# HANDCUFFS ACROSS THE IRISH SEA

**PART ONE**

A REVIEW OF CURRENT PERSPECTIVES
ON CORRUPTION AND CRIMINAL CARTELS
NICHOLAS PURNELL EXAMINES THE
CONTRASTS BETWEEN THE UK AND EIRE

ISSUE FIFTEEN SUMMER 2012
PUBLISHED BY

CLOTH FAIR CHAMBERS

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The importance of bi-lateral trading between the UK and the Republic of Ireland is reflective of the historical and geographical links between the two countries. Despite its population of only 4.5 million people, the Republic imports a volume of trade from the UK which exceeds the combined total of UK exports to China, India, Brazil and Russia. In monetary terms, the 2011 trade statistics show that UK exports to Eire were valued at £ 14bn and imports at £ 10.4bn.

However the manner in which the criminal law may impact upon trade between the two countries differs in significant respects. This is certainly the case with regard to national legislation in matters of criminal cartels and bribery and corruption.

In this first part of an examination of cross border legislation on corrupt practices, the focus is upon differences on both sides of the Irish Sea. Informed businesses in England and Wales and their trading counter-parts in the Republic of Ireland are trying to negotiate the hazards of the impact of recent and proposed legislation which affects commercial activity in both jurisdictions and the lack of clarity in the policy which enforcement agencies may adopt. Many undertakings, however, are lacking in awareness or are significantly under-informed about the risks that corporations and directors and senior managers may encounter.

In a survey of 1000 middle managers conducted by Ernst & Young which featured in *The Lawyer* on May 14 2012, 72% of the managers surveyed had never heard of the Bribery Act 2010. Of the 28% of informed managers, only half considered that the training they had received was adequate to ensure compliance with the statutory regime.

Such is the state of commercial awareness as we approach the first anniversary in July 2012 of the coming into force of the Act. In December 2011, the first sentence of imprisonment to be handed down under the Act was imposed on an employee of the magistrates' court service. The sentence at first instance included three years' imprisonment for an offence of receiving a bribe as part of an overall sentence of a six year term. On 23 May 2012, the Court of Appeal, by reference to the totality principle, reduced the overall sentence from six to four years but the case remains the only reference point for sentences on pleas of guilty to bribery.

The enforcement agencies in the UK and the scope of their functions appear to be constantly under review and critical examination. This adds to the levels of uncertainty. The Serious Fraud Office (SFO) begins life under a new Director. The Office of Fair Trading (OFT) is about to become a constituent of a new Markets and Competition Authority. The FSA is splitting its functions into the Financial Conduct Authority and the Prudential Regulation Authority.

The uncertainty is reflected in published commentary from the main protagonists.
"There needs to be better joined up working between the various enforcement agencies ...at a time of great pressure on budgets, there will be a big temptation to indulge in bureaucratic fighting about who takes over particular areas of work with the necessary budget... ."

So said Mr Richard Alderman, outgoing Director of the Serious Fraud Office in evidence to the All-Party Parliamentary Group on anti-corruption 29 February 2012

Mr Alderman's comments follow the disclosure in the Times on 22 February 2012 that an internal report by the Department for International Development threatens the continued existence of the SFO by criticising its alleged willingness to compromise with industry and commerce by

reaching financial settlements in cases of corruption and proposing its replacement by the creation of an International Counter-Corruption Task Force. Mr Alderman responded by issuing his own farewell account of his period in charge of the SFO which highlighted the 'achievements' of cases brought to a conclusion by convictions or settlements.

His successor, Mr David Green QC, took up his role with a robust declaration that the SFO was here to stay and that his experience and preference was for a prosecuting authority which investigated and brought cases to trial rather than encouraging alternative methods of disposal.

On 15 March 2012, the Department for Business Innovation and Skills published the Government response to the consultation on the Competition Regime which concluded,

**"Look at him tackling bribery, and corruption charges!"**

amongst other decisions, that legislation will be introduced to remove the 'dishonesty' ingredient from the criminal cartel offence under s188 of the Enterprise Act 2002. Further the response identified that the Government is satisfied with the current arrangements by which there is concurrent jurisdiction for the SFO and the OFT to prosecute cases of criminal cartels and that the Competition and Markets Authority – the new authority to combine the roles of the OFT and the Competition Commission – should prosecute in most cases. The draft Bill was published on 23 May 2012 and reflects those proposals.

## BRIBERY LEGISLATION

The law in England and Wales was reformed and restated in the Bribery Act 2010 which came into force on 1 July 2011. In Eire, anti-bribery legislation still has to be discerned from a complex sequence of statutes and amending legislation culminating to date in the Prevention of Corruption (Amendment ) Act 2010 and the Criminal Justice Act 2011, in force from 9 August 2011. The Irish Justice Minister has signalled an intention to introduce legislation to consolidate and reform the law.

The key differences between the two jurisdictions are to be found in territorial reach, reporting duties and whether the legislation relies on any presumptions.

### DEFINITIONS

The legislation of both jurisdictions contains similar offering and requesting bribery offences.

**The Bribery Act 2010** creates four separate offences: offering a bribe (Section 1) and requesting a bribe (Section 2), bribing a foreign official (Section 6) and failing, as a commercial organisation, to prevent bribery (Section 7).

The Bribery Act introduces a novel form of definition by setting out a series of 'cases':
Thus, offering a bribe, Case 1, is a promise of or advantage intended to induce or reward the improper performance of a function;
Case 2, a promise of or advantage, the acceptance of which would itself constitute impropriety;
Case 3, receiving a bribe: requesting or receiving an advantage in order to perform a function improperly;
Case 4, requesting or receiving an advantage where the request or receipt itself constitutes the impropriety;
Case 5, requesting or receiving an advantage as a reward for the improper performance of a function;
Case 6, performing a function improperly in anticipation of or in consequence of a request to receive an advantage.

The 2010 Act then defines 'function'; 'improper performance'; and the test of 'expectation'.

In the Republic, *The Prevention of Corruption (Amendment) Act 2001* section 2 introduced into the Irish legislation an amendment to s.1 of the 1906 Act. This inserts into the earlier Act offences of corruptly receiving gifts or advantage for doing an act or making an omission [s.1(1)] and corruptly offering or giving gifts or advantage as an inducement or reward for doing an act or making an omission in relation to an office or position [s.1(2)].

The Irish *Prevention of Corruption (Amendment) Act 2010* introduces for the first time in Irish law a statutory definition of the word 'corruptly'. Section 2 defines acting 'corruptly' as including:

*"acting with an improper purpose, personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information or by any other means."*

By a curious reverse approach to policy, the Irish legislators have introduced a statutory presumption of corruption at the same time as the UK legislators were removing similar presumptions from the statute-book on human rights and fair trial considerations. Section 4 of the Prevention of Corruption (Amendment) Act 2001 provides that, in the case of criminal proceedings against public officials, proof of any gift or consideration to an official by a person who has an interest in the discharge by the official of his functions is deemed to have been given corruptly unless the contrary is proved.

In UK law, the similar presumption which was contained in s.2 of the Prevention of Corruption Act 1916 had fallen into disuse and has been repealed by the Bribery Act s.17(3) and schedule 2 which repeals the whole statute.

## THE JURISDICTIONAL SCOPE OF THE PRIMARY OFFENCES

The Irish legislation extends jurisdiction to cover corrupt acts committed outside the State of Eire where the activity would constitute an offence if committed within Eire: S.7 of the Prevention of Corruption Act (Amendment) 2001. However this only applies if the person concerned is:
An Irish citizen;
An individual ordinarily resident in Eire;
A company registered under the Irish Companies Acts;
A body corporate established under Irish law;
A relevant agent of any of the above.

By contrast, a UK court has jurisdiction over a primary offence of bribery and all parties connected with it if:
any act or omission forming part of the offence takes place in the UK or any act or omission forming part of the offence is

undertaken anywhere in the world by a person *having a close connection with the UK*.

Moreover, so far as the offence of failing to prevent bribery under s7, the United Kingdom jurisdiction extends over any undertaking *carrying on business in any part of the UK*.

The definition of a 'close connection' is set out in detail in section 12 of the 2010 Act but comprises British citizens, persons ordinarily residing in the UK, bodies incorporated in the UK etc.

The consequences of these two key extensions of jurisdiction are far reaching. A British director of an Irish-incorporated company who had participated in an act of bribery in the Irish Republic or elsewhere in the world in connection with an Irish company, might be liable to prosecution in the UK notwithstanding that no criminal investigation or prosecution had taken place in Eire.

Similarly, any Irish company that 'carries on business' in any part of the UK, will come within the world-wide jurisdiction of s7 of the UK Bribery Act 2010. (This extension would also catch undertakings of whatever 'nationality' which carry on business in the UK.)

In contrast, UK companies and their directors would only become subject to the extra-territorial jurisdiction of Irish anti-corruption legislation where the company is incorporated in Eire or the acts are committed by Irish citizens or residents.

Moreover, in both jurisdictions, a director or senior manager who knows that bribery is being committed, or is wilfully blind to the circumstances, may be guilty of the primary offence on the basis that he has aided and abetted the offence or has a relevant duty of care to prevent the offence being committed and fails to do so. The attribution of the director's acts to the company itself is also likely to be sufficient to establish the criminal liability of the company.

There is no requirement in Irish law for corporate entities to develop or maintain procedures to satisfy anti-bribery legislation. However, should the business maintain premises or agencies within the UK, or have a subsidiary that it controls with a business presence in the UK, then a robust anti-bribery policy would be a highly prudential measure.

The global portfolios of international equity funds raise further far reaching issues. If an Irish director, resident in the UK, sits on the board of an Irish Equity Fund with an Indonesian portfolio company and agents or other directors in Indonesia commit acts of bribery in Indonesia, the Irish director may be liable to prosecution in the UK for his knowledge of the bribery committed in Indonesia. If the Irish company 'carries on business' in the UK, then the company itself and any other incriminated directors, may be prosecuted in the UK. The failure of the company to prevent corruption, by having in place an effective policy, might


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render the company liable to prosecution for the s.7 offence. In the case of such a director who is a UK citizen, he may be liable to prosecution in the UK, notwithstanding the fact that he is neither within the UK nor resident in the UK.

The key factor is that jurisdiction extends to the case not merely to the individual. So that the presence of a criminally liable Irish director as a resident in the UK would potentially render all directors, who were criminally involved in the matter, at risk of prosecution in the UK wherever they were resident and whatever their nationality.

The definition of '*relevant commercial organisation*' includes partnerships and companies which carry on business in the UK, regardless of where they are registered or incorporated. An '*associated person*' includes persons who perform services for the company regardless of the capacity in which they do so. The corporate procedures offence is a strict liability offence so that if an 'associated person' has committed bribery, the commercial organisation will be found guilty unless it can prove that 'adequate procedures' had been put in place.

Both in Eire and in the UK the maximum sentence on indictment for the primary offences of bribery is ten years' imprisonment.

## THE SIX PRINCIPLES OF CORPORATE GOVERNANCE

On 30 March 2011, the Director of the SFO and the Director of Public Prosecutions (DPP) published joint UK guidelines and provided six non-prescriptive principles to guide corporate procedures. These suggest that corporate entities should have in place:

(i) **Proportionate procedures** with regard to the risks of bribery;
(ii) **Top level commitment** to the prevention of bribery;
(iii) **Risk assessment** of the extent of internal and external exposure to bribery;
(iv) **Due diligence** to mitigate risk;
(v) **Communication and training** to ensure that policies and procedures are embedded;
(vi) **Monitoring and review** in order to make improvements where required.

Irish commentators recommend that, in the absence of any comparable guidance to which private businesses operating in Eire can refer, corporate entities in Eire should introduce similar processes. They would be well advised to ensure that they can demonstrate a robust approach to establishing that their business is compliant across their field of operations wherever the company may be actively in business.

## REPORTING OBLIGATIONS

Whilst the obligation in the UK to report suspicions of criminality is limited to terrorism and money laundering offences, and only then to entities within the 'regulated sector' as defined by statutory schedules, there is a much wider reporting requirement in Eire.

The *Criminal Justice Act 2011* imposes reporting obligations within the Republic with regard to a wide category of white collar crime. Both bribery and corruption are included in the list of offences captured by the new offence of 'withholding information' which has been introduced in Eire by s19 of the Criminal Justice Act 2011. This section criminalises a failure "without reasonable excuse" to disclose information to the police which a person knows or believes may be of material assistance in preventing or prosecuting these classified offences.

A person is obliged to disclose the information 'as soon as practicable.'

To reinforce this obligation, the 2010 (Amendment) Act inserts a new whistle-blower's protection clause into the 2001 Act as s.8A. This prevents employers from penalising any employee who reports or intends to report corruption offences.

This marks a distinction between the two jurisdictions. Within the UK jurisdiction, the risk for any director or senior employee who remains mute in the face of uncovered corruption is principally that of involvement in money laundering. Where revenue or income still to be received from corrupt contracts or business capital which has been derived from a corrupt source is being redeployed or invested, such handling of the 'proceeds of crime' may incriminate those who knowingly so transfer or deal with those proceeds.

Within the Irish jurisdiction, there is a statutory obligation to report and a failure to do so will render those with knowledge of the corruption liable to prosecution in Eire. An identified incidence of corruption anywhere in the world would be capable of bringing any involved or informed employee ordinarily resident in Eire within the jurisdiction of the Irish courts' powers under s.7 of the 2001 Act to prosecute a failure to report extra-territorial corruption.


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## PROSECUTORIAL DETERMINATION

The criticism of the Irish Government's record on the implementation and exercise of anti-bribery legislation by the OECD Anti-Bribery Group and by the Council of Europe Criminal Law Group led directly to the enactment of the 2010 (Amendment) Act. The November 2011 announcement of proposed future legislation in a Criminal Justice Corruption (Consolidation) Bill co-incided with Eire's ratification of the UN Convention on Corruption.

In his Burren Law School Lecture in May 2010, James Hamilton described his experience of implementing the Irish corruption legislation in his role as DPP. He stated that the increased rate of prosecutions in Eire, (17 cases between 2005 and 2008) reflected the modernisation of the legislation since 2001 and the introduction of presumptions of corruption in the case of gifts or considerations paid to public officials. He pointed out, however, that these presumptions only applied to donations made to an individual office holder and that no presumption applies to donations made to a political party.

In the UK, the rate of prosecutions for corruption has remained fairly constant but the sense of outrage over the MP's expenses disclosures and the current inquiries into the relationships between politicians and commercial interests and the press and the police perhaps underline a significant change in public attitude towards instances of alleged corruption. The newly appointed Director of the SFO has

confirmed his determination to re-establish the SFO as a "key crime fighting agency targeting top-end fraud, bribery and corruption."

There can be no doubt that the SFO and other UK prosecuting authorities are coming under increasing pressure from the Department of Justice in the US to increase the incidence of investigation into prosecutions for over-seas corruption.

Both public and governmental policy strongly suggest that we can expect a more active scrutiny and the vigorous pursuit of investigations and prosecutions using the anti-bribery legislation on both sides of the Irish Sea.

## CRIMINAL ENFORCEMENT OF COMPETITION LAWS IN EIRE AND IN THE UK

### THE IDENTITY OF THE PROSECUTING AUTHORITY

The move to decentralised competition enforcement which followed the Modernisation Directive (Regulation 1/ 2003) produced a radical overhaul of EU competition law. National competition authorities are given power to apply EU competition law but may only do so using existing national enforcement procedures. In the UK there is a highly developed and successful system of administrative penalties for competition breaches by undertakings which is enforced by the national competition authority, the OFT and the Competition Commission (CC). This system has undergone examination and reform through the Competition Act 1998 and the Enterprise Act 2002 and is currently the subject of a further Enterprise Bill announced in the Queen's Speech in May 2012.

The OFT, as well as its role as the authority through which the civil enforcement process is pursued, is the principal prosecuting authority for the criminal cartel offence under s.188 of the Enterprise Act 2002. When the proposed new Bill becomes law, this responsibility will transfer to a new body, combining the roles of both the OFT and CC, to be known as the Markets and Competition Authority (MCA).

In Eire, the Irish Competition Authority cannot determine whether undertakings have breached competition legislation or impose fines. This is because the Irish Constitution (Article 34.1) vests the sole power to administer justice, impose legal liabilities and levy penalties in the Courts. The Irish Competition Authority, unlike its UK counter-part, is limited to investigating alleged anti-competitive conduct. The authority in Eire to prosecute any criminal offence rests with the DPP, an independent statutory officer. The Irish Courts have been designated a national competition authority.


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This distinction of role between the two national competition authorities is significant.

Eire made cartel activity a criminal offence in 1996. The penalties for cartel offences were increased and jurisdiction was transferred to the Dublin Central Criminal Court in 2002 at the same time as the UK legislature enacted s.188 of the Enterprise Act 2002. In 2006, a 6 months' suspended sentence of imprisonment was imposed on one of the accused in the Irish 'heating oil' cartel case and thus became the first prison sentence to be imposed for a criminal cartel offence in Europe.

By the end of 2010, thirty-three undertakings and individuals had been convicted of cartel offences in Eire and suspended prison sentences had been imposed on ten convicted defendants.

By the date of this article, only two criminal prosecutions have been instituted in the UK for the criminal cartel offence and no trial has proceeded to a verdict as a contested case. The Marine Hose case was a plea of guilty arising from a controversial plea bargain in the United States and the BA trial (*Regina v Martin George and others*) collapsed for disclosure and evidential reasons before any witness was called.

In the UK, before the enactment of the Enterprise Act 2002, the Government accepted that for the cartel offence, as in Eire, the prosecuting authority would customarily be the Director of the Serious Fraud Office, an independent statutory office holder.

In the event, the SFO has never adopted or accepted any suspected criminal cartel for prosecution. This role has been assumed by the OFT and the proposed new authority, the MCA, is destined to retain this function as prosecuting authority for cartel offences.

The Irish legislation is recognised to be national competition law and makes the criminal offence bite on companies as well as individual corporate executives. The UK Enterprise Act offence – and the Government's mooted possible redrafting of the offence – is in contrast directed only at individual offenders and disclaims any competition law status.

There are many sound and long standing arguments in favour of the Irish separation of the prosecutorial power from the national competition authority. This was first recognised in the report of the independent consultants which the Government commissioned from Sir Anthony Hammond and Professor Roy Penrose before the 2002 Act (OFT 365 Nov. 2001). Significantly their reasoning was adopted by the Government in the subsequent White Paper and acknowledged in the replies given by the ministers in the parliamentary debates.

The essence of their reasoning was that the structure should be one in which the OFT managed the initial investigative enquiries and the criminal immunity regime but the SFO conducted any investigation which led to a prosecution. This would avoid the danger of a small team succumbing to the temptation to become too closely identified with the policy demands of the organisation and taking on a solicitor and client relationship rather than the independent judgement of a prosecutor whose role as a Minister of Justice and experience of long and complex criminal litigation is established and recognised. The SFO is directly accountable to the Attorney General.

It is arguably a fundamental common law principle that no-one should act as investigator, prosecutor, judge and jury, as does the national competition authority in the civil enforcement process in the UK. The danger of 'false positives', that is where the same agency imposes civil sanctions on companies to enforce the competition regime

and investigates and uncritically pursues individuals by prosecution for criminal involvement in the same cartel, is only too apparent. Moreover, for all the reasons articulated by Thomas LJ in the arguments that preceded his rejection of the plea bargain proposed by the SFO in *Regina v Innospec (2011)*, there is a fundamental objection to a prosecuting authority acting in a judicial or quasi-judicial capacity when the authority has a financial interest in the outcome of the bargain or disposal.

The incidence of wrongful findings of anti-competitive behaviour by the European Commission (for example *Wood-pulp* 1988; *Airtours* 2002) and by the OFT (the Competition Appeals Tribunal found fault with the OFT's decisions in three of the first five appeal cases referred to it – *Global Competition Review* 15.08.2003) demonstrates the difficulties for agencies in bringing a sufficiently dispassionate eye to the central question of whether there has in fact been anti-competitive let alone criminal conduct. Even more subtle is the damaging effect this closeness of team ethic may have on the sensitive decision making role of a prosecutor in preparation for and prosecution of a criminal trial. This is not to denigrate the individual balance and ethical standards of officials and personalities within a national competition authority. It recognises however the experience of evolving fair trial principles in the past three decades and the need for the prosecutor to be a truly independent 'Minister of Justice'.

That this proposition is not accepted by the ECJ, which rejected the argument that the Commission's embodiment of these combined functions was contrary to the rules of natural justice in *Musique Diffusion Francaise SA v Commission [1983] ECR 1825*, does not, I would respectfully suggest, diminish the strength of the arguments in favour of the Irish, as opposed to the UK, procedure.

## THE INGREDIENT OF DISHONESTY

As the law stands today, the Irish cartel offence has no ingredient of dishonesty whereas the s.188 offence under the UK Enterprise Act does. There are a number of reasons for this but one clear distinction is that the Irish offence is expressly stated to be a sanction against those who infringe the European competition regime.

Section 6 of the Irish Competition Act 2002 provides that undertakings who enter into or implement agreements which are prohibited by section 4(1) of the Act or Article 81(1) of the Regulation are committing an offence. Section 7 provides similar offences for breaches of Section 5(1) and Article 82. The 2002 Act in this way provides direct criminal sanctions for breaches of Articles 81 and 82 and enables the Authority to bring civil proceedings for those same breaches.

This is in direct contrast to the UK statutory offence which has steadfastly turned its face away from the proposition that s188 is an enactment of national competition law. The argument contends that s.188 establishes a stand-alone criminal offence (however closely associated it may be) rather than a species of competition law.

The Government has insisted in the past that the dishonesty ingredient supports this policy objective by sending out the strong message that this was a 'free standing offence based on dishonesty'; that it served to distance the offence from some of the economic considerations which may arise under article 81; to demonstrate that individual liberty was at stake and to demarcate the offence as criminal and not competition law.

Some critics suspect that another unspoken fear is that any national competition regime is subject to the supremacy of the EU competition authorities and there may be an obvious

fear that the Commission might exercise that supremacy and reserve or take to its own jurisdiction the largest cases with the potential for maximum financial sanctions. Such action might diminish the reputation of the courts and thereby prevent or obstruct the national jurisdictions from imposing criminal sanctions.

These were arguments not merely accepted by the Government but are arguments which were identified as the pillars of the policy objective behind the Enterprise Act.

By contrast, the Irish approach has embraced a contrary approach and has based that policy upon competing but powerful principles.

One consequence is that the Irish legislation accepts that cartels are not illegal of themselves. Section 6(3) of the Competition Act 2002 provides that a defendant can claim that an agreement, notwithstanding that it is contrary to Article 81(1) or Section 4(1) of the 2002 Act, nevertheless satisfies the four conditions for exemption contained within Article 81(3).


**"Do you think they will take a bribe to drop the corruption charges?"**

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This might result in the court and a jury having to consider complex economic arguments but, as Owen J pointed out, on the facts of the BA case, (*Regina v Martin George and Others: 24 July 2009*) such arguments may, in a specific case, be admissible and relevant whatever the ingredients of the cartel offence. If the ingredient of dishonesty is removed from any criminal cartel offence, the question may be whether there can be any other substantial defence?

The UK Government's response to the consultation process of 15 March 2012, has been succeeded by the publication on May 23 2012 of the draft Bill, the Enterprise and Regulatory Reform Bill. The main provisions of Chapter 4 of the Bill, "Cartels", provide for the removal of the dishonesty element of the cartel offence under s.188 of the Enterprise Act 2002 and the introduction of new circumstances in which the offence is not committed. This is the so-called 'publication defence.' Whether this clause can be reformulated during the passage of the Bill remains to be seen but this 'reform' will be in contradiction to all the Governmental reasoning set out above which underlay the 2002 legislation.

Moreover, it runs contrary to the results of the Government's recent consultation exercise. The response frankly concedes that the proposed removal of 'dishonesty' reflects only a small number of respondents and of that small number, most thought that the ingredient should be replaced by 'active secrecy'. An even smaller number was in favour of deleting dishonesty and replacing it with a defence of publication. The majority of respondents argued for the retention of the dishonesty element and saw no risk to a robust and effective regime from its retention.

Thus the Government seems to be opting for the least favoured approach in the opinion of the informed and relevant constituency which engaged with the consultation process. However the BIS Response states that the proposed offence still requires a clear mental element: "the offence will still require proof of the mental elements of the intention to enter into an agreement and intention as to the operation of the arrangements in question" (whatever that means).

This may illustrate the contrast faced by businessmen and women between the policy of criminal prosecution in Eire by a statutorily independent DPP and a criminal prosecution in the UK by the body which is both responsible for applying and enforcing competition policy and national competition law and investigating and prosecuting criminal cartels.

## THE SENTENCING DILEMMA

What are the sentencing issues which the courts face on either side of the Irish Sea? The reasoning behind the 2002 UK legislation, namely the enactment of the *dishonest cartel offence*, was the creation of an offence which marked the gravity of anti-competitive behaviour. This identified an ingredient which juries are traditionally able to recognise and which served to mark out the conduct as being such as to require the sanction of criminality. In this the dishonesty element chimes appropriately with the *Adomako* test in cases of criminal gross negligence to demonstrate that the defendant's failure was so serious as to call for its condemnation and punishment as a criminal act.

The current Irish sentencing experience reflects what is currently the overwhelming judicial response to convictions for cartel offending, namely that prison sentences, if imposed, are suspended. The argument that cartel involvement without dishonesty is comparable with other business crimes that omit dishonesty (BIS cites insider share dealing) seems to ignore the element of personal enrichment present in such other crimes and which, generally, is absent in cartel offending.

There can certainly be examples (Marine Hoses is clearly one) in which the participants receive an identifiable reward for engaging in the cartel activity. However the usual experience of competition lawyers is that the average participant in a cartel is a middle manager who is carrying out the policy of his employers without any direct financial reward for his illegal conduct. The financial rewards are reflected in the commercial advantages for the corporate entity and these are taken into account in Eire by the criminal fines imposed on the corporate defendant and in the UK by the civil enforcement regime which exempts the company from criminal exposure.

Thus in Eire (as apparently in the rest of Europe) the ten individuals sentenced to terms of imprisonment have received suspended sentences. (In Brazil, where the competition authority has pursued a vigorous campaign of criminal prosecutions, each one of the more than 25 sentences of imprisonment which have been imposed, is subject to the long delays of the appellate process. As a result no convicted defendant in Brazil has yet served a night in prison and may never do so given the delays in the system). In Canada, convicted defendants sentenced to prison sentences customarily receive suspended sentences or are ordered to serve a form of sentence which equates to house arrest. In the 2010 Canadian 'gasoline cartel' case, the principal defendant, who had organised and executed the cartel, received a conditional discharge.

It is difficult to envisage immediate terms of imprisonment becoming the normal judicial response when sentencing

defendants in the UK for some future offence which does not require proof of dishonesty.

In these circumstances, it may be questionable whether the introduction of individual criminal liability for participants in cartel activity achieves the intended deterrent effect which the national competition authorities seek to foster.

In practical terms, I would argue that the introduction of individual criminal liability without a dishonesty ingredient may work in a counter-productive way by creating a tension which works against the effective operation of competition policy. The clear success of the immunity and leniency programmes and the consequential commercial pressure on undertakings to co-operate with the national and European competition authorities may be at risk if the consequence of that co-operation and compulsory questioning will, in future, be to render loyal employees at risk (or more at risk) of criminal prosecution when they have engaged in and given effect to the cartel agreements on behalf of their employers.

At present the civil enforcement process provides undertakings with a very real commercial imperative to limit, through co-operation, the geographical and economic effect of any anti-competitive agreement.
This is the most potent weapon in the competition authorities' arsenal. If criminal prosecutions are to be mounted solely on the basis of a mental element of an intention to enter into an agreement and an intention as to its operation, then the impact for any employer who has regard for its employees becomes more significant and more finely balanced.

The introduction of compulsory powers to interview and the requirement for waivers of privilege as a condition of leniency will reinforce these tensions.

## THE OUTLOOK

Those engaged in business activities whether in Eire or in the UK and in trade between the two nations need to take notice of the risks and the procedural and legal differences which apply to conduct in the market place on both sides of the Irish Sea. As the Ernst & Young survey appears to demonstrate, ignorance and misunderstanding may be the predominant state of current business knowledge.

This is a recklessly dangerous position for directors and senior management to sustain. As Part Two of this review will examine, the risks may become even more pronounced when corporate activity extends to the US and Australia.

IN PART TWO, TO BE PUBLISHED IN JULY, JONATHAN BARNARD WILL EXTEND THE REVIEW OF CORRUPTION LEGISLATION TO THE US AND AUSTRALIA

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