
LEGISLATION

Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence

Dr Peter Whelan*

On 1 April 2014, section 47 of the Enterprise and Regulatory Reform Act 2013 (ERRA) entered into force, ensuring significant changes to the UK cartel offence. The criminal offence, contained in section 188 of the Enterprise Act 2002, was enacted to secure the deterrence of cartel activity affecting the UK. Following almost ten years of enforcement, the cartel offence had failed to live up to expectations. Consequently, following a public consultation, it was reformed in substance. Section 47 ERRA, removed the (controversial) definitional element of 'dishonesty' from the offence, created a number of 'carve outs' from the offence, and created three additional defences. This article examines in detail the specific reforms of the cartel offence and argues that, although considerable improvement has been made, the UK offence is fundamentally flawed and unworkable in practice. Further reform is therefore advised.

INTRODUCTION

The concept of 'cartel activity' refers to the making or implementing of an anticompetitive agreement, concerted practice or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or divide markets by allocating customers, suppliers, territories or lines of commerce.¹ Cartel activity is generally perceived to be harmful to society in that it reduces competition in the marketplace to the detriment of consumers.² The potential effects of cartel activity include an increase in prices for consumers, a reduction in output, quality and innovation, and the existence of 'deadweight loss' (ie, a situation where consumers who would have purchased goods at the competitive price are unable to purchase those goods at the cartelised price). Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits cartel activity which has an effect on trade between EU Member States. While, as a result of Article 101(3) TFEU, an exception to the prohibition in Article 101(1) TFEU is legally possible, provided strict criteria are fulfilled,³ in practice it is very unlikely to be

*Associate Professor in Law and Deputy Director, Centre for Criminal Justice Studies, School of Law, University of Leeds.

1 Organisation for Economic Cooperation and Development (OECD), 'Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels' 25 March 1998, C(98)35/final, at [2(a)].

2 S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (London: Sweet & Maxwell, 2010) 163.

3 See Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595.