

Preface

In 2004, writing with Susan Nash, I published the first book to deal with the UK's new Cartel Offence, set out in the Enterprise Act 2002. At that time, when there had not yet been any enforcement of the new law, we looked forward to an effective regime, and anticipated, following the Penrose Report, that there would be a significant number of cases. This book, for which I bear sole responsibility, is probably the last to be written dealing with the first phase of the Cartel Offence, and looks back on the operation of the regime over the intervening years with despair, and looks forward with pessimism to the immediate future. The cut-off date for inclusion in material in this book is April 1, 2012, by which time the Department for Business, Innovation and Skills ('BIS') had published the Government response to a consultation exercise looking at various aspects of the UK competition law regime, including the operation of the Cartel Offence. The consultation exercise, and its result, is dealt with in Chapters 4 and 7 of this book. In essence, the Cartel Offence has given rise to convictions only in respect of three persons, in relation to a single cartel. In that case enforcement was driven by the United States' authorities, and the UK convictions were secured on the back of a US plea agreement (this case is discussed in detail in Chapters 4 and 6). While more general failings in the work of the Office of Fair Trading in the last eight years have made it difficult to determine to what extent difficulties encountered in enforcing the Cartel Offence have been a result of the structure of the Offence itself, or the result of wider institutional failings, it is clear, and the consultation exercise confirms that the Government believe this to be the case, that matters have not gone well. My primary aim in writing this book has been to evaluate the operation of the UK's Cartel Offence to date.

After an introduction I start with a general review of the literature relating to cartels and to the criminalisation and imposition of personal sanctions in respect to cartelisation. As will become clear, I am persuaded that individual criminal sanctions have a role to play, and in Chapter 3 I draw on the US experience, setting out relevant US law and procedure in some detail, to demonstrate how such an approach can, in practice, work well. In Chapter 4 I focus on the UK experience, seeking in particular to clarify differences between this and the US experience. Given that a

major difference between the US antitrust regime and the UK competition regime is that the UK operates in the shadow of a superior EU regime, in Chapter 5 I look at the experience in Ireland. A constitutional peculiarity in Ireland gives rise to a situation in which competition law sanctions are criminal. Ireland has prosecuted more cases with success than has the UK, but the nature of those cases has been somewhat different than has been the case in the UK: in Ireland cases have been brought against localised, domestic cartels; in the UK prosecutions have been mounted against international cartels. The Irish experience however is also not one of stunning success – penalties have been limited, and enforcement activity has been bedevilled by a lack of resources.

In Chapter 6 I set out the key details of three major cartel cases which have had a significant impact on enforcement policy in the US, and which have fed into wider discussions as to the approaches to be taken to cartelisation. These cases illustrate the sophistication of cartel arrangements, the harms that cartelisation gives rise to, and the difficulty of enforcing prohibitions on cartelisation.

In Chapter 7 I set out my broad conclusions, and explain the reason for my pessimism for the UK's soon-to-be-revamped Cartel Offence. I hope that the evidence I consider throughout the book has misled me, and that I am in fact too pessimistic here. The evidence that cartels are not rare, that they are very harmful, and that they are organised in knowing defiance of legal prohibitions is overwhelming, and I take the view that criminalisation and incarceration is an appropriate enforcement mechanism, but only where the conditions are appropriate.

If I have achieved what I set out to, readers of this book should find before them a fair and balanced review of much of the relevant literature, explaining clearly the key arguments relating to criminal enforcement of anti-cartel laws, a clear statement of the law in the US and Ireland, and of the law in the UK up to the point before the Offence is to be changed, and a reasonable conclusion. It is unlikely that all readers will agree with my conclusions, and in fact many may disagree. The BIS consultation exercise demonstrated clearly that this is not an area in respect of which there is consensus in the UK at present.

Work began on this book in April 2011, just after BIS published its consultation document, and finished in April 2012, just after the response to that exercise was published. At both times, but not in the intervening 12 months, I was based at Hong Kong University, and I am very grateful for the continued support that HKU has offered to my work over the years. Notwithstanding the Hong Kong sojourns I remain a full-time member of staff at Glasgow University, School of Law, and have benefited from the support of the School throughout the period in which I have worked

on this book. I must in particular acknowledge the continued support of my colleague and friend, Professor Rosa Greaves, who has been an exceptional Head of School. Students on the LLM course, Competition Law Enforcement, have patiently sat through seminars in which the arguments made in this book have been worked out and rehearsed, and I am grateful both for their patience and for their questions, which have often been acute. Dr Kay Munro has provided invaluable help in tracking down a wide range of materials, and has gone well beyond the call of duty in doing so. Colin MacIver and Ioannis Apostolakis at the University of Glasgow provided helpful research assistance. A number of academic and professional colleagues have looked at either the complete draft manuscript of this book, or parts of it, and have given me their comments; some have given me access to their own draft work, and I am very grateful for this engagement. The staff at Edward Elgar have been professional and helpful throughout the publication process. Finally, I must thank the patience of my wife, Dr Xuya Huang, who, after watching *The Informant!* (which is based around Mark Whitacre's role in uncovering the lysine cartel) asked 'what's wrong with price fixing?' This was a question she came to regret, although if she reads Chapter 2 of this book (an unlikely prospect) she may find a fairly full answer to that question.

As always, all errors and omissions in this text are my own. Also as always, I would welcome any (reasonable) comments about this book, which may be addressed to me at: mark.furse@glasgow.ac.uk.

The law in this book is up to date as at April 1, 2012 (which, coincidentally, is the 26th anniversary of the formalisation of the marine hose cartel discussed in Chapters 4 and 6).

Mark Furse
Hong Kong

