

## CONTENTS—SUMMARY

|   |            |
|---|------------|
| <i>Table of Cases</i>   | xxiii      |
| <i>Table of Legislation</i>   | xxix       |
| <br>  |            |
| <b>1. A General History of Criminal Cartels</b>   | <b>1</b>   |
| <b>2. UK Criminal Cartel Conduct</b>  | <b>43</b>  |
| <b>3. Criminal Cartel Investigations in the UK</b>  | <b>87</b>  |
| <b>4. The Conduct of Civil Cartel Investigations in the UK</b>  | <b>129</b> |
| <b>5. Criminal Immunity in the UK and US</b>  | <b>167</b> |
| <b>6. Prosecution of Cartel Offences in the UK</b>  | <b>213</b> |
| <b>7. Territoriality in Criminal Cartel Investigations</b>  | <b>239</b> |
| <b>8. Criminal Cartel Regimes in Other Jurisdictions</b>  | <b>287</b> |
| <br>  |            |
| Appendix 1: Enterprise Act 2002 (Part 6)  | 329        |
| Appendix 2: Enterprise Act 2002, Part 6 Explanatory Notes   | 337        |
| Appendix 3: OFT, The Cartel Offence: Guidance on the<br>Issue of No-action Letters for Individuals                            | 343        |
| Appendix 4: Leniency and No-action—The Office of<br>Fair Trading’s Guidance Note on the Handling of<br>Applications           | 349        |
| Appendix 5: OFT, Powers for Investigating Criminal<br>Cartels—Guidance  | 389        |
| Appendix 6: Memorandum of Understanding between the<br>Office of Fair Trading and the Director of the<br>Serious Fraud Office | 401        |
| <br>  |            |
| <i>Index</i>  | 405        |



# CONTENTS

|                              |       |
|------------------------------|-------|
| <i>Table of Cases</i>        | xxiii |
| <i>Tables of Legislation</i> | xxix  |

## 1. A General History of Criminal Cartels

|  |       |
|--|-------|
| A. What is a Cartel?                             | 1.01  |
| B. The US Approach to Cartels                    | 1.05  |
| The Sherman Act                                  | 1.05  |
| Enforcement under the Sherman Act                | 1.08  |
| Leniency Programmes                              | 1.11  |
| Modern position                                  | 1.16  |
| C. The European Community Approach to Cartels    | 1.19  |
| Article 81 of the European Treaty                | 1.20  |
| Leniency   | 1.25  |
| Modernization and enforcement                    | 1.27  |
| Criminal enforcement in Europe                   | 1.36  |
| D. Cartel Enforcement in the UK                  | 1.37  |
| Common law                                       | 1.37  |
| UK legislative framework                         | 1.44  |
| Cartel agreements under the Competition Act 1998 | 1.49  |
| The Enterprise Act                               | 1.62  |
| The <i>Norris</i> case                           | 1.82  |
| Enforcement under the Enterprise Act 2002        | 1.84  |
| E. International Cooperation                     | 1.93  |
| F. The Relevant Institutions                     | 1.96  |
| The Office of Fair Trading                       | 1.96  |
| The European Competition Network ('ECN')         | 1.98  |
| The International Competition Network (ICN)      | 1.100 |

|  |       |
|--|-------|
| <b>2. UK Criminal Cartel Conduct</b>                               |       |
| A. Introduction  | 2.01  |
| B. The ‘Hard Core Cartel’  | 2.02  |
| C. The Cartel Offence  | 2.06  |
| ‘Dishonestly’  | 2.10  |
| The <i>Ghosh</i> test  | 2.16  |
| Effect of <i>Norris</i> and <i>GG plc</i>                          | 2.20  |
| Agreement to make or implement, or cause to be made or implemented | 2.34  |
| ‘Agreement/conspiracy’   | 2.36  |
| ‘Agreement’ in civil competition law                               | 2.42  |
| ‘Agreement’ and ‘concerted practice’                               | 2.48  |
| Reciprocity in the agreement                                       | 2.53  |
| Horizontal/vertical agreements                                     | 2.57  |
| Mental element of agreement: ‘intention’                           | 2.58  |
| Jurisdictional reach of the agreement                              | 2.61  |
| Prohibited arrangements  | 2.62  |
| Price fixing   | 2.65  |
| Limiting supply or production in the UK                            | 2.73  |
| Market sharing   | 2.79  |
| Bid rigging  | 2.83  |
| Conspiring/attempting to commit the cartel offence                 | 2.90  |
| Compatibility with EC law  | 2.96  |
| Criminalizing conduct exempt under EC law                          | 2.98  |
| Appreciable effect on competition                                  | 2.102 |
| Inconsistency with Article 81 and Regulation 1/2003                | 2.103 |
| D. Conspiracy to Defraud   | 2.121 |
| Jurisdictional reach of conspiracy to defraud                      | 2.128 |
| <br>   |       |
| <b>3. Criminal Cartel Investigations in the UK</b>                 |       |
| A. Introduction  | 3.01  |
| B. OFT Powers of Investigation                                     | 3.05  |
| The initial stage  | 3.05  |
| The power to require answers, information, and documents           | 3.08  |
| The power to enter and search premises under a warrant             | 3.13  |
| Obtaining the warrant  | 3.14  |
| Powers exercisable under the warrant                               | 3.23  |
| Procedure when executing the warrant                               | 3.25  |

|   |       |
|---|-------|
| Penalties for non-compliance  | 3.46  |
| OFT powers to conduct interviews  | 3.47  |
| Compulsory interviews   | 3.49  |
| Interviews under caution  | 3.54  |
| OFT surveillance powers   | 3.57  |
| Directed surveillance   | 3.62  |
| Intrusive surveillance  | 3.75  |
| Covert Human Intelligence Sources   | 3.91  |
| ‘Confidential information’ obtained by the OFT<br>using surveillance powers | 3.103 |
| Access to communications data   | 3.106 |
| Redress   | 3.107 |
| Use of covertly obtained evidence by the OFT in criminal<br>proceedings     | 3.108 |
| C. Disclosure of Information Obtained in an Investigation                   | 3.110 |
| D. Parallel Civil and Criminal Investigations                               | 3.117 |
| Use of material obtained using criminal powers                              | 3.124 |
| Use of material obtained using civil powers                                 | 3.126 |
| Proceedings before the European Commission                                  | 3.131 |
| E. Dealing with a Dawn Raid   | 3.132 |
| Pre-raid preparation  | 3.133 |
| The dawn raid   | 3.134 |
| After the raid  | 3.146 |
| <b>4. The Conduct of Civil Cartel Investigations in the UK</b>              |       |
| A. Introduction   | 4.01  |
| B. Investigations under the Competition Act                                 | 4.06  |
| An investigation under Part 1 of the Competition Act                        | 4.07  |
| Reasonable grounds  | 4.09  |
| When would an investigation be unlawful?                                    | 4.12  |
| C. The Investigatory Powers   | 4.14  |
| Information requests  | 4.14  |
| Power to enter premises without a warrant                                   | 4.20  |
| Powers on entry without a warrant   | 4.24  |
| Power to enter and search business and domestic<br>premises with a warrant  | 4.26  |
| The warrant   | 4.30  |
| Powers on entry with a warrant  | 4.33  |

|  |             |
|--|-------------|
| The procedure for carrying out the entry with or<br>without a warrant  | 4.38        |
| Applications to vary or discharge a warrant  | 4.44        |
| Access to legal advice   | 4.45        |
| Offences for failing to allow the OFT to exercise its<br>investigatory powers                                  | 4.46        |
| Penalties  | 4.50        |
| Parallel investigations under the Enterprise Act and<br>the Competition Act                                    | 4.51        |
| <b>D. Investigations by the European Commission Part II of the Act</b>   | <b>4.53</b> |
| Requests for information: Article 18   | 4.57        |
| Power to take statements: Article 19   | 4.62        |
| Inspection of business premises: Article 20  | 4.63        |
| The form and terms of the warrant  | 4.79        |
| Inspection of premises other than business premises: Article 21  | 4.80        |
| The OFT assisting or acting on behalf of the Commission<br>under Article 22(2)                                 | 4.87        |
| Investigations on behalf of other national competition authorities:<br>Article 22(1): Part IIA Competition Act | 4.91        |
| <b>E. Matters Applicable to All Investigations</b>   | <b>4.92</b> |
| Privileged communications  | 4.92        |
| Privilege against self incrimination   | 4.99        |
| Use of statements obtained in civil proceedings in relation<br>to offences under the Enterprise Act            | 4.101       |
| Disclosure of information and confidential documents   | 4.104       |
| Complaints about investigations  | 4.110       |
| Applications for return of seized property   | 4.111       |
| <br><b>5. Criminal Immunity in the UK and US</b>   |             |
| United Kingdom   | 5.01        |
| A. Introduction  | 5.01        |
| B. Type A Immunity   | 5.18        |
| Contemporaneous OFT/European Commission Type A<br>immunity applications  | 5.25        |
| Individual applications for immunity when there is<br>no pre-existing investigation                            | 5.32        |
| C. Type B Immunity   | 5.35        |
| Individual application for immunity when there is a<br>pre-existing investigation                              | 5.46        |

|   |       |
|---|-------|
| D. Commission Immunity Outside UK: Type A and B                                   | 5.47  |
| E. The Coercer Test in Type A, Type B, and Corporate Immunity Cases               | 5.48  |
| F. Criminal Immunity in Type B or C Leniency Cases                                | 5.51  |
| G. ‘Public Interest’  | 5.53  |
| H. Criminal Immunity: Preliminary Issues  | 5.55  |
| ‘Principal offender’  | 5.57  |
| ‘Likelihood of prosecution’   | 5.59  |
| Comfort letter  | 5.61  |
| I. Conditions for Immunity  | 5.64  |
| (a) Admits participation in the criminal offence                                  | 5.65  |
| (b) Provides the OFT with all available material                                  | 5.69  |
| (c) Maintains continuous and complete cooperation throughout the investigation    | 5.72  |
| (d) Not have taken steps to coerce another undertaking to take part in the cartel | 5.78  |
| (e) Refrains from further participation in the cartel                             | 5.81  |
| J. Conduct of Interviews in Immunity/Leniency Applications                        | 5.82  |
| Conducting internal investigations  | 5.87  |
| Use of information received by the OFT  | 5.90  |
| Disclosure of leniency material in a criminal case                                | 5.91  |
| K. Transfer of Information  | 5.92  |
| Between the OFT and the Commission/European Competition Network                   | 5.92  |
| Between the OFT and UK law enforcement  | 5.99  |
| L. Value of the No-action Letter  | 5.100 |
| Competition Disqualification Orders (‘CDO’)                                       | 5.110 |
| Leniency plus   | 5.111 |
| M. Revocation of a No-action Letter   | 5.115 |
| United States   | 5.119 |
| N. Introduction   | 5.119 |
| O. Corporate Leniency Policy 10 August 1993                                       | 5.125 |
| Requirements for corporate leniency to be granted                                 | 5.125 |
| The application process   | 5.128 |
| P. Leniency Policy for Individuals 10 August 1994                                 | 5.133 |
| Requirements for leniency for individuals   | 5.134 |
| Q. Revocation of Immunity   | 5.136 |

|  |       |
|--|-------|
| R. Incentives to Self-report                       | 5.137 |
| Amnesty Plus                                       | 5.138 |
| Penalty Plus                                       | 5.140 |
| Affirmative amnesty                                | 5.144 |
| Omnibus question                                   | 5.145 |
| S. Second-In Cooperation/Non-immunity Applicant    | 5.146 |
| Form of plea agreement                             | 5.152 |
| Type B (FRCP 11 (c)(1)(B)) agreements              | 5.153 |
| Type C (FRCP 11(c)(1)(C)) agreements               | 5.154 |
| Acting for an employee of a second-in cooperator   | 5.159 |
| T. Information Transfer                            | 5.166 |
| <br>   |       |
| <b>6. Prosecution of Cartel Offences in the UK</b> |       |
| A. Introduction                                    | 6.01  |
| Commencement of the prosecution                    | 6.02  |
| B. The Pre-Trial Process                           | 6.04  |
| The Magistrates' court                             | 6.04  |
| Crown Court  | 6.13  |
| Disclosure   | 6.23  |
| C. The Trial Process                               | 6.34  |
| The indictment                                     | 6.34  |
| Prosecution case                                   | 6.37  |
| Submission of no case to answer                    | 6.39  |
| Defence case                                       | 6.40  |
| Summing up   | 6.42  |
| Verdict  | 6.43  |
| D. Consequences of a Conviction                    | 6.44  |
| Confiscation                                       | 6.44  |
| Sentencing options in cartel cases                 | 6.51  |
| Imprisonment                                       | 6.53  |
| Fines  | 6.58  |
| Community order                                    | 6.60  |
| Absolute and conditional discharges                | 6.62  |
| Director's disqualification                        | 6.63  |
| Competition Disqualification Undertakings ('CDU')  | 6.70  |
| Appeal against conviction                          | 6.71  |

|  |      |
|--|------|
| Appeal against sentence  | 6.74 |
| Prison   | 6.75 |
| <b>7. Territoriality in Criminal Cartel Investigations</b>                     |      |
| A. Introduction  | 7.01 |
| Investigative assistance   | 7.02 |
| Receiving information/evidence via the<br>European Competition Network ('ECN') | 7.03 |
| B. Mutual Legal Assistance   | 7.11 |
| Obtaining evidence from overseas   | 7.14 |
| Defence request for overseas evidence  | 7.18 |
| Defence requests to the US   | 7.20 |
| Format and content of letters of request                                       | 7.23 |
| Incoming requests to the UK  | 7.27 |
| Enterprise Act provision   | 7.28 |
| General provisions: the process  | 7.34 |
| Obtaining evidence via court   | 7.37 |
| Obtaining evidence via the SFO   | 7.38 |
| SFO search powers  | 7.43 |
| The content of request for search and seizure                                  | 7.46 |
| Conditions for search warrant execution  | 7.48 |
| Transmission of evidence   | 7.52 |
| European evidence warrant  | 7.54 |
| C. Concurrent UK/US Cartel Investigations                                      | 7.55 |
| AG Guidance  | 7.55 |
| D. Extradition   | 7.60 |
| Categorization of countries  | 7.61 |
| Extradition from the UK to category 1 territories: the process                 | 7.62 |
| Provisional arrest   | 7.62 |
| Arrest under warrant   | 7.63 |
| Initial hearing  | 7.64 |
| The substantive extradition hearing  | 7.67 |
| Bars to extradition to category 1 territories                                  | 7.70 |
| Conviction cases   | 7.71 |
| Appeal   | 7.72 |
| Extradition to category 2 territories (including the US): the process          | 7.73 |
| Provisional arrest   | 7.76 |

|   |       |
|---|-------|
| Arrest following receipt of the full request                            | 7.77  |
| The initial hearing   | 7.78  |
| The substantive extradition hearing in<br>category 2 territory requests | 7.80  |
| The ‘extradition offence’   | 7.82  |
| When has ‘conduct occurred’ in the category 2 territory?                | 7.85  |
| The evidential test   | 7.90  |
| Bars to extradition   | 7.92  |
| ‘Double jeopardy’   | 7.93  |
| Value of a ‘no action’ letter   | 7.103 |
| Passage of time   | 7.109 |
| Human rights  | 7.111 |
| Forum conveniens  | 7.113 |
| Role of the Secretary of State  | 7.125 |
| Appeal  | 7.127 |
| Non-extradition outcomes  | 7.128 |
| The Interpol Red Notice   | 7.128 |
| Marine Hose Deal  | 7.130 |

## **8. Criminal Cartel Regimes in Other Jurisdictions**

|   |      |
|---|------|
| A. Introduction                                   | 8.01 |
| B. The United States                              | 8.04 |
| Overview  | 8.04 |
| Recent notable criminal cases                     | 8.14 |
| C. France   | 8.19 |
| Overview  | 8.19 |
| The law   | 8.25 |
| Enforcement                                       | 8.27 |
| Recent notable criminal cases                     | 8.30 |
| Leniency  | 8.32 |
| D. Germany  | 8.35 |
| Overview  | 8.35 |
| The ARC (as amended by the Seventh Amendment)     | 8.36 |
| Competition authority and powers of investigation | 8.37 |
| Level of fines                                    | 8.41 |
| Leniency  | 8.43 |
| E. Ireland  | 8.45 |
| Overview  | 8.45 |

|  |       |
|--|-------|
| Civil liability  | 8.47  |
| Leniency   | 8.54  |
| Recent notable criminal cases  | 8.55  |
| F. South Africa  | 8.61  |
| Overview   | 8.61  |
| Leniency   | 8.70  |
| Enforcement  | 8.75  |
| Investigative powers   | 8.78  |
| G. Brazil  | 8.80  |
| Overview   | 8.80  |
| Enforcement  | 8.82  |
| Penalties  | 8.85  |
| Leniency   | 8.88  |
| Recent notable criminal cases  | 8.92  |
| H. Japan   | 8.93  |
| Overview   | 8.93  |
| Enforcement  | 8.97  |
| Sanctions  | 8.100 |
| Leniency   | 8.103 |
| Recent notable criminal cases  | 8.107 |
| I. Canada  | 8.110 |
| Overview   | 8.110 |
| Criminal cartel offences (pending implementation of<br>the new criminal offence)                   | 8.111 |
| Criminal cartel offence after implementation<br>of the 2009 Act                                    | 8.122 |
| Enforcement process  | 8.126 |
| Leniency   | 8.129 |
| Recent notable criminal cases  | 8.140 |
| J. Australia   | 8.145 |
| K. Russian Federation  | 8.152 |
| L. A Summary of the Criminal Cartel Regime in<br>EU Member States                                  | 8.158 |
| Appendix 1: Enterprise Act 2002 (Part 6)   | 329   |
| Appendix 2: Enterprise Act 2002, Part 6 Explanatory Notes  | 337   |
| Appendix 3: OFT, The Cartel Offence: Guidance on the<br>Issue of No-action Letters for Individuals | 343   |

## *Contents*

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|   |     |
|---|-----|
| Appendix 4: Leniency and No-action—The Office of Fair Trading’s Guidance Note on the Handling of Applications           | 349 |
| Appendix 5: OFT, Powers for Investigating Criminal Cartels—Guidance   | 389 |
| Appendix 6: Memorandum of Understanding between the Office of Fair Trading and the Director of the Serious Fraud Office | 401 |
| <i>Index</i>  | 405 |

**2.07** This offence is only directed at individuals and cannot be committed by an undertaking, which follows the recommendation of the Hammond/Penrose Report,<sup>9</sup> subsequent Parliamentary comment during the passage of the Enterprise Bill,<sup>10</sup> and the position set out in the DTI consultation paper on EC modernization where it was stated that:

The cartel offence aims to catch dishonest activity by individuals whereas the civil prohibitions are directed at undertakings.<sup>11</sup>

**2.08** Since an undertaking<sup>12</sup> can include individuals acting as sole traders,<sup>13</sup> it would therefore seem that the cartel offence is specifically focused on individuals in their natural and not legal capacity. The offence only applies to horizontal agreements, which are those concluded between parties at the same level of supply in any particular market<sup>14</sup> and does not require the actual implementation of the agreement (see paragraph 2.34).

**2.09** The cartel offence can be broken down into certain key components so that in order to be liable an individual must have:

- (1) dishonestly,
- (2) agreed to make/implement or cause to be made or implemented,
- (3) ‘*prohibited arrangements*’ relating to at least two undertakings.

Each of these component elements are considered below.

### *‘Dishonestly’*

**2.10** The UK is the only jurisdiction in which dishonesty is an element of its criminal cartel offence.<sup>15</sup> The UK Government White Paper<sup>16</sup> identified two possible routes to ensuring that:

the law targets those who set up and maintain the cartel, as well as any senior executives or directors who know about the arrangement and condone or encourage it.<sup>17</sup>

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<sup>9</sup> Ibid, para 2.11.

<sup>10</sup> House of Commons Standing Committee, 23 April 2002, cols 165 and 174.

<sup>11</sup> UK DTI, *Consultation on Modernisation* (April 2003) para 10.16.

<sup>12</sup> OFT 510, para 2.2.

<sup>13</sup> OFT, *The Cartel Offence: Guidance on the Issue of No-action Letters for Individuals*, April 2003, para 1.1.

<sup>14</sup> EA 2002, Explanatory Notes, at para 403.

<sup>15</sup> Dishonesty is not an element of the cartel offence in the US, Canada, Ireland, France, Germany, Japan, or Korea. Australia has recently decided after a full consultation process to reject having a dishonesty element in the proposed new criminal cartel offence.

<sup>16</sup> See n 5 above.

<sup>17</sup> Ibid, para 7.27.

The first was to link the illegal conduct with a breach of either Article 81 of the Treaty or Chapter I of the CA 1998. However, this was considered unattractive as it increased the risk that defendants would raise complex economic arguments which juries might struggle to understand.<sup>18</sup> It was also considered that a company might notify the European Commission of any potentially infringing agreement with a competitor and thereby frustrate the criminal process.<sup>19</sup>

The second route which was considered, was to include the concept of ‘dishonesty’ within the definition of the offence.<sup>20</sup> This second option was seemingly preferred in the White Paper and this issue was revisited and analysed in more detail in the Hammond/Penrose Report<sup>21</sup> prior to the statutory drafting of the Enterprise Bill.<sup>22</sup> This Report recommended that the cartel offence should include a requirement of ‘dishonesty’ and that this would:

- demonstrate that the offence was serious and that it should attract a significant penalty; and
- reduce the risk of the defendant being able to argue that his or her conduct was not reprehensible, delivered economic benefits, or attracted exemption under EC or UK competition law.<sup>23</sup>

The Report did not detail the arguments for and against the use of ‘dishonesty’, (referring only to the summary note contained in the Government White Paper<sup>24</sup>) and concluded that in most cases the facts would demonstrate that the parties realized that what they were doing was dishonest and contrary to the law.<sup>25</sup> Accordingly, the Enterprise Bill draft of the cartel offence included the requirement of ‘dishonesty’. During the passage of the Enterprise Bill, the Government made it clear that this definition was preferred, as it would:

- create a tightly defined offence aimed at ‘hard core cartels’, and
- achieve consistency with UK and EC competition law by ensuring that there would be no prosecution if there was a real possibility that the agreement would be compatible with EC or UK law.<sup>26</sup>

Echoing the concern expressed in the White Paper, the then Minister for Trade and Industry, Melanie Johnson MP, said that any other approach would ‘entail a lot of complex argument about economic competition of a sort that would make

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<sup>18</sup> Ibid, para 7.30.

<sup>19</sup> See Chapter 5, paragraph 5.29 for consideration of these notifying provisions.

<sup>20</sup> n 1, para 7.31.

<sup>21</sup> See n 6.

<sup>22</sup> Ibid, para 2.2.

<sup>23</sup> Ibid, para 2.5.

<sup>24</sup> See n 5, para 7.31.

<sup>25</sup> Ibid.

<sup>26</sup> Hansard, House of Commons Standing Committee, 18 April 2002, cols 135–140.

prosecution extremely difficult'.<sup>27</sup> This statement is clearly at odds with the Government's White Paper which states that 'A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Art 81 or Ch I.'<sup>28</sup>

- 2.14** Despite some pressure from the opposition, the Government resisted providing a statutory definition of 'dishonesty' in the Enterprise Bill,<sup>29</sup> preferring to follow the common law definition set out in *R v Ghosh*<sup>30</sup> (see paragraphs 2.16 to 2.20). Further statements at both Committee stage and in the House of Lords confirmed the Government's view that the prosecution would have to prove beyond reasonable doubt that the accused acted with a dishonest state of mind. A dishonest state of mind was said to exist with both intent and with knowledge of the consequences of the agreement.<sup>31</sup>
- 2.15** The Government considered that the sort of evidence which would point to dishonesty was likely to include attempts to disguise or hide activity, for example, holding secret meetings and the absence or destruction of records.<sup>32</sup> This adherence to the test set out in *R v Ghosh* was confirmed in the OFT's Guidance document published before the implementation of the EA 2002<sup>33</sup> and has been the subject of considerable commentator criticism.<sup>34</sup>

### The *Ghosh* test

- 2.16** This test was established by Lane LJ in the Court of Appeal judgment when he stated that:

A jury must first of all decide whether, according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was, by those standards, dishonest.

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<sup>27</sup> Ibid, col 139.

<sup>28</sup> See n 24.

<sup>29</sup> House of Lords, 15 October 2002, cols 836–837 per Lord Hunt of Wirral.

<sup>30</sup> *R v Ghosh* [1982] QB 1053, CA.

<sup>31</sup> Hansard, House of Commons Standing Committee, 18 April 2002, cols 135–140; House of Commons Standing Committee, 23 April 2002, cols 170–171; House of Lords Debates, 18 July 2002, col 1539; 15 Oct 2002, cols 835–838; and 28 Oct 2002, cols 65–71.

<sup>32</sup> Ibid, at col 136. See also D Beard, 'The Cartel Criminal Offence' [2003] Comp Law 156.

<sup>33</sup> n 13, para 2.1.

<sup>34</sup> Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 ABLR 235; Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of the Legal Control of Delinquency* (2003); Julian Joshua, 'Norris v United States—A Stalking Horse for the Cartel Offence' (2008) *Competition Law Insight* 11; Julian Joshua, 'Dishonesty after Norris' (2008) *Competition Law Insight* 13; Stephen Parkinson, 'The Cartel Offence under the Enterprise Act 2002' [2004] *Company Lawyer* 1.

In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.<sup>35</sup>

In other words, in considering whether or not dishonesty is established in a given case, a jury needs to ask itself two questions: **2.17**

- (1) was the conduct in question dishonest according to the standards of ordinary people?  
and if so,
- (2) did the defendant know that according to this standard the conduct was dishonest?

Both of these questions must be answered in the affirmative before liability in respect of dishonesty will be established. The *Ghosh* test therefore contains a clear objective element, coupled with a second subjective element, which requires an individual to assess his conduct by the standards of ordinary people. In the context of a prosecution for the cartel offence, some commentators have questioned how easy it would be for a jury to answer the first objective part of the test.<sup>36</sup>

This test has attracted considerable criticism from the Law Commission<sup>37</sup> and the opinion of the High Court of Australia which stated that: **2.18**

in practice juries would ignore the direction to conceive the fictitious ‘ordinary standards of reasonable and honest people’ separate from their own standards or they would subsume those standards to their own, cutting through the fiction and drawing on their own experience and opinions despite the judicial direction. If this were what happened in practice, it would make each of the two stages of the *Ghosh* test for dishonesty futile at best and misleading at worst.<sup>38</sup>

Despite this criticism, the *Ghosh* test has become the well-established single test for dishonesty across a broad spectrum of criminal offences<sup>39</sup> including conspiracy to defraud.<sup>40</sup> In a criminal trial, it is only necessary for a judge to explain the *Ghosh* test to a jury in cases where the defendant might have believed that what he **2.19**

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<sup>35</sup> See n 30, at 696.

<sup>36</sup> A MacCulloch, ‘The Cartel Offence and the Criminalisation of UK Competition Law’ [2003] *Journal of Business Law* 616. George Peretz, ‘Go Directly to Jail: Losing Badly in “Monopoly”’ (2003) 153 *NLJ* 99.

<sup>37</sup> Law Com Consultation Paper No 155, para 5.32.

<sup>38</sup> *Peters v The Queen* [1998] 192 CLR 493 at 547.

<sup>39</sup> The *Ghosh* test has also been applied to civil cases: see *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] BCLC 324 and *Twinsectra Ltd v Yardley* [2002] 2 WLR 802.

<sup>40</sup> David Ormerod, *Smith & Hogan’s Criminal Law* (11th edn, 2005) p 697.

is alleged to have done was in accordance with the ordinary person's idea of honesty.<sup>41</sup> The courts have held that the defendant's knowledge of the criminal or civil law will be irrelevant when determining the issue of dishonesty,<sup>42</sup> and this seems consistent with public pronouncements by the OFT, that they will only pursue cases where the alleged conduct is clearly dishonest, without reference to any civil law arguments.<sup>43</sup> This policy appears to accord with current UK public perception of cartel conduct, where a recent survey revealed that 60 per cent of the public considered price fixing to be dishonest with only 25 per cent strongly holding that belief and 10 per cent thinking that imprisonment was the appropriate penalty.<sup>44</sup>

### Effect of *Norris*<sup>45</sup> and *GG plc*<sup>46</sup>

- 2.20** The approach to 'dishonesty' was recently addressed by the House of Lords in the connected cases of *R v Norris* and *R v GG plc*. In *Norris*, the United States Department of Justice Antitrust Division ('ATD') sought his extradition for a number of offences, chief amongst which was conspiring to operate a price-fixing agreement from 1989 to 2000, in contravention of the Sherman Act, which criminalizes any 'contract, combination or conspiracy . . . in restraint of trade'.<sup>47</sup> The House of Lords was asked to consider if the conduct alleged by the ATD was, at the material time, capable of amounting to a criminal offence in the UK, thereby satisfying the double criminality requirement under UK extradition law.<sup>48</sup> The position of the ATD was that his conduct was capable of amounting to conspiracy to defraud, contrary to UK common law.<sup>49</sup>
- 2.21** In *GG plc*, the Serious Fraud Office ('SFO') was prosecuting five companies and nine individuals for conspiracy to defraud, alleging that between 1998 and 2000, the defendant parties had agreed to defraud the UK Department of Health ('DoH') and pharmacists by agreeing to fix the prices of particular drugs sold to the DoH. The defendants argued that this alleged conduct was tantamount to entering into a price-fixing agreement and, as such, was not a criminal offence before the EA 2002. Both appeals to the House of Lords were heard consecutively,

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<sup>41</sup> *R v Price* (1989) 90 Cr App R 409 at p 411.

<sup>42</sup> *R v Clowes (No 2)* [1994] 2 All ER 316.

<sup>43</sup> n 8.

<sup>44</sup> Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain* (2007) CCP Working Paper 07-12 and see George Peretz, 'Go Directly to Jail: Losing badly in "Monopoly"', (2003) 153 *New Law Journal* 99, p 2.

<sup>45</sup> *Norris v Government of the United States* [2008] UKHL 16, [2008] 2 WLR 673.

<sup>46</sup> *R v GG Plc and Others* [2008] 2 WLR 673.

<sup>47</sup> Section 1 of the Sherman Act 1890, as amended (15 USC § 1).

<sup>48</sup> Extradition Act 2003, s 137(2).

<sup>49</sup> See n 45, para 4.

given the degree of common ground between them. Additional aspects of both judgments are analysed later in this chapter (paragraphs 2.116 and 2.120).

In *Norris*, the House of Lords concluded that ‘*mere price fixing*’, namely the ‘making and implementation of a price-fixing agreement without aggravating features’<sup>50</sup> was not a criminal offence at the relevant time. In reaching this conclusion it is of note that the ATD in its indictment was constrained by United States domestic law from alleging dishonesty, although for the purpose of the extradition request, the US indictment was translated into the UK offence of conspiracy to defraud, in which dishonesty is a central element.<sup>51</sup> Therefore, in the *GG plc* case, the issue was narrowed to whether the indictment, as drafted, revealed more than ‘*mere price fixing*’. The prosecution submitted that this was a fraudulent scheme, devised dishonestly, with the aim of perpetrating a fraud and that simply because the non-criminal conduct of price fixing was an element of the scheme, did not cause the indictment to be defective. The House of Lords ruled in favour of the defendants, although to date the detailed judgment has been the subject of a reporting restriction.<sup>52</sup> The judgment in *Norris* does however, cross-refer to arguments made in *GG plc*. **2.22**

In *Norris*, when asked to determine the circumstances in which price-fixing agreements could be prosecuted as conspiracies to defraud, the House of Lords held that simply entering into a price-fixing agreement and keeping it secret was not sufficient to demonstrate ‘dishonesty’ and that some ‘additional dishonesty’ or ‘aggravating features’ was required.<sup>53</sup> Examples of such ‘aggravating features’ were stated to be: **2.23**

- (1) express or implied misrepresentation intended to deceive,<sup>54</sup> particularly to potential or actual purchasers as to the competitive nature of the pricing or offering process;<sup>55</sup>
- (2) violence or intimidation;<sup>56</sup> and
- (3) inducement to breach of contract.<sup>57</sup>

The *Norris* judgment suggests that without any of these factors, a secret agreement between competitors to fix prices will not of itself amount to a conspiracy to defraud. It seems that if a conspiracy to defraud case concerning price fixing is **2.24**

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<sup>50</sup> Ibid, para 62.

<sup>51</sup> Ibid, para 4.

<sup>52</sup> Criminal Justice Act 1987, s 11 prevents publication of the judgment in an interlocutory appeal where to do so could create a risk of prejudicing the criminal trial.

<sup>53</sup> See n 44, paras 21 and 23.

<sup>54</sup> Ibid, paras 16, 21, 100.

<sup>55</sup> Ibid, para 51.

<sup>56</sup> Ibid, para 17.

<sup>57</sup> Ibid.

brought, the prosecution will be under an enhanced burden of having to prove not only all of the current elements of conspiracy to defraud, including dishonesty, but an additional dishonesty involving one or more of the aggravating features. This potential requirement for this type of conspiracy to defraud, as distinguished from others, has attracted considerable criticism.<sup>58</sup>

- 2.25** Importantly, the House of Lords did not deal with the crucial question of whether this interpretation of ‘dishonesty’ in the context of a secret price-fixing agreement could apply to the cartel offence. By stating that ‘there are problems with the notion that mere secrecy can of itself render the price fixing agreement criminal’<sup>59</sup> the House of Lords left open the possibility of raising this argument in the context of an EA 2002 cartel offence prosecution.<sup>60</sup> However, this position was made no clearer when later in the judgment, commenting on the allegation of price fixing in the affidavit of the US prosecutor, it is stated:

But that is no more than to assert an intrinsic unlawfulness and dishonesty merely in taking part in a secret cartel *and under English law, until the enactment of section 188 of the Enterprise Act 2002, that was simply not so.*<sup>61</sup> (emphasis added)

- 2.26** In reality, many ‘hard core’ cartel cases lack the aggravated features set out by the House of Lords and for the purposes of the cartel offence, the OFT is likely to concentrate on clear evidence that the participants knew that their conduct was dishonest by their standards and by those of the ordinary person. According to the predecessor of the current OFT Director of Cartels:

criminal prosecution will be reserved for the *really hardcore cartels with evidence of deep dishonesty*. . . . If . . . we have . . . executives travelling specifically to a trade association meeting where there is a fictitious agenda and a fictitious set of minutes and the only purpose of the meeting is to collude on prices, then we should and we will prosecute the individuals.<sup>62</sup> (emphasis added)

- 2.27** The intention of the OFT would therefore seem to be to set a high threshold for prosecution, but given the lack of case precedent to date, it is hard to determine accurately if this policy is being uniformly applied. It does seem to have been borne out in the first successfully completed UK cartel offence prosecution against three individuals for their participation in the cartel conduct related to the international marine hose market. In this case, the defendants pleaded guilty to one

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<sup>58</sup> Maya Lester, ‘Prosecuting Cartels For Conspiracy to Defraud’ [2008] Comp Law 134; Andreas Stephen, ‘That Unsettling Feeling: Secret Price-Fixing is Not in Itself Dishonest? *Norris v USA*’ Centre of Competition Policy, Issue Number 14, May 2008, p 5; see: [http://www.uea.ac.uk/polopoly\\_fs/1.104308!ccpnewsletter14.pdf](http://www.uea.ac.uk/polopoly_fs/1.104308!ccpnewsletter14.pdf); Julian Joshua, ‘Dishonesty after *Norris*’ (2008) *Competition Law Insight* 13.

<sup>59</sup> *Ibid*, para 60.

<sup>60</sup> See n 57.

<sup>61</sup> n 45, para 63.

<sup>62</sup> See <<http://www.petersandpeters.co.uk/news/documents/MichaelOKaneC5Paper.pdf#>>.

count in the indictment that alleged price fixing, market sharing and bid rigging. The prosecution case demonstrated that they had conducted their affairs in secret, taking positive steps to conceal their conduct by using code names and non-business e-mail accounts and therefore inferred that they were clearly aware that their conduct was dishonest.<sup>63</sup>

An interesting comparison can be made between the actions of the OFT in the *Marine Hose* case and its actions in the civil investigation into 112 construction companies for bid rigging in the UK. This construction case concerned 112 companies which were engaged in ‘cover pricing’, in other words, colluding with a competitor during a tender process, in order to obtain a price or prices which were intended to be too high to win the contract. The party tendering for the contract was then left with a false impression as to the level of competition in the market and this may have resulted in it paying inflated prices. When issuing its Statement of Objections, the OFT also issued a press release stating that: **2.28**

the SO formally alleges that a minority of the construction companies have variously entered into one or more arrangements whereby it was agreed that the successful tenderer would pay an agreed sum of money to the unsuccessful tenderer (known as a ‘compensation payment’). These more serious forms of bid rigging are usually facilitated by false invoices.<sup>64</sup>

The wording of this release expressly states that the cover-pricing was on occasions accompanied by a compensation payment from the ‘winning party’ to the ‘losing party’ and implies that such payments may have been covered up within the accounting books of the respective companies, by the issuing of false invoices. If correct, it is difficult to see how such conduct does not give rise to the strong inference that the parties were aware that what they were doing was dishonest, according to their standards and those of the ordinary person, yet no criminal prosecutions have resulted. **2.29**

In relation to civil cases, the OFT has issued Guidance on the factors taken into account in deciding the appropriate penalty for an infringing undertaking.<sup>65</sup> In the context of on what factors the OFT might place emphasis when considering if dishonesty exists in an agreement, the aggravating factors in relation to a financial penalty are listed as: **2.30**

- (1) the role of the undertaking as a leader in, or an instigator of, the infringement;
- (2) involvement of directors or senior management;

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<sup>63</sup> *R v Whittle and others* [2008] EWCA Crim 2560.

<sup>64</sup> OFT Press Release 52/08, 17 April 2008.

<sup>65</sup> OFT, *Guidance as to the Appropriate Amount of a Penalty*, Document 423, December 2004, paras 2.14–2.16.

- (3) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- (4) continuing the infringement after the start of the OFT's investigation, repeated infringements by the same undertaking or other undertakings in the same group;
- (5) infringements which are committed intentionally rather than negligently;
- (6) retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

**2.31** Given the absence of clear precedent in the UK for what cartel conduct might be considered '*dishonest*', some assistance can be gained by a study of the European Commission and the ATD's<sup>66</sup> approach. The Commission's approach to fining has become increasingly aggressive over the last few years with five decisions in 2003 (total fines of €405million) and six decisions in 2004 (total fines of €1.843million). The Commission defines 'very serious infringements' as 'horizontal restrictions such as price cartels and market sharing quotas or other practices which jeopardise the proper functioning of the single market'.<sup>67</sup> It treats hard-core infringements as 'deliberate' and the ATD treats cases as criminal rather than civil when they concern the following types of activity:

- An agreement whereby the competitors fixed the prices of different products, allocated sales quotas, agreed price increases, and monitored compliance with the agreement. All of this was achieved via many meetings: the Vitamins' cartel.<sup>68</sup>
- An agreement between six producers controlling 80 per cent of the global market to fix prices and share customers and markets in the Choline Chloride product market. This agreement was supported by numerous meetings during which the participants exchanged commercially sensitive information, the monitoring of their compliance with the agreement and taking steps to ensure that distributors did not undercut the inflated agreed prices: the Choline Chloride cartel.<sup>69</sup>
- An international conspiracy between manufacturers where they engaged in discussions and attended meetings with each other, during which agreements were reached to fix the level of prices, increasing capacity and expanding output

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<sup>66</sup> The United States Department of Justice, Anti-Trust Division.

<sup>67</sup> Guidelines on the method of setting fines pursuant to Article 15(2) of regulation 17 and Article 65(5) of the ECSC Treaty, OJ No 9, p 3.

<sup>68</sup> Case T-15/02 *BASF AG v Commission* [2006] ECR II-497, CFI.

<sup>69</sup> Case COMP/37.533 *Choline Chloride*, 9 December 2004 [2006] 4 CMLR 159.

during the relevant period as well as limiting the rate of price declines: the DRAM ('Dynamic Random Access Memory' chip) cartel.<sup>70</sup>

A consistent theme, apart from extensive meetings and agreements, are the steps taken to conceal the cartel from others in the company as well as the general public. This accords with the nature of cartel conduct where the more that is done to conceal the cartel, the greater the inference that those engaged were acting dishonestly. **2.32**

This point was made by Sir Jeremy Lever QC and John Pike in their seminal article 'Cartel Agreements, Criminal Conspiracy and the Statutory Cartel Offence—Parts I and II',<sup>71</sup> where it is stated that dishonesty could be demonstrated if the cartel agreement involved: **2.33**

the taking of *active steps* to mislead . . . that the parties to the agreement were engaged in normal competition with each other . . . *The greater the efforts of the parties to a cartel to keep it secret, the more readily a jury might infer . . .* that the intention of the cartelists was to preserve an illusion that they were engaged in normal and bona fide competition with each other . . . (emphasis added)

*Agreement to make or implement, or cause to be made or implemented*

The intention of the Government in introducing the cartel offence was to ensure that the law targeted 'those who set up and maintain the cartel, as well as any senior executives or directors who know about the arrangement and condone or encourage it'.<sup>72</sup> The 'agreement' element of the offence was, accordingly, drafted widely in an effort to capture the conduct of such culpable individuals, as it requires that the accused: **2.34**

agrees with one or more other persons to make or implement, or to *cause to be made* or implemented arrangements.<sup>73</sup> (emphasis added)

An individual can only '*cause to be made*' if he or she contemplated or desired that the act would ensue and that it was done on his express or implied authority or as a result of him exercising control or influence over the other person.<sup>74</sup> This is normally a question of fact to be determined applying a common sense approach<sup>75</sup> and the 'mere tacit standing by and looking on'<sup>76</sup> is insufficient to constitute liability.<sup>77</sup>

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<sup>70</sup> See <<http://www.usdoj.gov/atr/cases/f213400/213483.htm>>.

<sup>71</sup> [2005] ECLR Issue 2.

<sup>72</sup> See n 5, para 7.27.

<sup>73</sup> EA 2002, s 188(1).

<sup>74</sup> *Attorney General of Hong Kong v Tse Hung-lit* [1986] AC 876, PC.

<sup>75</sup> *Alphacell Ltd v Woodward* [1972] AC 824, HL.

<sup>76</sup> *Price v Cromack* [1975] 1 WLR 988.

<sup>77</sup> *Attorney-General's Reference (No 1 of 1994)* [1995] 1 WLR 599, CA.