, there has been no application of the provisions underpinning criminal liability for the cartel offence as amended by the Enterprise and Regulatory Reform Act 2013 throughout the entire period of the amended legislation to date. This fact unequivocally confirms the concerns that were already raised during the course of the amendment and also immediately after their entry into force.

The weak engagement of the CMA to conducting investigations and the lack of applications to the courts for sentencing were also highlighted. Swan and Sallybanks described the Memorandum of Understanding entered into on 21 October 2019 between the CMA and the Serious Fraud Office (SFO) to co-operate and co-ordinate the investigation and/or prosecution of individuals for cartel offences. The CMA has relinquished certain investigative powers to the SFO while retaining the power to issue decisions by way of no-action letters, which are binding on the SFO²³. The above remarks were included by these authors in a study with a telling title: “Another false dawn for UK criminal cartel enforcement?”

The results of the CMA’s 2015 survey point out that too little importance is attached to communication among senior business executives, even when it comes to communicating about bids during tender procedures or agreeing for dividing customers. An analogous attitude can be observed among members of the jury adjudicating cartel cases. It is emphasised that this differs significantly from the attitude towards cartel agreements seen, for example, in the American courts where cartels are described as the “supreme evil” of competition law²⁴.

The assessment of cartel agreements has been a contentious field since the early days of the formation of competition law. The issue has a deep socio-economic background, linked to the perception of the whole issue also on a moral aspect. Stephan points out that awareness of these contentious issues in many countries, however, goes hand in hand with a very broad prohibition of cartel agreements. In the chapter entitled: “Is morality important to cartel law?” contained in the newest 2023 Research Handbook on Cartels, this author, writing about the lack of consensus in this field, states that “the design of cartel laws does little to make them stand out as any less morally ambiguous than other areas of competition law regulation. In particular, prohibitions of the most serious forms of cartel conduct are not focused on effects and are deliberately designed to capture

²² M. Readings, R. Noorali, 2023, *op. cit.*, para. 3. See also: M. Readings, *United Kingdom: Cartels Comparative Guide*, para. 6.1, ‘mondaq’, 7 October 2021, <https://www.mondaq.com/uk/antitrustcompetition-law/890396/cartels-comparative-guide> (accessed 15.07.2023).

²³ A. Swan, R. Sallybanks, *Another false dawn for UK criminal cartel enforcement?*, ‘BCL’, November 2020, <https://www.bcl.com/another-false-dawn-for-uk-criminal-cartel-enforcement/> (accessed 15.07.2023).

²⁴ M. Simpson et al., *Criminal Cartel Offence in UK: Public Attitudes*, ‘Competition World’ 2016, No. 2, <https://www.nortonrosefulbright.com/en-pl/knowledge/publications/3436c26a/criminal-cartel-offence-in-uk-public-attitudes>, p. 6-7 (accessed 15.07.2023).

a very wide spectrum of anti-competitive arrangements, including those entered into out of ignorance and those involving only very minimal communication and exchange of information between competitors”²⁵.

This complete absence of prosecutions for cartel offences in the post-amendment period in the UK raises interest in the operation of laws defining cartel offences in some other countries.

2. Countries that criminalise cartel offences where prison sentences and/or fines are possible for cartel offences against individuals include for example: Australia, Brazil, Canada, Greece, Ireland, Israel, Japan, Mexico, South Africa or the United States²⁶. In some countries criminalisation of cartels has been limited to collusive bidding²⁷. At this point – due to the slim framework of the article – it is possible to cite some data on the application of penalties for cartel offences in countries with common law legal systems, where the criminalisation of cartel violations is the norm.

Insight into the practice of these countries makes it possible to note that, the experience gathered in the UK and the effects of the detection of cartel violations and the number of convictions for such violations in other countries are completely incomparable.

In the United States, the range of sanctions and penalties available in criminal proceedings for cartel activities can be severe. Penalties can be imposed on individuals as well as companies. Fines can be substantial, with the maximum amount for a violation being USD 1 million for individuals and USD 100 million for companies. Corporate fines based on the volume of trade affected by the infringement (twice the losses or profits resulting from the conduct) can often exceed USD 100 million²⁸.

As indicated by Bial, author of the description covered in the database of the International Comparative Legal Guide (ICLG) – Cartels & Leniency Laws and Regulations 2023, USA, an average of 47 offenders were convicted of cartel

²⁵ A. Stephan, *The Morality of Cartel Activity*, (in:) P. Whelan (ed.), *Research Handbook on Cartels*, Cheltenham and Northampton 2023, pp. 74–75.

²⁶ See on this topic: M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warsaw 2013, pp. 256–334. See also: M. Giangaspero, *Criminalisation of Cartels and Bid Rigging Conspiracies: a Focus on Custodial Sentences*, DAF/COMP?WP3 (2020)1 OECD.2020, p. 15 ff.

²⁷ This extent of criminalisation exists, for example, in Austria, Belgium, Finland, Germany, Hungary, Italy, Poland, Portugal and Turkey. See on this topic: M. Król-Bogomilska, 2013, *op. cit.*, pp. 256–334 and M. Giangaspero, 2020, *op. cit.*, p. 145 ff.

²⁸ A.H. Silberman, *USA*, para. 4.4 (in:) *Cartels 2023, Practice Guides*, 2023, <https://practiceguides.chambers.com/practice-guides/cartels-2023>, (accessed 15.07.2023).

offences each year in US practice during the period 2010–2017 (offenders were typically sentenced to prison terms of 18 months)²⁹.

Amato and Arguello, in a description presented in *Cartels Laws and Regulations 2023/USA*, indicate that between 2015 and 2022, the US Department of Justice prosecuted 99 companies and 270 individuals for criminal antitrust cartel violations. During this period, the total amount of fines and penalties was 5,285 billion. These authors state that the average length of a prison sentence between 2010 and 2020 was 18 months, but add that the length has dropped to 15 months in the last three years. These authors point out that since 1998, criminal fines of USD 100 million or more have been imposed against 36 companies, including 13 fines of USD 300 million or more³⁰.

In Ireland, contrary to the path taken in the legal system in the UK, the response to the difficulties of ensuring the effectiveness of criminal cartel proceedings has been to move towards tougher penalties for cartel infringements. Namely, there was a radical change to Irish competition law in 2022. The change consisted, inter alia, of an increase in the limits of fines for cartel offences (up to EUR 50 million or up to 20 per cent of turnover for offences (whichever is greater)). On an analogous basis, the upper thresholds for fines for undertakings in “civil” proceedings for cartel infringements were also increased³¹.

In their 2022 publication on fighting cartels in Ireland, McKenna and Warren point out that in the past 5 years only one criminal case with prosecutions has been taken to a conclusion (in the Commercial Flooring cartel case). It is emphasised that although this prosecution has been finalised, this has only occurred many years after it was initiated³².

Criminalisation of cartels has also been applied **in Australia’s** legal system. The law of this country provides penalties for corporations and for individuals. For corporations the maximum fine for each criminal cartel offence is the greater of: AUD 10 million, three times the total benefit that has been obtained and which

²⁹ J. Bial, *USA Chapter – Cartels & Leniency Laws and Regulations 2023*, ‘International Comparative Legal Guide (ICLG)’ 2023, para. 3.2, <https://iclg.com/practice-areas/cartels-and-lenieny-laws-and-regulations/usa> (accessed 15.07.2023).

³⁰ J. J. Amato, S. Arguello, *USA Chapter – Cartels Laws and Regulations 2023*, ‘Global Legal Insights (GLI)’ 2023, para. 11, <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/usa> (accessed 15.06.2023).

³¹ K. McKenna, C. Warren, *Irish Competition Law Update: 20 Things You Need to Know About Irish Competition Law Changes*, ‘Competition and Regulation Date’ 3 February 2022, para. 4, <https://www.matheson.com/insights/detail/irish-competition-law-update-20-things-you-need-to-know-about-irish-competition-law-changes> (accessed 15.07.2023). See also: P. Gorecki, *Cartel Sentencing in Ireland: Criminal Standards of Proof, But Civil Sanctions*, Munich Personal RePEc Archive, 1 November 2018, https://mpra.ub.uni-muenchen.de/89817/1/MPRA_paper_89817.pdf (accessed 15.07.2023).

³² K. McKenna, C. Warren, 2022, *op. cit.*, para. 4. See text in the introduction to this study, <https://www.matheson.com/insights/detail/irish-competition-law-update-20-things-you-need-to-know-about-irish-competition-law-changes> (accessed 15.07.2023).

is reasonably attributable to the commission of the offence, or if the value of the benefit obtained cannot be determined, 10 % of the corporation's annual turnover connected with Australia. An individual convicted of a criminal cartel offence may be sentenced to up to 10 years' imprisonment or fined up to AUD 444,000, or both. In June 2022 the first conviction of individuals for cartel offences since the criminalisation of cartel activities in 2009 was reached. The convictions involved four individuals who were linked to Vina Money and its competitor Hong Vina (the case involved price fixing of the Australian dollar to Vietnamese dong exchange rate and transaction fees charged to customers sending money from Australia to Vietnam). These individuals were sentenced to prison terms with conditional suspension of these sentences³³.

Also in **Canada** grounds for criminal liability for cartel collusion (including collusive bidding) have been stipulated.

According to sec. 45 of the Canadian Competition Act, for cartel violations the court may impose a sentence of up to 14 years' imprisonment or a fine or both together on an individual. There recently have been some changes made to the law in this regard. Following consultation by Innovation Science and Economic Development Canada (Department of the Government of Canada)³⁴, as of 23 June 2023 the maximum limit of CAD 25 million for fines for individuals has been removed and the amount of the fine is at the discretion of the court. Also, offences relating to bid rigging (under sec. 47 Competition Act) are punishable by up to 14 years' imprisonment or a fine at the discretion of the court³⁵.

In Canada, cartel prosecutions carry significant penalties – up to CAD25 million per violation for companies and up to a CAD 25 million fine or 14 years' imprisonment for individuals. There is no specification of a maximum fine for foreign-directed collusion or bid rigging. The courts have emphasised, both in the context of competition law and general criminal law, that fines must be high enough to deter powerful companies and not simply become a cost of doing business. To date, CAD 10 million is the highest fine for a single conspiracy. While the maximum prison sentence under Section 45 (for conspiracy) and Section 47 (for collusive bidding) of the Act is 14 years, to date, prison sentences imposed on individual cartel offenders have been relatively rare. Virtually all prison sentences for cartel violations have not exceeded two years. In most cases, these convictions were combined with probation. However, legislative changes to the

³³ Australian Competition & Consumer Commission, *First Individuals Are Sentenced for Criminal Cartel Conduct*, 8 September 2022, <https://www.accc.gov.au/media-release/first-individuals-are-sentenced-for-criminal-cartel-conduct> (accessed 15.07.2023).

³⁴ S. Bhattacharjee, D. Rothschild, P. N. Gemson, *The Cartels and Leniency Review: Canada*, 'The Law Reviews' 14 February 2023, <https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/canada> (accessed 15.07.2023).

³⁵ M. Osborne, S. Bogetti, *Canada*, para. 4.4, (in:) *Cartels 2023, Practice Guides*, <https://practiceguides.chambers.com/practice-guides/cartels-2023/canada> (accessed 15.07.2023).

Criminal Code in 2012 eliminated the possibility of conditional sentencing for future convictions³⁶.

New Zealand is another country with a legal system based on common law. However, it would be premature to compare the effectiveness of the criminalisation of cartels in the UK legal system with New Zealand's practice in this area due to the fact that, despite years of preparation, New Zealand's regulations giving rise to criminal liability for cartels only came into force on 8 April 2021. In the light of these provisions, an individual who deliberately engages in cartel conduct commits a criminal offence and can face 7 years in prison or a fine of up to NZD 500,000. Businesses can be fined up to NZD 10 million, three times the commercial gain of the offence, or 10% of the turnover for each year in which the conduct took place³⁷.

3. In legal systems based on common law, the examples of which are described above, the effectiveness of criminalisation of cartel violations, compared to the functioning of the law in the UK, looks better, and in some cases, such as the United States, even much better.

In view of the experience in other countries, where even prison sentences are imposed on individuals for cartel offences, the failures of criminalisation of cartels in the UK do not nullify the conviction of some authors of the need to intensify the fight against cartel violations through strict criminal liability. In particular, in the opinion of Whelan, the two paths of fighting cartels: the application of both "civil" liability to companies and strict criminal liability for cartel infringements to individuals, is supported by the much stronger deterrent effect of criminal penalties applied to individuals³⁸.

The confrontation of the failures of the concept on which the principles of criminalisation of cartels were based in the UK in 2014 with the functioning of the concept of criminalisation in the legal systems described above makes it possible to see the reasons for these failures not in the concept of criminalisation of cartels itself, but in the inclusion in the Enterprise Act of the entire complex of exclusionary circumstances described in Part III of this paper and the three "defences" against the allegation of cartel offences.

³⁶ A. Neil Campbell, G. Pinsonnault, W. Wu, *At a Glance: Sanctions for Cartel Activity in Canada*, <https://www.lexology.com/library/detail.aspx?g=9a152ecf-3ec9-42b0-b105-e69390e-f696a> (accessed 15.07.2023).

³⁷ R. Bycroft, *Cartel Conduct Now a Criminal Offence in New Zealand*, 12 April 2021, Tompkins Wake, <https://www.tompkinswake.com/insights/knowledge/cartel-conduct-now-a-criminal-offence-in-new-zealand/> (accessed 5.07.2023).

³⁸ P. Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law*, 'The Competition Law Review' 2007, Vol. 4(1), p. 39. See also: A. MacCulloch, 2021, *op. cit.*

The authors of papers describing the failures of legislation criminalising cartel offences in the UK also note the low level of public support for sentencing cartelists to prison terms³⁹.

That the total – so far – absence of prosecutions for cartel offences in the period after the 2014 amendment of the regulations in the UK is not a result of the absence of cartel infringements in this market, as evidenced by the sizable number of infringements committed by companies detected by the CMA in the comparable period, which will be discussed below (in Part V of this paper).

V. SECOND TRACK OF LIABILITY IN CARTEL CASES – PENALTIES FOR COMPANIES

In the UK, this lack of criminal prosecutions, described above, which would be pursued by the CMA under the amended provisions of the Competition Act 1998, co-exists with a whole group of what are termed “civil” prosecutions of companies in cartel cases.

In this Act, the prohibition of agreements which have the object or effect of restricting competition is set out in sec. 2; undertakings are liable for breaches of this prohibition. Under this provision, agreements between undertakings, decisions by associations of undertakings or concerted practices:

- 1) which may distort competition in the UK;
 - 2) which have as their object or effect the prevention, restriction or distortion of competition in the UK
- are prohibited.

As regards the application of Article 101 TFEU, which, prior to Brexit that took place on 31 January 2020, could be the basis for CMA decisions imposing penalties on undertakings, EU competition law in the UK ceased to apply after the end of the transition period. Under the new section 60A of the Competition Act, courts and competition authorities must continue to interpret competition law in accordance with EU law and case law in force before the end of the transition period. The authorities and courts must also take into account EU guidelines and future case law. However, courts and authorities are not bound by future EU law and, where appropriate, may also deviate from pre-Brexit EU competition law⁴⁰.

³⁹ J. Galloway, *Securing the Legitimacy of Individual Sanctions in UK Competition Law*, ‘World Competition: Law and Economics Review’ 2017, Vol. 40(1), p. 32 (accessed 15.07.2023). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884418. See also: L. Danagher, *The Convergence of Past and Present Challenges to the Criminal Cartel Law of the UK*, ‘European Competition Law Review’ 2015, Vol. 36(7), pp. 307–308.

⁴⁰ Practical Law Competition, *UK cartels and restrictive agreements: a quick guide* by Practical Law Competition. *A quick guide to the application of UK competition law to car-*

It is within the competence of the CMA to be able to order an undertaking to cease a restrictive practice and to be able to impose a fine of up to 10% of the annual (worldwide) turnover of this undertaking on an undertaking that has intentionally or negligently committed infringements of competition law as defined in Chapter I of the Competition Act, including cartel infringements.

Warrington and Cannon point out that the CMA's "Guidance on the appropriate amount of a fine" (currently as published in December 2021) plays an important role in determining the amount of the fine⁴¹. According to these Guidelines, it is particularly important to take into account the gravity of the infringement and to prevent future infringements. CMA Guidance (in § 2.3) requires the CMA to identify a starting figure, which may be up to 30% of the undertaking's turnover in the relevant market. The amount of the penalty depends on the seriousness of the breach; cartels are usually at the upper end of this scale. As part of the subsequent steps, the CMA adjusts the amount of the fine determined at the initial stage.

One example of the changes made to the Guidance in 2021 was that the CMA would no longer consider the introduction of a competition law compliance programme as a mitigating factor justifying a reduction in the penalty. The final step for the CMA to determine the penalty is to take into account the proportionality of the penalty (previously the proportionality of the penalty was determined in parallel (alongside) taking into account the deterrent effect). The CMA may also take into account – in exceptional circumstances – arguments relating to the company's financial difficulties⁴².

In determining the penalty, the duration of the infringement, aggravating or mitigating factors, the deterrent purpose of the penalty, settlement and leniency applications must be taken into account. The fine may not exceed a maximum threshold of 10% of the company's worldwide turnover in the most recent financial year⁴³.

The consequence of submitting a leniency application may be complete immunity from fines for companies and, for individual employees and directors, immunity from prosecution for the cartel offence. Acceptance of a leniency application may also mean non-application of the "director disqualification" measure, which will be discussed in the next part of this paper (in Part VI). A successful

tel activity and restrictive agreements or practice, 2023, [https://uk.practicallaw.thomsonreuters.com/0-381-9658?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-381-9658?transitionType=Default&contextData=(sc.Default)&firstPage=true) (accessed 15.07.2023).

⁴¹ CMA, CMA's Guidance as to the Appropriate Amount of a Penalty, 16 December 2021, CMA73, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060671/CMA73final_.pdf (accessed 15.07.2023).

⁴² G. Warrington, R. Cannon, 2023, *op. cit.*, para. 9. See on this topic: M. Readings, R. Noorali, 2023, *op. cit.*, para. 3.

⁴³ G. Warrington, R. Cannon, 2023, *op. cit.*, *op. cit.*, para. 9.

leniency application, on the other hand, does not protect the company from claims for damages⁴⁴.

Section 13(4) of the Competition Act 1998 provides that “If an agreement to which the prohibition applies has been notified to the OFT (now: CMA) under this section, no penalty is to be imposed under this Part in respect of any infringement of the prohibition by the agreement which occurs during the period:

- (a) beginning with the date on which notification was given; and
- (b) ending with such date as may be specified in a notice in writing given to the applicant by the OFT (now: CMA) when the application has been determined”.

Particularly high penalties were imposed on undertakings by the CMA in 2019 – 2022:

- in February 2022, the CMA imposed fines totalling £35 million in relation to an arrangement under which a competitor was paid not to launch a product and which enabled the companies to increase prices of tablets;
- in January 2022, the Payment System Regulator imposed fines totalling more than £33 million after concluding that the parties had agreed not to compete or poach each other’s customers in the pre-paid cards market;
- in July 2021, the CMA imposed fines totalling £260 million for competition law breaches against a number of companies in relation to the supply of hydrocortisone tablets, including excessive pricing and market sharing arrangements; and
- in October 2019, the CMA imposed total fines of £36.9 million on three suppliers of pre-cast concrete drainage products⁴⁵.

These figures highlight the multiplicity of cartel violations detected by the CMA. Although they are attributed to undertakings, importantly, they demonstrate a far different reason for the lack of convictions of individuals for criminal cartel offences than the absence of such violations in practice.

VI. “DIRECTOR DISQUALIFICATION” AS A SPECIFIC MEASURE USED IN THE UK UNDER THE “CIVIL” LIABILITY REGIME IN CARTEL CASES

1. The application of the measure of “director disqualification” is particularly noteworthy. This measure is referred to in section 9A of the Company Directors

⁴⁴ *Ibidem*, para. 6.

⁴⁵ P. Chappatte, P. Walter, *The Cartels and Leniency Review: United Kingdom*, 14 February 2023, Lexicology, <https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/united-kingdom> (accessed 15.07.2023).

Disqualification Act. It is seen as a means of helping to counteract recidivism on the part of corporate officers⁴⁶.

Directors can be disqualified for **up to 15 years** where they knew, or ought to have known, that their company was guilty of an infringement of UK competition law. Neither in the past nor now is it required to prove “dishonesty” on the part of the director. This measure can be applied **in two ways**: the CMA can either apply to the court for such orders or it can agree with the company the commitment to disqualify its director⁴⁷.

The use of this measure means that, even in the absence of criminal prosecutions for cartel offences, the CMA is still engaged in enforcing the law against individuals as a disincentive to anti-competitive behaviour, but in these cases, the authority’s actions are taken on a completely different track than the prosecution of cartel offences intended to lead to the application of criminal penalties against managers by the court.

Since its first director disqualification in Posters and Frames in December 2016, the CMA has applied director disqualifications in five other cartel cases (Estate Agent, Pre-cast Concrete Drainage Products, Non-residential Premises Refurbishment, Rolled Lead Roofing Materials and most recently in January 2022, Nortriptyline)⁴⁸.

Warrington and Cannon indicate that the CMA now routinely considers seeking director disqualification in competition law cases. In 2021 the disqualifications covered by the CMA’s applications were approaching the statutory maximum disqualification period. The CMA’s March 2021 applications following the 2019 infringement decisions included the disqualification of two former directors of a precast drainage company – for periods of 11 and 12 years respectively. Another case involved the disqualification of three directors involved in a roofing materials cartel. This measure was also applied in 2022 (disqualification periods ranged from three to six and a half years)⁴⁹.

In February 2023 the CMA led to the disqualification of three former directors of various construction and demolition services companies for periods ranging from four and a half to seven and a half years⁵⁰.

⁴⁶ B. Williamson, *Analysing the place of the criminal cartel offence within the Regulatory Landscape of Anticartel Enforcement in the UK: more change needed?*, PhD dissertation, School of Law Newcastle University 2019, p. 155, <https://theses.ncl.ac.uk/jspui/bitstream/10443/4761/1/Williamson%20B%202019.pdf> (accessed 15.07.2023).

⁴⁷ M. Readings, R. Noorali, 2023, *op. cit.*, para. 3.

⁴⁸ *Ibidem*.

⁴⁹ G. Warrington, R. Snape, *Cartels. Enforcement, Appeals & Damages, Actions*, 10th edition, London 2022, p. 246. See also: M. Readings, 2021, *op. cit.*

⁵⁰ G. Warrington, R. Cannon, 2023, *op. cit.*, para. 9.

2. The CMA website posted “Guidance on Competition Disqualification Orders” with a publication date of 6 February 2019⁵¹, (which replaced the previous OFT Guidance). The guidance relates to the exercise of the CMA’s powers under the Company Directors Disqualification Act 1986.

The Guidance provides a description of the legal framework for the CMA’s power to seek a court ordered measure of “director disqualification” or to accept director disqualification undertakings. The Guidelines also describe the factors that the CMA takes into account when deciding whether to make an application to disqualify a director.

Paragraph 2.1 of this Guidance points out that a court will make an order disqualifying a director in respect of a person when the following two conditions are met:

- (a) the company that is the company in which that person is a director has committed a breach of competition law; and
- (b) the court finds that that person’s conduct as a director makes him or her unfit to be concerned in the management of a company).

In turn, paragraph 2.3 of the Guidance points out that a request for the disqualification of a director can be made against both the current director and the former director of the company. A “director” for these purposes includes a “*de facto*” and “a shadow director”.

The Guidance sets out the legal consequences of a director’s failure to comply with a disqualification applied to him (in either of two forms). It is indicated that such conduct undertaken by a director which consists of (a) acting as a director of the company; (b) acting as a receiver of the company’s assets; and (c) directly or indirectly engaging or taking part in the promotion, formation or management of the company will be regarded as offences. Such a person may also not act as an insolvency practitioner.

Where the second form of application of director disqualification is used – the CMA may accept an undertaking from the director to disqualify him or her instead of seeking this measure from the court.

In both cases, the application of director disqualification has the same effect. The maximum period for the application of director disqualification is 15 years.

3. The CMA website has also posted (updated as at 24 January 2017) Guidance entitled: “Avoiding disqualification: advice for company directors”⁵². This Guidance includes key questions and answers and indications. This type of guide-

⁵¹ CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf (accessed 15.07.2023).

⁵² CMA, Guidance. Avoiding disqualification: advice for company directors, 24 January 2017, <https://www.gov.uk/government/publications/advice-for-company-directors-on-avoiding-cartel-infringements/avoiding-disqualification-advice-for-company-directors> (accessed 15.07.2023). See also: *Ashurst Quickguides*, 2019, *op. cit.*

lines can be conducive to the prevention of violations and can also contribute to their early detection. It is therefore worth quoting their content *in extenso*:

a) Why should directors help companies avoid breaking competition law?

Company directors have a special responsibility to be well-informed about their company practices and ensure they comply with the law.

If caught breaking competition law, directors can be disqualified from acting as a director of a company or carrying out other specified roles in relation to a company for up to 15 years.

Knowing about illegal practices without taking steps to stop them could be grounds for disqualifying a director.

If a company breaks competition law and the director did not know about it but wasn't diligent and should have known, this may also be a ground for disqualification.

b) What action do company directors need to take?

You must ensure you are sufficiently abreast of your company's affairs to spot and stop any illegal practices as soon as possible.

If you suspect illegal business practices, you should investigate.

If you become aware of anti-competitive practices, you should take immediate steps to stop them and seek independent legal advice.

Lead by example – familiarise yourself with competition law risks and cascade advice to staff – the CMA has published a range of short and simple guides and a risk guide to help.

c) Test your company's compliance with competition law, here are some questions to ask:

- What are our present competition law compliance risks?
- What are the high, medium and low risks?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the effectiveness of these measures?

d) Encourage and facilitate reporting

Designate an independent, trustworthy person in your company for staff to report concerns to (for example a company secretary).

If you've been involved in an illegal cartel yourself: you may benefit from lenient treatment by being the first to come forward to the CMA.

Seek independent legal advice if you have a competition law concern.

e) What is a cartel and how does being involved affect you?

In simple terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually secret and often informal.

Cartels are a particularly serious breach of competition law. Individuals involved in cartels can go to jail for up to five years. Businesses that breach competition law can be fined up to 10% of turnover⁵³.

⁵³ Up to 10% of the annual (worldwide) turnover of the undertaking.

VII. OTHER FORMS OF DIRECTORS' LIABILITY. A REAL ALTERNATIVE OR CREATION OF APPEARANCES?

1. It would be reasonable to assume that an important form of countering cartel violations is the need for directors to compensate those who have been harmed as a result of cartel violations.

However, as Cheffins and Black point out, the effectiveness in this regard is significantly undermined by the operation of **three mechanisms** that **can reduce** the likelihood of defendant directors having to pay damages out of their own money⁵⁴:

the first of these possibilities may follow the judge's finding that the director's misconduct was excusable and finding that the director acted 'honestly and reasonably' honestly and reasonably and that the director 'ought fairly to be excused;

the second option is to take advantage of the coverage of the awarded amount of damages from the company;

and the third is the director's ability to take out insurance; the D&O (Directors and Officers Insurance) policies offered in this respect in the UK cover "losses" caused even by "culpable" acts or omissions committed by the insured as a direct director. D&O policies specifically exclude cover for dishonest or fraudulent conduct and for conduct resulting in private gain or profit. However, the term "culpable act" is usually defined broadly and includes breaches of duty, breaches of trust, negligence and wrongful trading.

2. An interesting alternative is **the voluntary redress programme** applicable to violations under Chapter I of the Consumer Rights Act 2015. The provisions of this law provide that undertakings investigated or found to be in breach of competition law may enter into a redress programme whereby they will voluntarily compensate parties for the loss suffered as a result of anti-competitive behaviour. The purpose of this programme is to enable those harmed by infringements to obtain compensation without having to resort to costly and lengthy litigation⁵⁵.

⁵⁴ B.R. Cheffins, B. S. Black, *Outside Director Liability Across Countries*, University of Texas at Austin School of Law. Law and Economics, Research Paper No. 31, Stanford Law School. Law and Economics. Working Paper No. 266, ECGI – European Corporate Governance Institute. Law. Working Paper No. 71/2006, *Outside Director Liability Across Countries*, 2006, pp. 1414–1416, https://www.ecgi.global/sites/default/files/working_papers/documents/SS-RN-id438321.pdf.

⁵⁵ G. Warrington, R. Cannon, 2023, *op. cit.*, para. 9; E. Burrows, D. Fosselard, *Cartels Laws and Regulations 2023*, 'Global Legal Insights (GLI)' 2023, <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations> (accessed 15.07.2023). See also: M. Readings, R. Noorali, 2023, *op. cit.*, para. 8.

VIII. RECENT PROPOSALS TO REFORM THE UK COMPETITION REGIME

The need for further changes to the law against cartels has already started to be written about almost in parallel with the entry into force of the Enterprise and Regulatory Reform Act 2013 amending the regulation of cartel crime. Jones and Williams in their study – citing the position of other authors as well – suggested considering the issue of **extending “civil” liability** to provide a more effective deterrence mechanism. These authors also stressed the need to broaden the category of those liable under “civil” – i.e. non-criminal – law by extending this liability to those directly involved in the cartel infringement. The authors referred their thesis to entities sometimes referred to as **“gatekeepers”**, such as lawyers, insurers, external directors or accountants, who have specific information about a company and can influence its behaviour to ensure its compliance with the law. In the opinion of these authors, it is worth considering broadening the scope to adopt a wider range of “civil” sanctions, including individual fines or non-financial sanctions such as disqualification orders and/or criminal injunctions for corporations⁵⁶.

Now, almost a decade on from the amendment of the cartel offences legislation, there is a growing sense of ineffectiveness of the reform. On 16 February 2021, John Penrose MP published his independent report outlining proposals for change⁵⁷. He stated that the CMA, as a competition authority, is “currently behind” its counterparts in other countries in terms of the number of cases opened and fines imposed. In response, in July 2021 the UK government published a consultation on proposed reforms to the competition law and consumer protection framework. The aim of this reform would be to improve the investigation and enforcement of competition law.

These are currently being consulted on and include in particular:

- expanding the leniency programme to protect applicants against third-party damages actions;
- increasing sanctions for non-compliance with information requests (both companies and on individuals);
- reducing the threshold for small agreements exemptions;
- increasing sanctions for failing to comply with CMA orders/commitments; as well as
- limiting the scope of the Competition Appeal Tribunal “full merits” review⁵⁸.

⁵⁶ A. Jones, R. Williams, 2014, *op. cit.*, pp. 26 ff.

⁵⁷ G. Warrington, R. Cannon, 2023, *op. cit.*, para. 14.

⁵⁸ G. Warrington, R. Snape, *Cartels 2022 Enforcement, Appeals & Damages Actions*, pp. 249 ff., <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/united-kingdom> (accessed 15.07.2023).

On 20 April 2022, the UK government announced a plan for changes to the competition and consumer law regime. These would include, in particular: changes to interim measures and the rules for appealing decisions in this regard to the courts and restricting access to the CMA's investigation file, extending the prohibition of anti-competitive agreements and cartels to activities outside the UK, changes to the rules on evidence gathering and access to confidential documents, and increased penalties for failing to respond to requests for information or providing misleading information⁵⁹.

On 25 April 2023, a communication on the proposed reform was posted on the website of the Department for Business & Trade. Particular emphasis was placed on ensuring that the CMA conducts investigations and enforcement more quickly and efficiently. It was pointed out that the Bill will place a duty on the CMA to operate efficiently to enable speedy decision-making, while maintaining the importance of 'robust' decisions and procedural rights. The CMA will have greater powers to impose sanctions on companies that refuse to submit to investigations and remedies, which is intended to deter them from gross breaches of the law⁶⁰.

The above description indicates that the assumptions regarding the planned reform only concern the rules for conducting "civil" proceedings against companies. In contrast, the description of the assumptions of the planned reform does not mention any future changes concerning criminal law regulation which would deal with the rules of criminal liability for cartel offences provided for individuals. This implies a lack of response on the part of the government to the criticisms described above, which the existing regulations in this area have been facing for years.

IX. CONCLUSIONS

After the amendment of the Enterprise Act 2002 that contained the grounds of criminal liability for the cartel offence, carried out almost a decade ago by way of the Enterprise and Regulatory Reform Act 2013, there are no criminal prosecutions for such offences based on amended grounds. **Concerns** have therefore been **confirmed** – at least so far – that the amendment to the Act concerning the

⁵⁹ B. Batchelor, F. Depoortere, A. Luoma, G. Motta, I. Vandenborre, *UK Revamps Antitrust Rules With Broader Jurisdictional Reach, Tougher Penalties and More Flexible Procedure for Merger Control*, 28 April 2022, Skadden, <https://www.skadden.com/insights/publications/2022/04/uk-revamps-antitrust-rules-with-broader-jurisdictional-reach> (accessed 15.07.2023).

⁶⁰ Policy paper. Competition reform: policy summary briefing, 23 November 2023, <https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/competition-reform-policy-summary-briefing> (accessed 15.07.2023).

grounds for liability for the cartel offence, which was intended to improve the fight against cartels, will not produce the expected results.

The reasons for this state of affairs can be traced to the fact that the legislator allowed for the entire complex of circumstances excluding criminal liability described above in Part III of this paper, as well as the three “defences” against the allegation of a cartel offence. The fact that, after ten years of the amended legislation, not a single prosecution based on these amended grounds has taken place may mean that these new legal solutions with which it has been decided to replace the previous law based on the element of “dishonesty”¹⁰ are an even greater obstacle to the successful prosecution and conviction of cartel offences than those which, in the previous state of law prior to 1 April 2014, operated on the element of “dishonest”¹¹ (and which, despite evidentiary difficulties, nevertheless enabled at least 3 convictions).

The thesis on the reasons for the failure of the amendment as being in the essence of the solutions adopted ten years ago cannot be undermined by conjecture that the reason for the lack of criminal prosecutions in cartel offences is simply the absence of cartel violations during the period in question. The reality is different. Indeed, the existence of cartel infringements in the UK is evidenced by the CMA’s finalised **“civil” proceedings** against companies during the same period.

Nor is it reasonable to see the reason for the failure of criminalisation in the UK legal system in the very concept of criminalising such infringements. The data included in the article on the operation of cartel **criminalisation** in selected **other countries** shows that, compared to the operation of the law in the UK, the effectiveness of criminalisation of cartel violations in other systems looks better, and in some cases – such as in the United States – even much better.

The paradox of the practice existing in the UK is that this lack of application of the provision defining the cartel offence goes hand in hand with the application of a specific measure relating to individuals (**director’s disqualification**) – linked to the provisions defining the grounds for “civil” proceedings against companies, namely the disqualification of directors. The application of this measure of disqualification of directors – may, of course, be effective in preventing future violations by persons to whom this measure has been applied. The application of this measure can fulfil this function, provided, of course, that such a disqualified director is not employed in the company in another position giving him the opportunity to influence further violations.

The existing state of affairs, however, raises the idea that currently in the UK **the criminalisation** of cartels is only **maintained for the sake of appearances**. The addition to the provision criminalising the cartel offence of three types of circumstances giving grounds for concluding that an offence has not been committed (under Section 188A of the Enterprise Act) and three possible “defences” (under Section 188B of that Act) against the allegation of cartel offence is in fact

the creation of an instruction for cartel offenders, which could be put most succinctly as an indication of how to commit a cartel offence and to be personally protected from criminal liability for that offence. This form of “defence” allows the offender to avoid criminal liability for the cartel offence by relying on the fact that at the time the agreement was entered into he took reasonable steps to obtain advice from professional legal counsel to discern the nature of the arrangements before entering into or implementing them.

By declaring a desire to streamline cartel proceedings a decade ago, in the UK, in effect, a regulation has been created that could be seen as the “**anti-pattern**” of a regulation intended to be a real and effective tool against cartels. This means **a further impediment to prosecuting cartel offences**. The problem is all the more serious because the legal construction chosen by the legislator which makes the use of the tool of criminalisation of cartel offences in practice difficult or even impossible, concerns acts of significant harm (destroying competition on the market and harming the interests of millions of consumers).

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