

# Key Features of Cartel Enforcement in the UK - What You Need to Know

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## **Key features of cartel enforcement in the UK – what you need to know**

In April 2014 the Competition and Markets Authority (CMA) became the UK's single integrated competition and consumer authority, taking over functions performed by the Office of Fair Trading and the Competition Commission. The CMA's mission is to make markets work well - for consumers, for businesses and for the economy, reflecting the key role of competition as a driver of economic growth. As part of this mission, one of the CMA's strategic goals is to deliver a step change in the UK's enforcement against cartels. This article will examine the key features of the UK's cartel enforcement regime, including recent changes and the steps the CMA is taking to enhance its enforcement capability.<sup>1</sup>

### **Background**

Cartel enforcement in the UK operates through separate but complementary regimes aimed at businesses ('undertakings') and individuals respectively. In the case of undertakings, a civil/ administrative regime under the Competition Act 1998 (CA98) prohibits anti-competitive agreements or concerted practices that affect trade in the UK. This is a broad prohibition aimed at arrangements that have as their object or effect the prevention, restriction or distortion of competition in a market. Businesses found to be in breach can face fines of up to ten per cent of their worldwide turnover. Furthermore, the directors of those businesses may be subject to director disqualification for up to fifteen years.<sup>2</sup>

In the case of anti-competitive agreements that affect trade between EU member states,<sup>3</sup> the CMA also applies Article 101 of the Treaty on the Functioning of the European Union on which the CA98 prohibition is modelled. The civil prohibitions are also applied by a number of sector regulators in the UK who hold concurrent competition powers in relation to their respective sectors.

The criminal cartel offence under section 188 of the Enterprise Act 2002 (EA02) deals with the conduct of individuals. It applies to those who make or implement (or cause to be made or implemented) specific cartel arrangements amongst undertakings. The cartel offence is designed to deter individuals from engaging in the most serious and damaging forms of anti-competitive agreement, namely 'hardcore cartels'. Those convicted of the cartel offence can face up to five years imprisonment, unlimited fines, director disqualification for a period of up to fifteen years and potential confiscation of their assets under the Proceeds of Crime Act 2002, as well as ancillary costs orders. The cartel offence can only be prosecuted by the CMA, the Serious Fraud Office or with consent from the CMA in England, Wales and Northern Ireland. In Scotland the decision to prosecute is made by the Crown Office and Procurator Fiscal Service (COPFS).

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<sup>1</sup> I am grateful to a number of CMA colleagues for their assistance in preparing this article, in particular, to Stephen Blake, Roland Green, Juliette Enser, Max Malagoni and Judith Frame.

<sup>2</sup> Provision for Competition Disqualification Orders is made in sections 9A to 9E of the Company Directors Disqualification Act 1986 as amended by the EA02.

<sup>3</sup> OJ2008/C 115/88-89

The civil and criminal regimes can, and do, operate in parallel, with civil action being taken against undertakings and criminal proceedings directed at individuals. The decision to open a case is made against the CMA's prioritisation principles<sup>4</sup> but the CMA will always consider opening a criminal investigation if there are reasonable grounds to suspect that the cartel offence has been committed.

## **Legislative change**

At the same time as creating the CMA, the Enterprise and Regulatory Reform Act 2013 (ERRA) also made significant amendments to the criminal cartel offence, with a view to improving its effectiveness as a deterrent.

A person commits the cartel offence if he or she agrees with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, such as price fixing, limiting supply or production, market sharing and bid-rigging. In respect of arrangements to fix prices or restrict supply or production, the offence also requires that the restriction is reciprocal<sup>5</sup> and that it relates to undertakings operating at the same level in the supply chain.<sup>6</sup>

The offence will be committed irrespective of whether the agreement is actually implemented by the undertakings. If the agreement between individuals is made outside the UK, proceedings may be brought where the agreement has been implemented in whole, or in part, in the UK.

The original offence under section 188 of the EA02 included a requirement that the individual had been 'dishonest'. The ERRA removed dishonesty as an element of the offence and replaced it with a number of statutory exclusions and defences.

Specifically, the exclusions introduced by the ERRA mean that an individual will not commit the offence if certain information is notified to customers or published in a specified form before the relevant arrangements are implemented.<sup>7</sup> The CMA has also published prosecution guidelines on the principles it will apply<sup>8</sup> when determining in any case whether proceedings for the offence should be instituted.

The requirement to prove dishonesty had in practice made the cartel offence difficult to prosecute and the original reasons for its inclusion were found to be either unnecessary or ineffective. Following its removal, it is anticipated that a higher proportion of cases will result in successful prosecution. However, the amended offence only applies to agreements made on or after 1 April 2014, so dishonesty will continue to be a feature of cases for some time.

The ERRA also strengthened the CMA's civil investigation powers by introducing civil penalties for those failing to comply with investigations under the CA98 and giving the

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<sup>4</sup> <https://www.gov.uk/government/publications/cma-prioritisation-principles>

<sup>5</sup> Subsection 188(3) EA02

<sup>6</sup> Subsection 189 EA02

<sup>7</sup> Subsections 188A(1)(a)-(c) and Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 (SI 2014/535)

<sup>8</sup> <https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance>

CMA the power to require individuals to answer questions.<sup>9</sup> The latter mirrors an equivalent power in the EA02 for criminal investigations, which has been used to good effect in such cases.

## **Detecting cartels – leniency and other sources of information**

Cartels are notoriously difficult to detect and investigate, particularly without the benefit of inside information. Like the European Commission (EC), US Department of Justice (DoJ) and other leading international competition authorities, the CMA therefore operates a leniency policy. Under the policy, undertakings and individuals that have engaged in cartel activity can benefit from lenient treatment, provided they report the cartel, admit their involvement and cooperate fully with the CMA's investigation.

The CMA's leniency policy is designed to maximise incentives for applicants to come forward early and to cooperate fully throughout the course of an investigation. Provided that an investigation is not already underway and that certain other conditions are met, the first undertaking to apply for leniency will qualify for total immunity from financial penalties. Being 'first in' will also guarantee immunity from criminal prosecution for the cartel offence for all of the undertaking's cooperating current and former employees and officers. Cooperating directors of the applicant will also be guaranteed immunity from director disqualification.

If you are not the 'first in' there can still be significant benefits from applying at a later stage. These include a reduction in fines, automatic immunity from director disqualification for cooperating directors and scope for discretionary immunity from criminal prosecution for some or all employees and officers. The extent of fine reduction will depend largely on the value that the cooperation brings to the CMA's investigation. An undertaking can add value in several ways. These may include, for example, ensuring that individual employees who are suspects in any criminal investigation have access to expert independent legal advice, or refraining from taking certain steps that might undermine the CMA's investigation.

The CMA has published extensive guidance on the operation of its leniency policy.<sup>10</sup> This includes recommendations as to what the CMA expects in terms of any internal investigation the applicant may wish to carry out. This is to minimise the potential for an applicant inadvertently to tip off other cartel members to the possibility of an investigation or to contaminate evidence. While the CMA recognises that some internal investigation may be necessary prior to a leniency application, the CMA's guidance provides that this should be limited to what is necessary to decide whether to apply for leniency. The CMA's guidance also sets out how any such investigation should be conducted. Failure to comply with the guidance risks putting the undertaking's lenient treatment in jeopardy.

Notwithstanding that leniency is a key tool for the detection of cartels, it tends to catch cartels that are failing or at a late stage and obviously depends on those involved choosing to come forward. The CMA does not therefore rely exclusively on leniency for its cartel

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<sup>9</sup> Section 40A and section 26A CA98

<sup>10</sup> <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>  
<https://www.gov.uk/cartels-confess-and-apply-for-lenieny>

cases. The CMA also operates a cartels hotline<sup>11</sup> and is one of the few competition authorities to offer an informant rewards scheme for those coming forward with information which leads to the detection of a cartel. In exceptional cases, rewards can be as much as £100,000.<sup>12</sup> The CMA is also authorised under the Regulation of Investigatory Powers Act 2002 to conduct certain forms of surveillance, to use informants and to acquire certain types of communications data, in each case subject to appropriate authorisations.<sup>13</sup>

## **Increased capability**

The CMA enjoys broad political support and, in addition to the legislative changes described above, has been provided with extra funding to enable it to deliver a ‘step change’ in the scale and sophistication of its competition enforcement activities.

As part of its enhancement programme, the CMA has already made a number of senior appointments in the fields of intelligence, digital forensics and criminal enforcement with a view to further strengthening the CMA’s ability to take a more proactive approach to cartel detection, focusing on intelligence-led investigation and using the full range of its powers and available techniques. The investigation, civil enforcement and case support teams are also being strengthened through the recruitment of skilled and experienced professionals to deliver faster and more effective investigations. The CMA is also investing significantly in improvements to its digital forensics capability.

These changes, which represent a ‘step up’ in developments that were already underway prior to the CMA’s creation, are already bearing fruit. Nearly half of the UK cartel investigations opened since 2010 have been intelligence-led (that is, they have not been as a result of a leniency application). Moreover, in June last year the CMA charged two men with the cartel offence in its Galvanised Steel Tanks case, a third man having previously pleaded guilty to the same offence. This case is due to be heard in June.<sup>14</sup>

In addition to the intelligence function within the CMA’s Cartels and Criminal Group, the CMA has also established a dedicated Research, Intelligence and Advocacy team with responsibility for developing the CMA’s pipeline, gathering intelligence and providing analysis and research in order to coordinate and support the core work of the CMA, including enforcement.

## **Relationships with other enforcement partners**

The CMA is also able to draw on the support of other enforcement agencies and works closely with the police and other law enforcement agencies in the UK, EU and internationally. This network allows for strong joint working arrangements as appropriate, as well as the sharing of expertise, experience and information. This is true at both a national and international level.

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<sup>11</sup> [cartelhotline@cma.gsi.gov.uk](mailto:cartelhotline@cma.gsi.gov.uk) or 02037386888

<sup>12</sup> <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>

<sup>13</sup> Section 199 EA02

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<https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>

Nationally, the CMA has strong relationships and is working increasingly closely with agencies such as the police, the National Crime Agency, the Serious Fraud Office, the Financial Conduct Authority and Trading Standards, as well as key enforcement partners within the UK's Devolved Nations (Scotland, Wales and Northern Ireland). In the case of civil cartel enforcement, the CMA shares information and agrees the allocation of cases with sector regulators through the UK Competition Network. As regards its criminal enforcement activities, the CMA, is able to draw on police expertise in the conduct of searches and has, for instance, co-operated extensively with the City of London Police and other police forces on a number of criminal cartel cases, including with the execution of warrants and the arrest of suspects. In the Devolved Nations, the CMA has also worked closely with the COPFS in Scotland and the Crown Solicitors Office in Northern Ireland in obtaining and executing criminal cartel warrants for business premises in those jurisdictions. The CMA has also recently adopted a Memorandum of Understanding with the COPFS which governs the basis on which the CMA and COPFS cooperate to investigate and/or prosecute individuals for the cartel offence where the offence may have been committed within the jurisdiction of the Scottish courts.<sup>15</sup>

At an international level, globalisation means that businesses increasingly operate within multiple jurisdictions and cartels in turn have become internationalised. In response, agencies must also be ready to adopt an international approach.

As a member of the European Competition Network and the International Competition Network, and through its participation in the OECD, the CMA frequently interacts with international counterparts to discuss common issues and challenges, develop best practices and share ideas and information.

The CMA also engages and cooperates with its international counterparts on specific cases, and there are strong precedents for this, the most striking example being the *Marine Hose* cartel case,<sup>16</sup> which involved close cooperation between UK and US authorities, the EC, the Japan Fair Trade Commission and others and resulted in parallel investigations and proceedings in a number of jurisdictions. In particular, searches were coordinated in the US, UK, EU and Japan, and under a US plea agreement, three UK nationals who had been arrested in Houston, Texas pleaded guilty to Sherman Act offences in the US but were allowed to return to the UK where they were arrested, prosecuted and jailed.

## **Awareness and compliance**

However, the CMA's enforcement work is not just about sanctions. The CMA has also launched a number of awareness and compliance initiatives to educate businesses and protect consumers. The aim of this is to push competition compliance up the agendas of boards and businesses across the UK economy.

Cartels are a major barrier to competition and can lead to significantly increased prices and reductions of output, efficiency, innovation and choice, all of which are harmful to

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/328403/CMA\\_and\\_COPFS\\_MOU.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328403/CMA_and_COPFS_MOU.pdf)

<sup>16</sup> R –v- Whittle, Brammer & Allison 2008

consumers. Conversely, competition compliance helps ensure fairness within markets, encourages new investment and innovation and helps contribute to economic growth and consumer satisfaction. These are all positives that ethically-run businesses should be keen to achieve. Moreover, the CMA recognises that most businesses wish to comply with competition law.

To support this, the CMA has launched a number of initiatives. In particular, it has worked with the Institute of Risk Management to develop resources to help businesses comply with competition law and to provide a suggested approach to risk management. A result of this collaboration was the publication of a short guide on competition law risk that includes an overview, case studies and key learning points.<sup>17</sup> This promulgates the four-step compliance process developed by the CMA's predecessor and encourages a top down commitment to compliance.

The CMA has also sought to take specific issues from recent cases, identify key lessons and then turn those into simple compliance messages. In doing so it has used a variety of communication methods.

For example, in the *Commercial Vehicles* case three core messages were identified:

- There's a thin line between chatting with a competitor and forming a cartel,
- A single meeting can be enough to find yourself part of a cartel, and
- Small businesses don't get a free pass on competition law.

A range of channels, including social media, were used to extend the reach of this message. Working with trade associations, an open letter was also sent out to the industry and was received by at least 80% of the 200,000 people working in franchised motor dealers in the UK, including senior managers. The CMA also engaged directly with businesses by speaking at trade events and publishing articles in trade journals.<sup>18</sup>

The CMA has also developed a range of guidance and information documents including sixty-second summaries<sup>19</sup> on some common competition compliance issues.

## **In conclusion**

These developments all mean that the risks of detection in the UK are increasing, not just from fellow cartelists choosing to apply for leniency but from other and new sources reporting to the CMA. Alongside this, the CMA is developing its own intelligence gathering capabilities and a closer working relationship with other enforcement partners to help uncover and investigate those operating illegally.

As a result, individuals and businesses that engage in cartel activity are running higher risks than ever before and firms need to make sure that they are taking competition

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<sup>17</sup> <https://www.gov.uk/government/publications/competition-law-risk-a-short-guide>

<sup>18</sup> <https://www.gov.uk/government/publications/commercial-vehicles-case-cartel-enforcement-lessons>

<sup>19</sup>

<https://www.gov.uk/government/collections/competition-and-consumer-law-compliance-guidance-for-businesses>

compliance seriously. Moreover, if you do uncover a cartel, you need to be ready to act quickly and inform the CMA to get the benefits of leniency before someone else does.