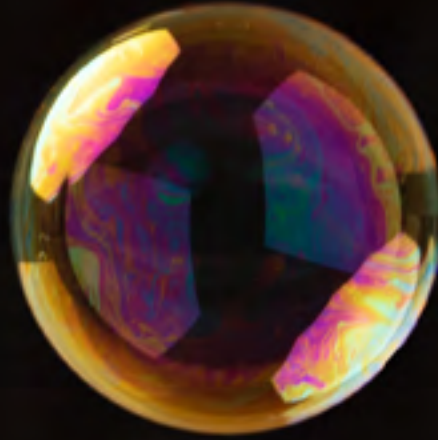


# UK PUBLIC PROCUREMENT – INCREASING RISKS FOR CARTEL PARTICIPANTS



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## UK PUBLIC PROCUREMENT – INCREASING RISKS FOR CARTEL PARTICIPANTS

By Juliette Enser, Georgina Laverack & Victoria Siguan-Cervera

Risks are increasing for those involved in cartel activity in the UK and in particular bid-rigging in public procurement. The UK Government has recently introduced to Parliament the Procurement Bill 2022 which includes a new exclusion from public procurement and debarment regime for cartelists. If enacted, the legislation will mean that companies that engage in price fixing, market sharing, bid rigging or other cartel activities could face mandatory exclusion by a contracting authority from public procurements for up to 5 years. They are also at risk of being included on the central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years. This article outlines the proposed changes and how the Procurement Bill protects and enhances incentives to apply for leniency by providing protection against exclusion for those companies that are the first to report a cartel to the CMA under its leniency programme. The article also looks at other ways that risks for cartelists are increasing; both in terms of the risk of detection from the CMA's intelligence work and the tough sanctions (both corporate and individual) that the CMA can apply.

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# I. INTRODUCTION

The stakes are getting higher for those involved in cartel activity in the UK and in particular bid-rigging in public procurement. In this article we will outline the Government's proposed new public procurement exclusion and debarment regime and why it will provide a further incentive to comply with competition law and also to apply for leniency. We will also touch on the other ways that risks for cartelists are increasing; both in terms of the risk of detection from the Competition and Markets Authority ("CMA")'s intelligence work and the tough sanctions (both corporate and individual) that the CMA can apply.

## II. NEW GOVERNMENT PUBLIC PROCUREMENT EXCLUSION AND DEBARMENT PROPOSALS

### *A. Proposed Changes to the Exclusion Regime in the Procurement Bill*

On May 11, the UK Government introduced to Parliament a Bill which, if enacted, will create a new UK framework for public procurement.<sup>2</sup> The Procurement Bill 2022<sup>3</sup> includes provisions to strengthen the exclusion regime. The proposed changes include a new mandatory exclusion ground for participants in cartel activity (which may be a supplier or "connected person"<sup>4</sup>) and the introduction of a central debarment register.<sup>5</sup>

As a result of these proposals, companies that engage in price fixing, market sharing (including bid rigging) or other cartel activities and their directors risk facing mandatory exclusion by a contracting authority from public procurements for up to 5 years. They are also at risk of being included on the central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years. However, cartelists that assist in the detection of wrongdoing by being the first to bring a cartel to the attention of the CMA under its leniency policy will be protected from exclusion.<sup>6</sup>

The CMA welcomes these proposed changes as they will provide an additional incentive for companies to comply with competition law, as well as protecting contracting authorities from companies that fail to take competition compliance seriously. With the background of increasing concerns about the cost of living following the economic shocks caused by the global coronavirus (COVID-19) pandemic and the war in Ukraine, it is more crucial than ever that consumers get the benefits of competition, and that innovative, hard-working businesses can compete on a level playing field.

The new regime would also maintain – and indeed enhance – incentives for cartel members to apply for leniency. Not only will successful immunity applicants continue to receive the current benefits for Type A immunity<sup>7</sup> but, in addition, they will also fall outside the new exclusion and debarment regime.

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2 In December 2021 the Government published Transforming Public Procurement - Government response to consultation setting out details of its proposals. See <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>.

3 The Procurement Bill was formally introduced to the House of Lords on 11 May 2022. See <https://bills.parliament.uk/bills/3159>. See also the Explanatory Notes. See <https://bills.parliament.uk/bills/3159/publications>.

4 Schedule 6 of the Procurement Bill (paragraph 43) defines "connected person" as follows: includes a person with 'significant control' over the supplier; a director or shadow director of the supplier; a parent undertaking or a subsidiary undertaking of the supplier; a predecessor company; any other person who it can reasonably be considered stands in an equivalent position in relation to the supplier as any of these persons; any person with the right to exercise or who actually exercises significant influence or control over the supplier; or any person over which the supplier has the right to exercise or actually exercises significant influence or control.

5 The central debarment register is a published list of suppliers which the Government considers may be unfit to bid for public contracts, because they meet either a mandatory or discretionary ground for exclusion and have failed to take sufficient action to ensure the circumstances giving rise to the misconduct will not happen again.

6 This is subject to the confirmation that the cartel member has met all conditions for leniency and can benefit from leniency. These conditions are set out in paragraph 2.7 of the CMA's guidance (Applications for leniency and no action in cartel cases, OFT1495). See Leniency and no-action applications in cartel cases: OFT1495 - GOV.UK ([www.gov.uk](http://www.gov.uk)) ([www.gov.uk](http://www.gov.uk)).

7 Successful Type A immunity applicants receive guaranteed corporate immunity from fines, guaranteed immunity from criminal prosecution for all cooperating current and former employees and directors of the applicant and protection from director disqualification for all cooperating directors.

## ***B. The Current Exclusion from Public Procurement Regime – Discretionary Exclusion for “Distorting Competition” Unless There Is Sufficient Evidence of “Self-Cleaning”***

Under current public procurement rules,<sup>8</sup> which were based on the applicable EU regime,<sup>9</sup> a supplier may be subject to mandatory or discretionary exclusion from future tenders by a contracting authority unless it provides sufficient evidence of “self-cleaning.”<sup>10</sup>

A mandatory exclusion applies where a supplier has been convicted of one of the specified criminal convictions (including, for example, for bribery, corruption, money-laundering, or drug trafficking).<sup>11</sup>

However, under the current regime anti-competitive activity is not a ground for mandatory exclusion. Rather, a supplier may be excluded where there are “sufficiently plausible indications”<sup>12</sup> that a supplier has entered into agreements with other economic operators aimed at “distorting competition” (for example, including price fixing, collusive tendering, or market sharing).<sup>13</sup> Before excluding a supplier, a contracting authority must also consider whether it has provided sufficient evidence of “self-cleaning.”

Under the current regime, the decision whether to exclude a supplier involved in “distorting competition” is left to the discretion of the individual contracting authority. We are not aware of any supplier having been debarred by a contracting authority in the UK for ‘distorting competition’ to date.

## ***C. New Mandatory Exclusion Ground for Cartel Infringements***

Under the legislation now before Parliament, the exclusion regime would be strengthened by adding new mandatory exclusion grounds<sup>14</sup> including where the CMA has made a decision that:

- a) the prohibition on anti-competitive agreements in Chapter I of the UK Competition Act has been infringed by an agreement or concerted practice to which the supplier or connected person<sup>15</sup> was party; and
- b) which was a cartel.<sup>16</sup>

The mandatory exclusion also applies where a similar infringement decision has been taken either by a concurrent regulator in the UK (such as the Financial Conduct Authority)<sup>17</sup> or an overseas regulator.<sup>18</sup>

The mandatory exclusion will apply if the contracting authority considers that the circumstances giving rise to the application of the exclusion ground are likely to occur again.<sup>19</sup> The Procurement Bill sets out matters that may be taken into account by a contracting authority when considering whether “the circumstances giving rise to the application of the exclusion ground are likely to occur again,” namely:

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8 The Public Contracts Regulations 2015, regulation 57.

9 The Public Contracts Regulations 2015 implement the Public Sector Procurement Directive (2014/24/EU) which provides rules for the procurement of goods, services and works above certain thresholds by public authorities. These Regulations also re-enact the relevant provisions of the Remedies Directives (Directive 89/665/EEC as amended by Directive 2007/66/EC), on remedies and review procedures for public procurement, as implemented by the UK in the Public Contracts Regulations 2009.

10 The Public Contracts Regulations 2015, regulations 57 (1), 57(8) and 57(13).

11 The Public Contracts Regulations 2015, regulation 57(1)(a) to (n).

12 The FAQs provided with the Procurement Policy Note ‘PPN’ 04/21 states the following as regards the use of the term “sufficiently plausible indications”: “(…) the use of this term indicates that definitive evidence of collusion is not required for the exclusion to apply. For example, depending on the circumstances, a decision by the Competitions and Markets Authority (CMA) finding a company to have restricted, distorted or prevented competition may amount to a “sufficiently plausible indication.”

13 The Public Contracts Regulations 2015, regulation 57(8)(d).

14 The Procurement Bill, clause 54(1)(a)(i) and (5). The Procurement Bill, Schedule 6, paragraph 39(1).

15 *Supra* note 4.

16 Paragraph 4(1) of Schedule 8A of the Competition Act 1998 defines cartel as “an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour in a market, or otherwise influencing competition in a market.”

17 The Procurement Bill, Schedule 6, paragraph 39(3).

18 The Procurement Bill, Schedule 6, paragraph 40. Paragraph 762 of the Explanatory Notes.

19 The Procurement Bill, clause 54(1)(a)(ii).

- a) evidence that the supplier, associated supplier or connected person has taken the circumstances seriously, for example by paying compensation;
- b) steps that the supplier, associated supplier or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place;
- c) commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
- d) the time that has elapsed since the circumstances last occurred; and
- e) any other evidence, explanation, or factor that the authority considers appropriate.<sup>20</sup>

Conduct which constitutes a breach of competition law which falls short of being a ground for mandatory exclusion, including cartel or other infringing conduct which has not been the subject of an infringement decision, will continue to be a ground for discretionary exclusion.

The new exclusion and debarment regime will apply to all public bodies in England, Wales, and Northern Ireland. The Procurement Bill does not make provision for all public procurement in Scotland but does apply to contracting authorities in Scotland which are either cross-border bodies or exercise wholly reserved functions with some exceptions.<sup>21</sup>

The Procurement Bill is unlikely to come into force before the end of 2023. However, the mandatory competition grounds have been designated as converted mandatory grounds which means that retrospective application of the mandatory competition grounds will be possible<sup>22</sup> for up to 3 years prior to the Procurement Bill coming into force.<sup>23</sup> As a result, a cartel infringement decision made by the CMA or concurrent regulators from now or going back as far as 3 years before the Procurement Bill comes into force could lead to the mandatory exclusion of a supplier once the Procurement Bill comes into force.

Further details of the proposed regime are set out in the Procurement Bill 2022 and Explanatory Notes<sup>24</sup> and it is intended will be explained in published guidance.

#### ***D. Protection for Type A Immunity Recipients***

The Procurement Bill provides protection against exclusion for those companies that are the first to report a cartel to the CMA under its leniency programme, thus protecting and enhancing incentives to apply for leniency.<sup>25</sup>

Under the Procurement Bill, “Type A”<sup>26</sup> immunity recipients (and individuals with immunity from prosecution for cartel offences)<sup>27</sup> would be exempt from exclusion, whether mandatory or discretionary, in relation to the reported cartel conduct.<sup>28</sup> A company may receive Type A immunity if it is the first to report a cartel that the CMA is not already investigating and provided it cooperates with the CMA’s investigation. It is the Government’s intention that similar protections from exclusion will apply to successful immunity recipients under a leniency regime in another jurisdiction.

<sup>20</sup> The Procurement Bill, clause 55(1).

<sup>21</sup> Paragraph 40 of the Explanatory Notes, available at <https://bills.parliament.uk/publications/46458/documents/1787>.

<sup>22</sup> The Procurement Bill, Schedule 6, paragraphs 42(1) and (4).

<sup>23</sup> The Procurement Bill, Schedule 6, paragraph 42(4)(i).

<sup>24</sup> *Supra* note 3.

<sup>25</sup> See [Cartels: come forward and apply for leniency - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/cartels-come-forward-and-apply-for-leniency).

<sup>26</sup> The Procurement Bill, Schedule 6, paragraph 39(2)(a). This is available to the first applicant to report and provide evidence of a cartel in circumstances where the CMA does not already have a pre-existing investigation and does not otherwise have sufficient information to establish the existence of the reported cartel activity. Type A immunity provides guaranteed corporate immunity from financial penalties and guaranteed individual immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking and protection from director disqualification proceedings for all directors of the undertaking (Application for leniency and no action in cartel cases. OFT’s detailed guidance on the principles and process. OFT1495).

<sup>27</sup> The Procurement Bill, Schedule 6, paragraph 39(2)(b).

<sup>28</sup> The Procurement Bill, Schedule 7, paragraph 8(2).

## ***E. Creation of Central Debarment List***<sup>29</sup>

The Procurement Bill also establishes a central debarment regime for relevant mandatory and discretionary exclusion grounds,<sup>30</sup> including the competition law infringement ground, and creates a “debarment list.”<sup>31</sup> The Procurement Bill provides the legal framework for central government to oversee the debarment list.

The debarment list will cover both mandatory and discretionary exclusion grounds, and both UK and overseas suppliers may be included on it.

Contracting authorities must exclude suppliers on the debarment list to which a mandatory exclusion ground applies (unless there are exceptional circumstances in which an overriding public interest applies) for the period that the suppliers remain on the debarment list. But contracting authorities will retain their discretion in respect of suppliers to which a discretionary ground applies.<sup>32</sup> Contracting authorities will continue to be able to exclude suppliers not on the debarment list on a case-by-case basis.

The Government has stated that it envisages that the central debarment regime will have the following features:<sup>33</sup>

- a) suppliers will be considered for debarment when they are excluded by a contracting authority during a procurement;
- b) certain categories of authorities, likely initially to be central government contracting authorities, will additionally be able to refer suppliers they want the Cabinet Office to consider to be added to the debarment list, without having excluded them;
- c) a new Procurement Review Unit will be responsible for considering cases, investigating evidence of misconduct and self-cleaning by suppliers, and making recommendations to the Minister;
- d) suppliers will be entitled to apply for early removal from the debarment list before the end of the 5-year period of exclusion, if they can show they have self-cleaned; and
- e) suppliers will be entitled to appeal a decision to put them on the debarment list to the court.

## **III. OTHER INCREASING RISKS FOR THOSE INVOLVED IN CARTELS**

In addition to the proposed new exclusion and debarment regime, there are other ways that the CMA has been increasing the risk of significant sanctions and personal consequences for cartel participants.

### ***A. Intelligence-Led Cases***

The CMA's leniency policy continues to play an extremely important role in the detection and investigation of cartels in the UK.<sup>34</sup> Indeed, the existence of an active leniency programme can, in and of itself, destabilize a cartel since each cartel participant is aware that the other party has an incentive to be “first through the door” for immunity.

However, the CMA does not rely exclusively on leniency as a means of cartel detection. Approximately half of CMA cartel cases are intelligence-led, by which we mean the investigation did not result from a report by a business participating in the cartel under our leniency policy. The concept of intelligence-led is quite a broad one and would cover, for example, information being mailed to us anonymously, market intelligence from our other functions, use of data ‘screening’ tools and information from other intelligence agencies. We are assisted in conducting intelligence-led investigations by our powers to investigate covertly, including carrying out surveillance and requiring production of communications data.

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29 The Procurement Bill, clauses 59 to 61.

30 The Procurement Bill, clause 56 (1).

31 The Procurement Bill, clause 59.

32 The Procurement Bill, clauses 54(1)(a) and 54(2)(a).

33 *Supra* note 2: Consultation response under heading Q21.

34 See <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>.

A key source of information leading to the uncovering of cartels is whistle-blowers (individuals – who are frequently current or former employees of industry participants – who get in touch with us, for example using our Cartels Hotline).<sup>35</sup> Individuals who provide us with information that leads to the detection and investigation of a cartel can receive a financial reward, currently of up to £100,000.<sup>36</sup> We have stringent processes in place to protect those who come forward as whistle-blowers.<sup>37</sup>

Cartel victims can also be a source of intelligence-led cases. Recently, the CMA has been working closely with public procurers and fraud teams across local and central government to increase the risk of detection and reporting of cartel activity in public procurement. The CMA has been supporting public procurers by providing training on the risks of bid rigging, how to spot ‘red flags’ and how to report any suspicions to the CMA (including a CMA e-learning training module for public procurers on how to reduce the risk of bid rigging,<sup>38</sup> how to spot bid rigging “red flags” and how to report any suspicions to the CMA). This is supported by existing CMA bid rigging advice for public sector procurers.<sup>39</sup> These materials are part of a wider education and business compliance programme housed on the CMA’s ‘Cheating or Competing’ campaign page.<sup>40</sup>

The CMA’s active engagement with public procurers aims to encourage the reporting of suspect supplier conduct while also deterring anti-competitive supplier behaviour, therefore increasing the risk of detection.

## ***B. CMA Enforcement Action Leading to Increased Corporate Sanctions and Consequences for Individuals***

Of course, corporate sanctions remain a very important tool in deterring cartel behaviour and the CMA routinely imposes significant fines on infringing businesses. For example in the construction sector alone, of which the public sector is a significant client, we have fined businesses £67 million across 5 cartel cases in recent years.<sup>41</sup>

Last year the CMA issued revised penalties guidance<sup>42</sup> following consultation earlier in the year. This is the guidance that we have regard to when calculating an appropriate penalty. In doing so, the CMA has been particularly mindful of the need to ensure that the level of penalty ensures effective deterrence especially in cases involving large, often global, businesses.

This is particularly relevant as, following Brexit, the CMA can examine global cartels and cross-border anti-competitive practices affecting the UK market. The CMA will do so where we consider it is necessary to act to protect UK customers or businesses from the practice causing concern. For example, we have recently looked at data practices by Meta (formerly Facebook)<sup>43</sup> and at Apple’s mobile payment systems<sup>44</sup> under the UK’s Competition Act prohibitions. We expect to open other similar cases in the coming months and years, across a wide range of sectors.

At the same time the CMA has been increasing the use of our director disqualification powers,<sup>45</sup> which ensures individual directors’ accountability for a company’s involvement in anti-competitive practices. In our view, individual directors are far less likely to cause or permit their companies to break the law if they know they may be held directly responsible for it. Under this regime, directors of infringing companies can be disqualified from acting as a director for a period of up to 15 years if by reason of the infringement they are found to be unfit to act as directors. Directors may be subject to disqualification not only if they were directly involved in the conduct but also where they did not know but ought to have known that the conduct constituted a breach or had reasonable grounds to suspect that the conduct constituted a breach and took

35 Cartels Hotline:020 3738 6888 or a whistle-blower can fill out the CMA online reporting form or email: [cartelshotline@cma.gov.uk](mailto:cartelshotline@cma.gov.uk). See <https://cma-553899.workflowcloud.com/forms/c35b9608-b73d-464c-bbfa-0b3ccda758b2>.

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

37 See <https://www.gov.uk/government/publications/whistleblowers-at-the-cma>.

38 See [https://cheatingorcompeting.campaign.gov.uk/#advice\\_for\\_public\\_procurers](https://cheatingorcompeting.campaign.gov.uk/#advice_for_public_procurers).

39 See <https://www.gov.uk/government/publications/bid-rigging-advice-for-public-sector-procurers>.

40 See <https://cheatingorcompeting.campaign.gov.uk>.

41 This included the CMA fining three suppliers of pre-cast concrete drainage products £36 million for having infringed competition law by agreeing to fix or coordinate prices, share the market and exchanging information fining two of the UK’s largest suppliers of rolled lead £9 million for breaking competition law.

42 CMA’s Guidance as to the appropriate amount of a penalty: CMA73, updated December 16, 2021. See <https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>.

43 See <https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data>.

44 See <https://www.gov.uk/cma-cases/investigation-into-apple-appstore>.

45 Company Directors Disqualification Act 1986 (c.46) and CMA’s Guidance on Disqualification Orders (CMA102) of 6 February 2019.

no steps to prevent it. The director disqualification regime therefore places responsibility for competition law compliance squarely with those at the top of an organization.

The risk of disqualification is high: we now routinely consider director disqualifications in all cartel cases. To date, the CMA has disqualified 25 directors for competition law breaches and we continue actively to pursue others. In one of the more recent disqualification orders agreed,<sup>46</sup> directors were banned from their roles for 12 and 11 years – the longest periods to date.

The CMA has published advice and information to help directors and their advisers understand their responsibilities in relation to competition law, including: a quick guide on how to avoid disqualification<sup>47</sup> and a checklist<sup>48</sup> on how to comply with competition law.

## IV. CONCLUSION

The CMA is prepared to come down hard on those businesses who cheat and we will continue to seek out and enforce against cartel activity. Indeed, the current economic circumstances have given a new urgency to this work. Consumers now more than ever deserve the benefits of competitive prices and honest, hardworking businesses deserve a level playing field to compete, innovate and succeed.

In this context, the UK Government's new proposals to strengthen the public procurement exclusion and debarment regime provide a welcome further incentive for companies that do business in the UK to comply with competition law. It also provides a further incentive for those companies that do find themselves implicated in a cartel to apply for immunity.

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46 See <https://www.gov.uk/government/news/directors-disqualified-over-illegal-construction-cartel>.

47 See <https://www.gov.uk/government/publications/advice-for-company-directors-on-avoiding-cartel-infringements/avoiding-disqualification-advice-for-company-directors>.

48 See <https://www.gov.uk/government/publications/competing-fairly-in-business-at-a-glance-guide-to-competition-law>.





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