

Criminalising Cartels: Theory and Practice in the UK and Australia

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The inadequacy of the traditional administrative enforcement mechanisms has been the driving force behind the tendency to criminalise cartels for the purposes of combating them. Although cartels have been criminalised in prominent jurisdictions, the theoretical basis and the practical design of their criminalisation do not seem so straightforward. As some empirical studies demonstrate, the two main justification theories, as based on deterrence and retribution respectively, are not wholly satisfactory in that respect. As a result, a hybrid approach to criminalising cartels appears to be in question. From a practical perspective, the position in the UK and Australia reflects the difficulty in designing concrete norms. An examination of the physical and mental elements of the cartel offence and the possible defences against it in the UK and Australian jurisdictions suggests that there are significant divergences which may affect the expected efficiency of criminalisation as a tool in the fight against cartels.

I. Introduction

The purpose of this article is to explore the answers to two interrelated questions regarding the criminalisation of cartels. These are: (i) on which theoretical basis it might be justified; and (ii) how cartel offences are designed at a practical level in the United Kingdom (UK) and Australia in this context? From a theoretical perspective, the underlying theories and approaches will be examined, while from a practical perspective, the elements of the offence will be addressed in a comparative analysis.

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The criminalisation of cartels has been a rising global trend, which is now embraced by more than thirty countries, as a result of the inadequacy of the classic administrative enforcement model to combat cartels. However, to design a criminal cartel offence on sound grounds, it is crucial to comprehend the theoretical grounds behind the process of criminalisation. Moreover, this alone is not sufficient. The actual design of a cartel norm is also of great importance, as its way of formulation may be determinative in practice. To this end, the UK and Australian jurisdictions in particular may provide valuable insights into this point, as the former has substantially reformed its cartel offence recently, while the latter has lately adopted criminal sanctions for participation in a cartel.

This article is structured as follows. First, the deterrence and retribution theories that provide the theoretical basis for the justification of criminalisation will be discussed in the context of cartels. Moreover, an important reconciling approach and studies providing data on the public's view of the subject will be reviewed. Secondly, the article will explore the physical elements of the offence in both jurisdictions with a view to discovering which 'act' forms the basis of criminal responsibility, the rules on attributing liability to corporations and the basic types of such responsibility. Thirdly, the article will describe the fault elements of the offence with a view to evaluating which 'mental state' is required for an offender to commit a cartel crime. In this context, the highly controversial dishonesty element, which does not currently exist in either jurisdiction, will also be discussed. Fourthly, the article will examine the defence/exemption mechanisms provided in both jurisdictions as the last ingredient of the designing exercise with a view to demonstrating the arguments that the undertakings may invoke in order to escape criminal responsibility. Finally, the article will offer some final conclusions on the theoretical basis and practical articulation of a cartel offence as drawn by the comparison between the UK and Australian jurisdictions and will identify potential areas for further research.

II. The Theoretical Framework for Criminalising Cartels

1. The Concept of Criminalisation

Before looking into the theories underpinning the criminalisation of cartels, it would be helpful to explore the concept of criminalisation generally.

Determining the scope of criminal acts¹ is a challenging task.² The literature points towards different views. Ashworth emphasises ‘serious wrongful behaviour’.³ Wills refers to criminal intent,⁴ moral condemnation,⁵ criminal powers of investigation, criminal rights for defence and a criminal penalty in order to distinguish criminal wrongdoings from civil ones.⁶ Freiberg and MacCallum argue that existing criminal offences are no worse than civil wrongdoings and remark the fallaciousness and inconsistency of both of them by pointing to the basis for characterising the conduct.⁷ For instance, the English Anti-Social Behavior Order providing criminal offences for the breach of civil orders⁸ supports this argument.

Being a supranational judicial body, the approach of the European Court of Human Rights’s (ECtHR) providing an autonomous interpretation of the notion of ‘criminal charge’ may also be helpful to understanding the concept of criminalisation. In *Engel v Netherlands*⁹ and *Benham v United Kingdom*,¹⁰ the Court determined that a person will be deemed as charged with a criminal offence, if (a) a public authority is pursuing the proceedings, and (b) there is a culpability requirement, or (c) there are potentially severe consequences (such as imprisonment and heavy financial fines). Considering that a severe consequence, so as to say, a heavy financial penalty may be also imposed by a regulatory authority, it seems that for the purposes of understand criminalisation, it is limb (b) which mostly sheds some light. Although there is no explicit definition, the requirement for

¹ See Glanville Williams, ‘Definition of Crime’ (1955) 8 Current Legal Problems 107; RA Duff, *Answering For Crime* (Hart Publishing 2007); John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2008).

² R Williams, ‘Cartels in the Criminal Law Landscape’, in C Beaton -Wells and A Ezrachi (eds), *Criminalising Cartels Critical Studies of an International Regulator Movement* (Hart Publishing 2011) 289, 290.

³ Andrew Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press 2009) 1,2.

⁴ Grant Lamond, ‘What is Crime?’ (2007) 27 Oxford journal of Legal Studies 609.

⁵ John C Coffee, ‘Paradigms Lost: The Blurring of Criminal and Civil Law Models-and what can be done about it?’ (1992) 101 Yale Law Journal 1875, 1878.

⁶ Wouter PJ Wills, ‘Is Criminalization of EU Competition Law The Answer?’ in Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar (eds), *Criminalization of Competition Enforcement* (Edward Elgar 2006) 61-63.

⁷ A Freiberg and RC McCallum, ‘The Enforcement of Federal Awards: Civil or Criminal Penalties’ (1979) 7 Australian Business Law Review 247, 259-264.

⁸ Nicola Lacey, ‘Historicising Criminalisation: Conceptual and Empirical Issues’ (2009) 72 Modern Law Review 936.

⁹ (1976) 1 EHRR 647.

¹⁰ (1996) 22 EHRR 293.

moral culpability and the severity of the sanction may be generally pertinent. In addition, both natural and legal persons may be covered by the scope of criminal offences.¹¹

2. Criminalisation of Cartels

2.1. Cartels: The Subject of the Process

Different approaches have been adopted in defining cartels. These are commonly defined as agreements between rivals to limit production or otherwise vitiate competition.¹² Some other definitions ascribe them an equalizer role for the disturbance of industry,¹³ while some others describe them as ‘dictation of price’,¹⁴ or as ‘simple economic racketeering’.¹⁵ Regulatory approaches also add some elements in the definition of cartel, such as ‘secrecy’,¹⁶ ‘naked practices and delinquency’.¹⁷ The OECD uses the term ‘hardcore cartel’ and defines it as:

A hardcore cartel is an anticompetitive agreement, anticompetitive concerted practice or anti competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories or line of commerce (involving) (...) the most egregious violations of competition law.¹⁸

Joshua and Harding define cartel as ‘an organization of independent enterprises from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling

¹¹ Vikramaditya S Khanna, ‘Corporate Criminal Liability: What Purpose Does It Serve?’ (1996) 109 *Harvard Law Review* 1523.

¹² Robert H Palgrave, *The Dictionary of Political Economy* (Vol 1, Macmillan 1919) 229..

¹³ R Liefmann, Report on International Cartels. In *Weltwirtschaftliches Archiv* (English Translation, 1927) 82 cited in Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, (2nd ed, Oxford University Press 2010) 14 fn 6.

¹⁴ Debora Spar, *The Cooperation Edge: The Internal Politics of International Cartels* (Cornell University Press 1994) 2

¹⁵ Michael O’Kane, *The Law of Criminal Cartels Practice and Procedure*, (Oxford University Press 2009) 1.

¹⁶ For notes of Office of UK Director General see Harding and Joshua (n 11) 15.

¹⁷ Mario Monti, ‘Fighting Cartels –Why and How?’ Opening Address at 3rd Nordic Competition Policy Conference, Stockholm, (11.09.2000) <http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm?locale=en> accessed 27.6.2013.

¹⁸ OECD, Recommendation of Council Concerning Effective Action Against Hard Core Cartels (1998); Mark Furse and Susan Nash, *Cartel Offence* (Hart Publishing 2004) 12.

competition themselves'.¹⁹ Harding, elsewhere, also emphasizes that the contestable point may be not only the anti-competitive result. As he notes, 'deliberate, covert, and knowingly unlawful collective scheming and planning' are also important for understanding cartels.²⁰

As we will demonstrate later, these definitions may provide some hints regarding the design of the cartel offence. For instance, the term 'hardcore' used by the OECD seems worth emphasizing, as it intrinsically refers to a 'seriousness' level for condemnation. Similarly, secrecy may be important since, as is the case in the UK jurisdiction, not to conceal a cartel agreement may constitute a potential defence against the offence.²¹

2.2. Justification for the Criminalisation of Cartels

In a capitalist system, competition is the cardinal driver, so the need to contemplate mechanisms against undesirable conducts like cartels that are 'ready instruments for fascist state'²² or 'property crime like burglary or larceny'²³ seems axiomatic.²⁴ Considering that their harm costs billions of dollars,²⁵ as a matter of choice²⁶ criminal sanctions for corporations and individuals,²⁷ especially imprisonment, may be seen as suitable vehicles.²⁸ The deterrence theory and the retribution theory are the two main theories

¹⁹ Harding and Joshua (n 13) 13.

²⁰ Christopher Harding, 'Forging European Cartel Offence: The Supranational Regulation of Business Cartel Conspiracy' (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 275, 278.

²¹ See Williams (n 1) 107; Duff (n 1); Gardner (n 1).

²² Christopher Harding, 'Business Cartels as a Criminal Activity: Reconciling North American and European Model Regulation' (2002) 9 *Maastricht Journal of European and Competition Law* 393, 396.

²³ Gregory J Werden, 'Sanctioning Cartel Activity Let the Punishment Fit the Crime' (2009) 4 *European Competition Journal* 23.

²⁴ Furse and Nash (n18) 12.

²⁵ OECD, 'Report on Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws' (2002); OECD, 'Report on Hard Core Cartels: Third report on Implementation of the 1998 Council Recommendation' (2005).

²⁶ For countries preferring 'decriminalisation', see Wills (n 6) 74.

²⁷ Oliver Guersent, 'The EU Model of Antitrust Enforcement Against Global Cartels: Evolving to Meet Challenges' (2006) *European Competition Law Annual* 213, 218.

²⁸ Julie Clarke, 'The Increasing Criminalisation of Economic Law A Competition Law Perspective' (2012) 19 *Journal of Financial Crime* 76.

which aim to explain the justification for the criminalisation of cartels.²⁹ In addition, a hybrid approach³⁰ will be described.

2.2.1. Deterrence Theory

(a) The Basis of the Deterrence Theory

The deterrence theory, based on a utilitarian philosophy,³¹ requires a reason for any suffering unless a social benefit can be derived from its imposition.³² Accordingly, only precluding or allaying a future crime is deemed as justification,³³ and moral outrage is not the main element that should be taken into account in this regard. Therefore, it is possible to state that this theory advances a prospective and consequentialist approach, which is the aim of deterring the crime. Becker incorporated economics into the theory to analyze its deterrence effect on a wealth maximization basis.³⁴ Rationality and economic efficiency are two legs of this approach. The first assumes that individuals are rational. Accordingly, if the cost of a conduct is more than its benefit to them, they will be deterred from doing it. The second requires that conduct to be prevented if its costs outweigh its benefit to society.³⁵

However, this theory may have two drawbacks. The first one is that it may cause the punishment of innocents due to a failure to consider the limits of individual responsibility and the second one is that it may employ unrealistic calculation methods regarding the level of the punishment.³⁶

From the angle of the deterrence theory's consequentialist approach, it is argued that the primary objective of criminalizing cartels is to increase deterrence, based on the *malum prohibitum* (wrong by virtue of law)

²⁹ Peter Whelan, 'Morality and Its Restraining Influence on European Antitrust Criminalisation' (2009) 12 Trinity College Law Review 42.

³⁰ Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4 Competition Law Review 8.

³¹ See John Stuart Mill, *Utilitarianism* (2nd ed, Hackett Publishing 2001).

³² Jeremy Bentham, 'The Principles of Penal Law', in John Bowring (ed), *The Works of Jeremy Bentham*, (Thoemmes Continuum 1997) 165-166.

³³ Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes & Noble 1980).

³⁴ Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.

³⁵ Whelan (n 30) 11.

³⁶ *ibid* 17.

category rather than the *mala in se* (wrong in itself) category.³⁷ The inadequacy of monetary fines alone to deter³⁸ and the fact that companies usually compensate their employees if imprisonment is not provided for individuals³⁹ are used as the main reasons to support this argument. Concerning the level of monetary fines, it should be emphasised that merely increasing the fine might lead to nothing but bankruptcy, which is by itself a factor lessening competition. Thus, imprisonment sanctions may be a very effective solution to this problem. However, this approach has been questioned, as may be seen below.

(b) Surveys of the Public Opinion about the Deterrence Theory

Based on some empirical evidence, Parker claims that the deterrence theory does not consider the sophisticated normative and social structure of cartel conduct and enforcement.⁴⁰ The 24 empirical studies he published between 1967 and 2009 showed, *inter alia*, that the deterrence of imprisonment may not be seen as a scientific reality because (i) the perceived possibility of being caught is more determinative than the objective severity and subjective luridness of the punishment; (ii) third parties' (like stock markets) reactions may be a stronger motivation to comply; and (iii) many cartelists feel that in fact they have a legitimate excuse for non-compliance and their moral evaluation affects their risk analysis.⁴¹

³⁷ Donald J Newman, 'White Collar Crime and Correction' (1958) 23 Law and Contemporary Problems 735, 738-39; John J Flynn, 'Criminal Sanctions under State and Federal Antitrust Laws' (1967) Texas Law Review 1301, 1315.

³⁸ Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar, 'Law and Economics of Criminal Antitrust Enforcement' in Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar (eds), *Criminalization of Competition Enforcement* (Edward Elgar 2006) 7-8; Wills (n 6) 177-192; Stephen Calkins, 'Coming to Praise Criminal Antitrust Enforcement' in CD Ehlerman and I Atanasiu (eds), *European Competition Law Annual 2006 Enforcement of Prohibitions of Cartels* (2007 Hart Publishing) 346-351; B Wardhaugh, 'Closing The Deterrence Gap: Individual Liability, The Cartel Offence and BIS Consultation, (2011) 10 Comp L J 182. cf. T Calvani and T Calvani, 'Cartel Sanctions and Deterrence', (2011) 56 (2) The Antitrust Bulletin, 185, 187.

³⁹ Donald I Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging' (2001) 69 *George Washington Law Review* 693, 705.

⁴⁰ Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising Cartels Critical Studies of an International Regulator Movement* (Hart Publishing 2011) ch 11.

⁴¹ *ibid* 257.

A more recent survey, conducted by the Cartel Project Team of University of Melbourne in December 2010,⁴² showed that (i) only 22.9% of attendees knew that cartel was a criminal offence leading to imprisonment; (ii) the perceived probability of being caught was 5.05 on a 1 to 10 likely-unlikely scale; (iii) 29% of attendees thought that criminal sanctions, including imprisonment, did not lead to deterrence; and 10% of respondents thought that criminal sanctions would not deter them from engaging in cartel activity themselves.

Based on another survey, Beaton-Wells and Parker argue that being in agreement with the essence of the law and considering its legitimate and fair implementation act as the main driver of deterrence, which undermines the self-cost/benefit analysis in the theory.⁴³ There are arguments parallel to the result of the above-mentioned surveys which emphasise how mental bias⁴⁴ and moral evaluations⁴⁵ may affect people's perceptions of costs/benefits. Apart from surveys, it may be argued that people's perceptions may be influenced by legislation. As Coffee stated, 'public learns what is criminal from what is punished, not vice versa',⁴⁶ and this creates illegitimacy in the eyes of the addressee even if he thinks that conduct is otherwise legitimate.⁴⁷ However, Kadish⁴⁸ has some concerns, as this approach may undermine public obedience if the situation does not reflect the public's judgment.

(c) Evaluation of the Deterrence Theory

⁴² The University of Melbourne, The Cartel Project Report on a Survey of Australian Public Regarding Anti-cartel Law and Enforcement (2010) <<http://www.law.unimelb.edu.au/files/dmfile/SurveyReportFinalDec131.pdf>> accessed 26.6.2013.

⁴³ Beaton-Wells C and Parker C, 'Justifying Criminal Sanction for Cartel Conduct A Hard Case', (2012) 1 J Antitrust Enforcement 8, 13-14; See also Caron Beaton-Wells, 'Criminal Sanctions for Cartels—The Jury is Still Out' in Ariel Ezrachi (ed), Research Handbook on International Competition Law (Edward Elgar 2012) 266.

⁴⁴ Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 Oxford Journal of Legal Studies 173.

⁴⁵ John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 American Journal of Political Science 490.

⁴⁶ Coffee (n 5) 1889.

⁴⁷ Harry V Ball and Lawrence M Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1964) 17 Stanford Law Review 197, 217.

⁴⁸ Sanford H Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423.

The deterrence theory seems to have a direct and result-oriented approach which considers criminalisation as a very attractive and valuable part of the arsenal for combating cartels. However, it is questionable that this approach completely reflects reality.

First, the aforementioned empirical studies cast doubt on the deterring ability of the criminalisation of cartels. It is especially striking that even imprisonment may not preclude people to commit the offence. Second, such doubt may also arise with regard to the real life application of the rationality principle of the theory, since it may operate in a different way in cartel cases, and businessmen may have different motives apart from pure rationality. Third, ignoring the moral values of a society may risk the sustainability of the theory, especially where efficiency concerns are the only drivers, because this may lead to the punishment of ‘morally’ innocents. Fourth, the deterrence theory may complicate the determination of liability, since the criminalisation of cartels may include companies as well as individuals; thus, it may be necessary to set definite liabilities. In this context, the reliability of economic data used to determine a suitable level for deterrence, in other words, to determine the appropriate punishment, may be another significant problem. That said, Coffee’s suggestion regarding ‘shaping the mind of society’ in favour of criminalisation by legislation seems highly important. Such an approach may contribute to fill the gap between the immediate moral requirement of the society and the practical needs for the formulation of the norm.

2.2.2. Retribution Theory

(a) The Basis of the Retribution Theory and Delinquency Suggestions

The retribution theory focuses on the act of the person that is deemed wrong by the public and provides that a person must get what he deserves when he commits a wrongdoing.⁴⁹ This theory does not however concern the future prevention of the prohibited act. The nature of the prohibited act⁵⁰ and retribution for the breach of moral codes are regarded as the main elements

⁴⁹ Herbert L Packer, *The Limits of the Criminal Sanction* (Oxford University Press 1968) 37.

⁵⁰ RA Duff and David Garland, ‘Introduction: Thinking about Punishment’, in RA Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press 1994) 4.

of this theory.⁵¹ The retribution theory suggests using punishment as a way of conveying the inherent wrongness of the act to society⁵² and considering culpability for the level of punishment,⁵³ thereby also ensuring the proportionality between the aggravation of the act and the punishment. However, this theory has been criticized for failing to explain why delinquency should be criminalized⁵⁴ and should be subject to criminal punishment.⁵⁵

In the case of offences such as theft, it is so straightforward that there is an inherent immorality. Although the existence of such clear immorality is questionable for cartels,⁵⁶ it is claimed that cartels are also ‘morally reprehensible’ and so, appropriate for criminalisation,⁵⁷ and that white-collar crimes (in this context, cartels) are not morally neutral.⁵⁸

Before discussing the moral delinquency/culpability element, it seems useful to refer to a work of Green that ‘maps’⁵⁹ the concept. Having stated that the absence of any of these elements may cause doubts about the criminal character of a conduct, Green classifies the interrelated elements of morality in the context of white-collar crimes as culpability, harmfulness and wrongfulness.⁶⁰ Culpability concerns the state of mind of the offender and does not consider acts and results.⁶¹ Harmfulness is about the degree to which a criminal act causes harm or creates the risk of harm⁶² and has a broad meaning including the collective interest of society, such as harm to

⁵¹ Denis James Galligan, ‘The Return to Retribution in Penal Theory’, in CFH Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (Butterworths 1981) 144.

⁵² Andrew von Hirsch, ‘Proportionate Sentences: A Desert Perspective’, in Andrew Ashworth and Andrew von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2000) 170.

⁵³ Mark Jephcott, *Law of Cartels* (2nd edn, Jordans, 2011) 344.

⁵⁴ Karen Yeung, *Securing Compliance A principled Approach* (Hart Publishing 2002) 76; Ashworth (n 3) 37.

⁵⁵ N Walker, ‘Modern Retributivism’, in Andrew Ashworth and Andrew von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2000) 157.

⁵⁶ Caron Beaton-Wells, ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal’ (2007) 31 *Melbourne University Law Review* 675, 689.

⁵⁷ Clarke (n 28) 81

⁵⁸ See Stuart P Green, *Lying, Cheating and Stealing A moral Theory of White Collar Crime* (Oxford University Press 2006) 31.

⁵⁹ Beaton-Wells (n 56) 679.

⁶⁰ Green (n 58) 33.

⁶¹ Stuart P Green, ‘Why It is a Crime to Tear the Tag of Mattress: Over criminalisation and the Moral Content of Regulatory Offences’ (1997) *Emory Law Journal* 1533, 1547-8.

⁶² *ibid* 1550.

competition and consumer welfare.⁶³ Wrongfulness was defined as ‘intrinsic violation of freestanding moral rule or duty rather than act’s consequences’.⁶⁴

There are different approaches to the definition of the delinquency element. Harding and Joshua,⁶⁵ like Kadish,⁶⁶ use the terms conscious defiance, collusive action and trickery to define this element. Beaton-Wells and Fisse,⁶⁷ however, refer to the subversion of competitive process as an inherent and self-sufficient⁶⁸ factor and view cartels the same as cheating, deception and theft. Williams uses ‘exploitation’ similar to dishonesty.⁶⁹ Feinberg seeks loss, gain and coercion.⁷⁰ However, there are also authors, like Hirsch, who do not rely on pure moralism, since it fails to explain the employment of criminal law for wrong behaviour and demand a prudential disincentive to reinforce moral censure.⁷¹

(b) Surveys of Public Opinion about the Retribution Theory

The Melbourne University’s empirical study may be revisited herein to assess public opinion on the source of criminal condemnation.⁷² The results indicate⁷³ that (on average, for cartel modalities) more than 69.7 % of the attendees think that cartels are illegal. The support for its criminal character is on average 41.1%, support for jail sanction is only 15.8% and, among others, support for fine payments is 71%. The character of the conduct is seen as deceiving and dishonest respectively by 61.6% and 64.5%. Regarding the harms of the cartel, 51.1% of attendees think that it is harmful to competition; the support for the reason that cartel conduct is theft is 49,5%; and regarding aggravating factors respectively, 81.1% and 76.3% of

⁶³ Beaton Wells (n 56) 689.

⁶⁴ Green (n 58) 39-45.

⁶⁵ Harding and Joshua (n 20) 277.

⁶⁶ Kadish (n 48) 445.

⁶⁷ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press 2011) 22.

⁶⁸ Beaton-Wells (n 56) 698.

⁶⁹ Williams (n 2) 300.

⁷⁰ J Feinberg, *Harmless Wrongdoing The Moral Limits of Criminal Law* (Vol 4 Oxford University Press 1990) 176.

⁷¹ Andrew von Hirsch, *Censure and Sanctions* (Calenderon Press 1993) 13.

⁷² See (n 42).

⁷³ For categorizations see Beaton-Wells and Parker (n 43) 16, 17.

attendees think that bullying another company and trying to conceal the conduct makes the situation more serious.⁷⁴

(c) Evaluation of the Retribution Theory and Concluding Remarks

The retribution theory seems more structured and realistic than the deterrence theory, particularly with regard to limiting the responsibility of the person who committed the offence in the context of the proportionality principle corresponding – in Green’s terminology – to the culpability element of cartel offences. This approach is in favour of also considering the intention of the person committing the offence when setting a convenient level. Under this theory, the harmfulness element of the cartels, which is also an indicator of the seriousness of the violation, does not seem problematic. As a concrete and verifiable fact, the harm that the cartels cause to the society is obvious. However, concerning the third element, wrongfulness, it is less straightforward to arrive at a definite conclusion that ensures a persuasive solution to both the immorality that will provide a basis for criminalisation of cartels, and the notional pattern(s) that may be employed. This point raises very crucial questions regarding the application of this theory. What kind of criteria should be employed to qualify cartels as wrongful and criminalise them? Is it sufficient to use a moral reason, such as dishonesty? What if an allegedly dishonest cartel has legitimate aims, such as keeping jobs or surviving in a devastating crisis? Empirical studies demonstrate that there is an entrenched majority that regards cartels as dishonest, treats them in the same way as theft and considers their concealment an aggravating factor. However support for their criminalisation is still weak. Hence, it is possible to argue that the mere existence of a wrongful act is not adequate for the criminalisation of cartels. It should also be explained why that act should be subject to criminalisation. Therefore, it seems that the retribution theory in itself is also not so persuasive when it comes to justifying the criminalisation of cartels.

In this regard, an approach developed by Whelan is worth mentioning. He employs the deterrence theory as the ‘existence reason of the criminalisation’. In this way, the need to set a moral base disappears.

⁷⁴ An older study demonstrates that %10 of Britons believe that cartel is a criminal offence and % 60 of them consider it as dishonest. See Andreas Stephan, ‘Survey of Public Attitudes to Price Fixing and Cartel Enforcement in Britain’ (2008) 5 Competition Law Review 123.

Whelan then uses the retribution theory as the balance element of the equation, in other words, as a ‘weighing’ factor providing proportionality and morality.⁷⁵ The first part of the approach explains the existence reason by referring to the preventative character of criminal law.⁷⁶ As it is argued, since ‘it provides a relief from the necessity of *ex ante* establishing a moral offensiveness, rationality is more acceptable in cartels, optimal fines including imprisonment will be obtained’.⁷⁷ The second part of the approach relies on the retribution theory to limit responsibility and set the seriousness level of the punishment.⁷⁸ The first part revokes the understanding of Beaton-Wells and Fisse that refers to Green’s analysis which concludes that cartels are inherently bad. This approach was criticized on the ground that it fails to establish the necessary links between the two theories and underestimates the intrinsic values of human beings by ignoring retribution for the justification of the existence of the offence.⁷⁹ These critics suggest that the focus of criminalisation should be on moral values, even though it is true to a certain extent that ‘rationality’ on which the deterrence theory is based may be unreliable sometimes. Considering the functions of the two different parts of the approach, this criticism seems less persuasive.

In conclusion, it is possible to state that none of the two theories scrutinized are adequate to justify the criminalization of cartels alone. However a hybrid approach, which seeks to establish deterrence as the reason for the offence and to limit liability by using the proportionality principle of the retribution theory, may be useful in providing a more solid basis for the justification for criminalising cartels. On this point, accepting that cartels are inherently bad may also be a catalysing factor. Additionally, the ‘shaping’ function of the criminal law to convince society is another important argument to take into account.

In the following sections, the elements of the cartel offence in the UK and Australia will be discussed with a view to establishing further links between the aforementioned theories. For instance, the consideration of the harm element in the articulation of physical elements may indicate reliance on the deterrence theory in both jurisdictions. As to the fault element, intent

⁷⁵ Whelan (n 30) 18; Whelan (n 29) 45.

⁷⁶ Herbert L Hart, *Punishment and Responsibility* (Clarendon Press 1968) 6.

⁷⁷ Whelan (n 29) 45.

⁷⁸ Whelan (n 30) 19.

⁷⁹ *ibid.*

(previously dishonesty) in the UK and intent, knowledge or belief in Australia may be based on the retribution theory. Regarding defences, the joint venture exemption in Australia requiring a cost-benefit analysis may be evaluated in light of the deterrence theory, and the open agreement defence provided in the UK may be related to the distribution theory.

III. Physical Elements of the Cartel Offence in the UK and Australia

1. The Concept of the Physical Element

The physical element (*actus reus*) may be a specific form of conduct (an act, omission, state of affairs) which occurs in specified circumstances and which has specified results or consequences. Ashworth states that ‘it consisted of prohibited behavior or conduct including any specified consequences’.⁸⁰

This definition may raise the question of what should be prohibited: the conduct itself or its consequences. Based on the theories discussed above, matches may be set between a conduct-oriented norm and the deterrence theory that has a per se⁸¹ character, and between a result-oriented norm and the retribution theory that requires harm in addition to delinquency, as Fletcher also pointed out.⁸² As alternative approaches, Feinberg suggests that ‘tend to harm’ should be the core of the physical element,⁸³ while Harding supports the attachment of the delinquency element not only to the outcome, but also to the conduct and suggests punishing ‘deliberate, covert, and knowingly unlawful collective scheming and planning to achieve anti-competitive ends’.⁸⁴

2. Physical Element of the Cartel Offence in the UK

Section 188(1) of Enterprise Act (EA) 2002 states that ‘An individual is guilty of an offence if he agrees with one or more other persons to make or

⁸⁰ Ashworth (n 3) 84.

⁸¹ For the concept of per se, see Oliver Black, *Conceptual Foundations of Antitrust* (Cambridge Univ Press 2005) 62.

⁸² George P Fletcher, ‘The Right Deed for Wrong Reason: A Reply to Mr Robinson’ (1975) *UCLA Law Review* 302.

⁸³ Joel Feinberg, ‘Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments against It’ (1995) *37 Arizona Law Review* 117, 122.

⁸⁴ Chris Harding, ‘The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation’ (2006) *14 Critical Criminology* 181.

implement, or cause to be made or implemented, arrangements of following kind relating to at least two undertakings'. S.188(2) lists the types of arrangements, briefly, as direct or indirect price fixing, output restriction (limiting supply or preventing production), market allocation (dividing costumers or markets) and bid rigging. The norm provides sanction only for individuals,⁸⁵ but not for corporations, following the Penrose Report recommendation and parliamentary comments.⁸⁶

The physical element of the offence is 'to agree'⁸⁷ on making the arrangements stated in the section. The Act itself provides no definition of the term 'agreement'. O'Kane, by setting a parallelism with statutory conspiracy definition⁸⁸ and the cartel offence, argues that guidance may be obtained from case law regarding conspiracy.⁸⁹ He states that the level of agreement should be lower in conspiracy than in contract law, although a decision to engage in unlawful conduct should be sought as held in the *R v Webster* case.⁹⁰ This line of argument may be welcome⁹¹ in order to justify some approaches, such as, for example, deeming indirect contact as sufficient to establish an agreement⁹² and the 'cartel as a whole' as modality,⁹³ an approach which is also embraced in the *Marine Hose* case, where the offenders pleaded guilty for the whole agreement including price fixing, market sharing and bid rigging.⁹⁴ It is possible to say, however, that there is no clear division between criminal and civil law for determining the meaning of the term 'agreement', because O'Kane also refers to civil law as a guide.⁹⁵ Joshua and Harding state that, in terms of substantive law, the concept of 'agreement' should comprise terms such as 'collusion',

⁸⁵ See s.190 of EA 02 for imprisonment penalty.

⁸⁶ Proposed Criminalisation of Cartels in the UK – a report prepared for OFT by Sir Anthony Hammond and Roy Penrose, 2001 OFT 365 (Penrose Report <http://www.offt.gov.uk/shared_offt/reports/comp_policy/offt365.pdf> access 10.07.2013; House of Commons Standing Committee, 23 April 2002, col, 174; Mark Furse, *The Criminal Law of Competitinon Law in UK and in US* (Edward Elgar 2012) 52.

⁸⁷ Penrose Report (n 86) para 2.7.

⁸⁸ Criminal Law Act 1977 s.5.

⁸⁹ For a similar approach, see Ali Nikpay, 'UK Cartel Enforcement-Past-Present- Future' Speech to Law Society Antitrust Section, 11.11.2012 <http://www.offt.gov.uk/shared_offt/speeches/2012/1112.pdf> accessed 10.07.2013.

⁹⁰ *R v Webster* [2003] EWCA Crim 1946.

⁹¹ O'Kane (n 15) 57-58.

⁹² *R v Mintern* [2004] EWCA Crim 07. Herein, O'Kane emphasizes the need of common design'. See (n 13) 57.

⁹³ *R v Cooke* [1986] 2 All ER 985, HL.

⁹⁴ *R v Whittle and others* [2008] EWCA Crim 2560, para 15.

⁹⁵ O'Kane (n 15) 58-61.

‘concentration’ or ‘concerted practice’ and ‘conspiracy’.⁹⁶ The authors refer to the inchoate offence of conspiracy for the commitment of crime, and emphasise that the meeting of minds may occur ‘in pursuance of a criminal purpose held in common’,⁹⁷ while they indicate that transmission by all defendants may be unnecessary as long as there is ‘a link conspirator’.⁹⁸

In addition to agreeing to ‘make’ an arrangement, agreeing to ‘implement’ an arrangement and causing to be made or implemented arrangements’ also fall within the scope of the cartel offence. As regards the ‘cause to be made’ condition, the case law requires an individual to want an action to be conducted and this is to be done under his authority or as result of him exercising control or influence over another person.⁹⁹

The cartel offence does not normally cover vertical agreements. However, if a vertical agreement is used to conclude an agreement at the horizontal level, it is argued that it can fall under the cartel offence.¹⁰⁰

3. Physical Elements for the Cartel Offence in Australia

3.1. Making a contract/arrangement, arriving at an understanding and giving effect to it

There are two types of cartel offence under Trade Practices Act (TPA). The first is to make a contract or arrangement or to arrive at an understanding containing a cartel provision’ (s 44ZZRF), and the second is to give effect to a cartel provision in a contract, arrangement or understanding (s 44ZZRG).¹⁰¹ As may be inferred, the physical elements of these two types of offences are ‘to make a contract or arrangement or arrive at an understanding’ and ‘to give effect to a contract, arrangement, understanding’.

⁹⁶ See Julian Joshua, ‘A Sherman Act Bridgehead in Europe, or Ghost Ship in Mid-Atlantic? A Close Look at the UK Proposal to Criminalise Hardcore Cartel Conduct’ (2002) 5 *European Competition Law Review* 231, 243.

⁹⁷ *Meyrick Case* (1929) 21 Cr. App. R.94.

⁹⁸ Julian Joshua and Christopher Harding, ‘Breaking Up The Hardcore: The Prospects for Proposed Cartel Offence’ 2002 *Criminal Law Review* 933, 940-41.

⁹⁹ *AG of Hong Kong v Tse Hung-lit* [1986] AC 876, PC.

¹⁰⁰ O’Kane (n 15) 61.

¹⁰¹ Beaton-Wells and Furse (n 67) 69.

With regard to individuals, the TPA provides principles on complicity and inchoate liability.¹⁰² The physical elements of complicity are stated as aiding, abetting, counseling or procuring, or being concerned in the commission of principle offence.¹⁰³ As to inchoate liability, the physical elements are attempt, conspiracy, inducement and attempted inducement.¹⁰⁴ Beaton-Wells and Fisse argue that inchoate liability for the cartel offence is unsatisfactory because of the deviation of the TPA from the Criminal Code.¹⁰⁵

Before dealing with the terms in the TPA, it must be emphasized that the terms used regarding the cartel offence are the same as those used in civil prohibition. That said, the courts' jurisprudence points out that identical wording will be interpreted in the same way for both civil and criminal processes.¹⁰⁶

Whereas there is no definition for 'making' under the TPA, 'arrive at' is defined as to reach or enter into.¹⁰⁷ In the *Leahy* case, it was stated that the verb 'make' means leading to a contract or arrangement that should include some form of express communication, while 'arrive at' refers to reaching a flexible understanding.¹⁰⁸ In *Trade Practices Commission v Nicholas Enterprises Pty Ltd*, it was held that 'understanding' included communication between the parties and an undertaking of mutual obligations.¹⁰⁹

As for the physical element under the TPA, 'giving effect to' is defined as including doing an act or thing in pursuance of, or in accordance with, enforcement or the purport to enforce.¹¹⁰ This verb has its ordinary meaning¹¹¹ and includes a 'single or series of act or omissions',¹¹² 'unilateral or concerted conduct',¹¹³ and 'conducts of the person who just

¹⁰² Principle and vicarious liability also have the physical elements stated above. For a detailed analysis, see *ibid* 161-65.

¹⁰³ s.79 (1) (a) – (c).

¹⁰⁴ ss.79(1) (aa), 76(1) (b), 79 (1) (b), 79 (1) (d), 76(1) (d), 76(1) (f).

¹⁰⁵ Beaton-Wells and B Fisse (n 67) 180.

¹⁰⁶ *Waugh v Kippen* (1986) 160 CLR 156, 165.

¹⁰⁷ s 4(1).

¹⁰⁸ *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321, 331.

¹⁰⁹ (1979) 26 ALR 609, 39-41.

¹¹⁰ s 4 (1).

¹¹¹ *ACCC v FFE Building Services* [2003] ATPR 41-926, 46, 878 [12].

¹¹² *Bray v Hoffman LaRouche* [2002] 118 FCR 1, 48-9 [158- 161].

¹¹³ *Dowling v Dalgety Australia* (1992) 32 FCR 109.

implement the provision without being a party to the contract, arrangement or understanding'.¹¹⁴

In the *Leahy* case, the terms contract, arrangement and understanding were defined.¹¹⁵ 'Contract' has a classical common law meaning. 'Arrangement' is defined as a dealing 'lacking of some of the essential elements that would otherwise make it a contract'. 'Understanding' is defined as to 'connote a less precise defining than either contract or arrangement'. Current law requires communication, consensus, and commitment criteria for the last two concepts¹¹⁶ that might be used synonymously.¹¹⁷ The Australian Competition and Consumer Commission (ACCC) sought to replace the commitment element with a list of factual matters that the courts might use. However, that attempt was criticized, *inter alia*,¹¹⁸ on the ground that it remained silent with regard to criminal liability.¹¹⁹

The 'purpose' element common for both offences is deemed to be the subjective purpose of the parties to the contract.¹²⁰ From the criminal liability perspective, this element may be treated as a fault element.¹²¹ The 'effect or likely effect' element may be an issue only for price fixing and may seem controversial as to what extent it may form the basis of criminal liability, especially having regard to the ambiguity in the case law, even for the purposes of determining civil liability.¹²²

3.2. Attribution of Physical Elements to Corporations

The TPA provides rules for the attribution of the conduct of individuals to corporations in order to determine the physical elements for them, since they are also subject to criminal sanctions. Accordingly, any conduct engaged in on behalf of a corporation (i) by a director, employee or agent of the corporation within the scope of the person's actual or apparent authority

¹¹⁴ *ibid.*

¹¹⁵ (n 106) para 25, 26, 27.

¹¹⁶ Beaton-Wells and Fisse (n 67) 43.

¹¹⁷ Ian Tonking, 'Belling the CAU: Finding A Substitute for "Understandings" about price' (2008) 16 Competition and Consumer Law Journal 46, 59.

¹¹⁸ Ian Wylie, 'Understanding "Understandings" under TPA – an enforcement Abyss?' (2008) 16 Trade Practices Law Journal 35

¹¹⁹ Beaton-Wells and Fisse (n 67) 47.

¹²⁰ See cases referred at Beaton-Wells and Fisse (n 64) 91 n 91.

¹²¹ Caron Beaton-Wells and Brent Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy' (2008) 36 Australian Business Law Review 190.

¹²² Beaton-Wells and Fisse (n 67) 93.

or (ii) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the corporation, where the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent, shall be deemed, for the purposes of this act, to have been also engaged in by the corporation.

4. Concluding Remarks

To start with, a significant difference between the UK and Australia is that unlike the UK, in Australia not only individuals but also corporations may have criminal liability. Though it is beyond the scope of this article to conduct a deep analysis, this approach favours the expansion of the scope of criminalisation as a desired notion on one hand,¹²³ but may cause problems with regard to defining the ‘act’ of the corporations on the other hand. Stigmatizing natural persons may make a contribution at the general awareness level. The attribution rules may be practical, but employing terms like ‘consent’ may cause ambiguity with regard to determining liability. In addition, potential complexities that may stem from parallel criminal and civil enforcement can create significant problems.

The cartel offence provisions in both jurisdictions seem to prohibit the conduct itself and do not require any harm to occur or any benefit to be obtained.¹²⁴ Therefore, they appear to be formulated based on the deterrence theory in this respect. Moreover, in both jurisdictions the formulation of the cartel offence provisions includes not only agreeing to make an arrangement’ or ‘to make a contract, arrangement or understanding’, but also ‘agreeing to implement’, ‘to cause to be made or implemented’ and ‘to give effect’. Such a formulation makes it possible to capture those who are not a party to the agreement, but who nonetheless use their power for an agreement to be concluded or implemented. Especially this second part may be very useful for catching directors in the upper level of the hierarchy who will seek to avoid responsibility. It is believed that this design will contribute to deterrence substantially.

¹²³ Beaton-Wells and Fisse (n 67) 213. For UK’s position preferring individual liability, see Julian Joshua, ‘The UK’s New Cartel Offence and its Implications for EC Competition Law: Tangled Web’, (2003) 28 *European Law Review* 620, 623.

¹²⁴ In the UK, the ‘detriment to consumer’ element caused by dishonest intention was suggested but because of its negative effect to deterrence it was not accepted. See HL Deb, October 15, 2002, col 836.

In conclusion, regarding the physical element of the offence, it is possible to state that both jurisdictions embrace an approach based on the deterrence theory by prohibiting the act without considering its harm. The formulation of the cartel offence provisions which makes it possible to reach other parties besides the original ones seems sensible. Moreover, by allowing for criminal liability of corporations, the Australian jurisdiction favours a wider scope for the application of the cartel offence. However, the wording of the rules attributing liability and the use of the same wording also for civil contraventions may cause complexity, focus problems and uncertainty.

IV. Fault Elements for the Cartel Offence in the UK and Australian Jurisdictions

1. The Concept of the Fault Element

The fault element (*mens rea*) concerns the mental state of the offender. It has subjective constituents, such as intention, knowledge and recklessness, and objective ingredients, such as negligence.¹²⁵ Although there are jurisdictions, such as Ireland and the US, which do not mention any fault element explicitly in their relevant laws, its existence and design is important in order to determine criminal responsibility.

2. Fault Element of the Cartel Offense in the UK

2.1. Before the Reform – ‘Dishonesty’

Dishonesty was the fault element of the cartel offence before the reform in the UK and it was preferred instead of setting a direct link between the infringement of a civil prohibition and committing an offence.¹²⁶ The legal test for dishonesty established by the *Gosh* case¹²⁷ was two-fold. First, the conduct should be dishonest according to the standards of ordinary people (objective criterion) and secondly, the defendant should know, according to this standard, that the conduct was dishonest (subjective criterion).¹²⁸

¹²⁵ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (LBC Services 2001) 173.

¹²⁶ O’Kane (n 15) 46.

¹²⁷ *R v Gosh* [1982] QB 1053 [1982] 2 All ER 689. See also *In R v Feely* ([1973] 1 QB 530, 537; Julian Joshua, ‘Can UK Cartel Offence be Resuscitated?’ in Caron Beaton-Well and Brent Fisse (eds), *Criminalising Cartels*, (Hart Publishing 2011) 129, 147.

¹²⁸ [1982] 2 All ER 689, 696.

Regarding this concept, it is worth mentioning the *Norris* case.¹²⁹ This was a conspiracy to defraud case regarding the extradition of defendants fixing prices in the US on the basis of dual criminality.¹³⁰ The ruling of the court was viewed as perplexing with respect to the dishonesty element since the price fixing itself, in other words the cartel, was not found to be dishonest in the absence of some aggravating factors, such as intimidation.¹³¹

The case law regarding cartel offence sheds no light on the dishonesty element. In the *Marine Hoses* case,¹³² since the defendants pleaded guilty in the US, there was no clue as to how the dishonesty element would have been evaluated by the jury. Similarly, the *Virgin* case¹³³ which was withdrawn by the OFT after the detection of vital procedural deficits,¹³⁴ did not provide any explanations on the interpretation of the concept.

In addition to the lack of judicial guidance, dishonesty was also highly controversial among scholars. Bailin defended it by arguing that ‘it remained the clearest possible distinction between criminal offence and civil prohibitions and their respective penalties’.¹³⁵ MacCulloch pointed out the deficiencies of the ‘subjective test’ by emphasizing the ability of businessmen to rationalize their conduct and by referring to empirical studies conducted in the US and Australia.¹³⁶ Nikpay argued that it caused problems in complicated white-collar crimes, had no ‘seriousness’ contribution, required more economic evidence and was not necessary for dividing criminal and civil.¹³⁷ Joshua indicated that the dishonesty rule based on theft was inappropriate and caused complexity for juries.¹³⁸

¹²⁹ *Norris v Government of the United States*, [2008] UKHL 16, [2008] 2WLR 673.

¹³⁰ See Andreas Stephan, ‘The UK Cartel Offence: Lame Duck or Black Mamba?’ University of East Anglia ESRC Centre for Competition Policy Working Paper 08-19, 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310683> accessed 12.07.2013

¹³¹ O’Kane (n 15) 51-52, 81-85. See also Maya Lester, ‘Prosecuting Cartels for Conspiracy to Defraud’ (2008) *Competition Law Journal* 134.

¹³² See (n 94).

¹³³ *IB v R* [2009] EWCA Crim 2575.

¹³⁴ See Nicholas Purnell, Christopher Bellamy, Nicole Kar, Daniel Piccinin and Priya Sahathevan, ‘Criminal Cartel Enforcement- More Turbulence Ahead? The Implication of BA/Virgin Case (2010) *Competition Law Journal* 313, 316.

¹³⁵ Alex Bailin, ‘Doing Away With Dishonesty?’ (2011) *Competition Law Journal* 169.

¹³⁶ Angus MacCulloch, ‘Honesty, Morality and Cartel Offence’ (2007) 28 *European Competition Law Review* 355-363, 360.

¹³⁷ Nikpay (n 89).

¹³⁸ Joshua (n 123) 625.

Harding and Fisse stated it was confusing and unnecessary.¹³⁹ Stephan argued that, due to the ambiguity of the ‘standards of other people’, the Ghosh test would create difficulties, while¹⁴⁰ Riley further indicated that the non-objective norm of the test provided a defence for the defendants.¹⁴¹

Considering these criticisms and with a view to improving the prosecutability and increasing deterrence,¹⁴² the UK government proposed abolishing the dishonesty test and instead suggested four options: introducing guidelines for prosecutors, issuing a white list for allowed conduct, using the secrecy element and excluding openly made agreements.¹⁴³ The government indicated its preference for the last option since it would prevent recourse to complex economic analysis by defendants, it would create a balance between excluding agreements that may offer benefits under civil law and it would avoid the norm being understood as a national competition law rule.¹⁴⁴ Following consultation, dishonesty was removed through the Enterprise and Regulatory Reform Bill; provisions as to situations in which the offence will not be committed (s 188(A)), defences (s 188(B)) and the publishing of prosecution guidance (s 190(B)) were deployed.¹⁴⁵

2.2. After the Reform – ‘Intent’

¹³⁹ Joshua and Harding (n 98) 938; Brent Fisse, ‘The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty’ (Legal Studies Research Paper 06/44, Sydney Law School, 2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946288> access 12.07.2013

¹⁴⁰ Andreas Stephan, ‘How Dishonesty Killed The Cartel Offence’ (2011) *Criminal Law Review* 446, 448.

¹⁴¹ Alan Riley, ‘Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement’ in Barry Rodger (ed) *Ten Years of UK Competition Law Reform*, (Dundee University Press 2010) 278.

¹⁴² Department for Business Innovation & Skills, *A competition Regime For Growth: A Consultation on Reforms*, June 2011 (Consultation) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf> accessed 10.07.2013, 10-11.

¹⁴³ *ibid.*

¹⁴⁴ Department of Business Innovation & Skills, *Government Response to Consultation*, March 2012 (Government Response) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf> accessed 10.07.2013, para 7.3.

¹⁴⁵ Enterprise and Regulatory Reform Act 2013 ch 47.

Following the abolishment of the dishonesty element, intention seems to be at the core of the fault element of the offence. O’Kane refers to the ‘intention’ of the parties to the cartel agreement and specifies that the knowledge of the parties regarding their infringement of Chapter 1 of the Competition Act (CA) 98 or Art 101 of The Treaty of the Functioning of the European Union (TFEU) is unnecessary.¹⁴⁶

There is no legislative definition for criminal intention. Ashworth notes that the courts seem reluctant to provide a definition to protect flexibility.¹⁴⁷ However, he also points out that the approach used in the *Woolin* case,¹⁴⁸ providing that ‘an intention to bring about a result may be found if it shown that defendant thought that the result was a virtually certain consequence of his/her action’, may be considered to indicate the courts’ position.¹⁴⁹ The term may simply purport the aim, purpose or objective of the defendant with regard to the action conducted.

O’Kane indicates that the intention of the parties must have a specific character such as fixing prices, sharing markets, restricting output and rigging bids and states that, if this condition is not met, an offence will not occur.¹⁵⁰ Regarding the intention element, s 188(3) seeks reciprocity between the parties for price fixing and the limitation of supply and production agreements.

As a final point, it may be stated that the implementation of the agreement has no importance¹⁵¹ and that the relevant standard of proof is ‘beyond a reasonable doubt’.¹⁵²

3. Fault Elements of Cartel Offences in Australia

3.1. Rejection of the Dishonesty Element

In Australia, ‘dishonestly obtain a gain’ was contemplated as the fault element of the offence, considering that it would, among other things, include deception, it would secure the seriousness of the offence and the

¹⁴⁶ O’Kane (n 15) 63.

¹⁴⁷ Asworth (n 3) 174; *Gillick Case* 1986] AC 112

¹⁴⁸ [1999] AC 82

¹⁴⁹ *ibid* para 176.

¹⁵⁰ O’Kane (n 15) 63.

¹⁵¹ O’Kane (n 15) 63.

¹⁵² *ibid* 74.

dishonest intent would be proved according to the Ghosh test.¹⁵³ However, this suggestion was questioned on the ground that the dishonesty was incapable of limiting the situation to serious cartel offences and the test deployed was ambiguous,¹⁵⁴ as it did not provide any distinction between criminal and civil matters and the essence was subverting competition, not acquiring gain or a causing harm, so dishonesty could not catch that essence.¹⁵⁵ The position of the ACCC is worth mentioning. The ACCC firstly supported the introduction of the dishonesty element because it would qualify cartels as ‘morally reprehensible’.¹⁵⁶ However, when formulating the offence itself, the ACCC did not include any element pointing out moral wrongfulness in the text.¹⁵⁷ Ultimately, the dishonesty element was rejected, considering that enforcement problems were likely to arise.¹⁵⁸ The difference between conduct that would constitute a civil breach and conduct that would be treated as an offence was left to prosecutorial discretion. The exercise of this discretion was to be guided primarily by economic factors.¹⁵⁹ In this respect, Beaton-Wells and Parker state that ‘moral condemnation remained and remains a significant feature of ACCC advocacy concerning the need for tough measures against cartels’.¹⁶⁰

3.2. Fault Elements - Intent, Knowledge or Belief

Under the Australian law, there are two fault elements for cartel offences. The first one is intention which is not stated in the TPA. However, the

¹⁵³ Australian Treasury, Criminal Penalties for Serious Cartel Behavior , Press Release 2 February 2005.

¹⁵⁴ Brent Fisse, ‘Cartel Offence: Dishonesty’ (2007) 35 Australian Business Law Review 235.

¹⁵⁵ Beaton-Wells and Fisse (n 67) 21-2; Julie Clarke, ‘Criminal Penalties for Contraventions of Part IV of TPA’ (2005) 10 Deakin Law Review 141, 162.

¹⁵⁶ A Fels, ‘Regulating in High-Tech Market Place’ Paper presented at Australian Law Reform Commission, Penalties: Policy, Principles and Practice in Government Regulation Conference, Sydney, 9 June 2001 <http://www.accc.gov.au/system/files/Fels_ALRC_short_9_6_01%5B1%5D.pdf> accessed 10.07.2013

¹⁵⁷ Beaton- Wells (n 56) 695.

¹⁵⁸ Beaton-Wells and B Fisse (n 67) 6.

¹⁵⁹ Caron Beaton-Wells and Fiona Haines, ‘Making Cartel Conduct Criminal: A Case-Study of Ambiguity in Controlling Business Behaviour’ (2009) 42 ANZJ Crim 227-36.

¹⁶⁰ Beaton-Wells and Parker (n 43) 198.

default fault provisions of the Criminal Code require it.¹⁶¹ The other fault element is knowledge or belief which is stated in the TPA.

For the first offence designated under s 44ZZRF, the defendant must intend to make a contract, arrangement or understanding and must know or believe that it includes a cartel provision. Similarly, for the second offence specified under s 44ZZRG, the defendant must intend to give effect to a provision and must know or believe that the contract, arrangement or understanding includes a cartel provision.

The term 'intention' is defined as follows: 'a person has intention with respect to conduct if he or she means to engage in that conduct' under the Criminal Code.¹⁶² 'Knowledge' refers to a situation in which 'a person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events'. 'Belief' has no definition under the Criminal Code. Case law defines it as the 'inclination of the mind towards assenting to, rather than rejecting, a proposition'.¹⁶³

The intent to make a contract, arrangement and understanding must be considered in close relation with the physical elements of the offence. In other words, it is stated that 'in relation to physical element under s 44ZZRF(1)(a), the defendant must intend that the relationship with the other relevant party have ingredients required for contract, arrangement or understanding, including consensus and commitment'.¹⁶⁴

An example may be given to clarify the situation. Suppose that one of the parties informs the other about his future prices, but the latter replies exigently about his future conduct, an understanding requiring the commitment/consensus of the defendant is not established. In this case, it will not be possible to set a criminal liability. However, if the parties agree to share prices between them without committing to fix prices upon this information, there is still an arrangement which may be a cartel offence since it has the likely effect of controlling the price and the parties know the existence of that provision. It is pointed out that the intention to arrive at an understanding does not have the effect of requiring the intention of the

¹⁶¹ Criminal Code s.5.6 (1)

¹⁶² See Bernadette McShery, Bronwyn, Naylor, *Australian Criminal Laws: Critical Perspectives*, (Oxford University Press 2004) 69-74.

¹⁶³ *George v Rockett* (1990) 170 CLR 104, 116 .

¹⁶⁴ *ibid* 140.

parties to fix prices¹⁶⁵ Therefore, for price fixing, it seems that intention may be replaced by the knowledge or belief element based on the ‘likely effect’ element and the wording of the provision does not allow any other option.

As to knowledge or belief, the defendant must know that there is a cartel provision in the relevant agreement. The knowledge or belief about the cartel provision must include the presence of facts adequate to establish the meaning of provision,¹⁶⁶ the purpose/effect condition and the rivalry condition mentioned in the related section.¹⁶⁷ In the Guide for Practitioners, published by the Attorney General of Australia (The Guide), a consciousness criterion is developed for the knowledge element.¹⁶⁸ Concerning the belief, it seems to be the most obscure part of the fault element. It does not require being sure and includes faith.¹⁶⁹ However, there are also opinions positing the necessity for conviction of the defendant.¹⁷⁰ The Guide states that ‘belief might be taken to require something less than the degree of conviction required for knowledge, but something more than the pallid substitute of mere suspicion’.¹⁷¹

Another topic that may be approached is the position of the managers who are ‘wilfully blind’. It is specified that people who purposely refrain from investigating the probability of a cartel cannot be held liable under the knowledge or belief element.¹⁷²

As a final issue, it may be pointed out that, whereas a mistake of fact is a preposition removing responsibility, ignorance or mistake of law is no excuse.¹⁷³

3.3. Attribution of Fault Elements to Corporations

¹⁶⁵ *ibid* 141.

¹⁶⁶ Provision is defined under s. 4(1) as ‘in relation to an understanding, means any matter forming part of the understanding.’

¹⁶⁷ Beaton-Wells and Fisse (n 67) 143.

¹⁶⁸ Guide for Practitioner, <http://www.ag.gov.au/Publications/Documents/GuideforPractitioners.pdf> accessed 15.07.2013.

¹⁶⁹ Beaton-Wells and Fisse (n 67) 145.

¹⁷⁰ Stephan Odgers, *Principles of Federal Criminal Law* (Lawbook, 2007) 43.

¹⁷¹ I Leader-Elliot, *The Commonwealth Criminal Code: A guide To Practitioners*, Attorney General’s Department (2002) 6.

¹⁷² Baeton-Wels and Fisse (n 67) 150.

¹⁷³ *ibid* 152-155.

Parallely to the physical elements, s 84(1) of the TPA provides the attribution of the fault elements to corporation. Accordingly, to be able to establish the state of mind of the corporation, it is sufficient to show that: (i) a director, employee or agent of the body corporate engaged in that conduct, (ii) the person mentioned acted within the scope of his/her actual/apparent authority, and (iii) that the person mentioned had the state of mind to commit the cartel offence.

4. Concluding Remarks

Dishonesty was intended to serve as a strong morality element providing the wrongfulness of the cartel offence. However, its implementation model, which is based on the ambiguous and impractical Ghosh test, as discussed above, bears the risk of paralyzing the whole process and causing the complete loss of the deterrence effect of criminalisation. Therefore, it seems reasonable to abolish it if the negative effect of the test is not proved empirically and the test is defended as a sharp division between criminal and civil liability.

It should be acknowledged that its absence weakens the effect of the retribution theory in the cartel offence provision. Here, as Williams pointed out, the question of whether there is a need to state the moral element explicitly may arise. Though there are contrary examples, for the elements such as intent, knowledge, etc., the answer may be yes to secure a minimum visible degree of certainty. However, to reflect the wrongfulness, following Beaton-Wells's approach that construe Green's categorization, accepting an inherent wrongfulness, seems reasonable. This preference will lead to a reliance on prosecutorial discretion; however, it is still evaluated as a reasonable trade-off, at least, rather than blocking all of the proceedings. Defences¹⁷⁴ designed as an exculpating mechanism may also be a vehicle for indicating the wrongfulness of the conduct in an *argumentum a contratio* interpretation. As a reinforcing factor, enacting a provision in this format may also be useful in the context of the 'shaping function of criminal law' to develop the perception of society about the malicious character of cartels. Nonetheless, of course, prosecutors must be well informed about the negative effects of hardcore cartels and eager to combat them.

¹⁷⁴ See Chapter 4 of TPA.

Having this determination in mind, the culpability elements may be analyzed. Criminal intent¹⁷⁵ is common for both jurisdictions. As for the UK, even though it does not have a statutory definition and the case-law is reluctant to provide one, the ordinary usage of the concept may be sufficient if the mentioned specificity condition is met. Here, it may be pointed out that the existence of other intents which are irrelevant, for instance stabilising market conditions, have no importance for the purposes of the cartel norm. As for Australia, due to the ‘likely effect’ proposition of cartel provision, it is possible to argue that replacing intent by knowledge is possible for price fixing modality¹⁷⁶. It may become even more tangled if recklessness, even though it is not mentioned in the TPA like intent, becomes involved due to the default operation of criminal law. This kind of shifting between the elements of a criminal provision seems unsuitable in light of the need for legal certainty.

Knowledge or belief is not an element in the UK, unlike in Australia. However, during legislation debates, it was suggested to add knowledge about the breach of a civil norm¹⁷⁷ or replace dishonesty with ‘knowingly or recklessly’.¹⁷⁸ However, these suggestions were rejected on the ground of potentially causing unprosecutability under a ‘beyond of reasonable doubt’ system¹⁷⁹ and of being likely to widen the scope of the offence.¹⁸⁰ Setting a connection with civil law may not be appropriate when designing a criminal provision and deployment of the recklessness may cause immoderate expansion in terms of the fault elements. However, adopting ‘knowledge’ associated with the offence itself and its elements may provide a stronger culpability element that contributes to the justification on the basis of the retribution theory. Moreover, it may be argued that there is no reason to believe that this is incompatible with the criminal standard of proof. For the belief element, however, due to its wide and obscure scope, this may enable potential escape routes for defendants.

¹⁷⁵ See Donald Robertson, ‘The primacy of “purpose” in competition law. –Part 1’ (2001) 9 *Competition and Consumer Law Journal* 1.

¹⁷⁶ The reason explained as departure of Australia from common law definition of criminal conspiracy, which requires common design in addition to intention. See Beaton-Wells and Fisse (n 66) 141 n 33.

¹⁷⁷ HL Deb, 15 October 2002, col. 836.

¹⁷⁸ House of Commons Standing Committee, 18 April 2002, Col 134.

¹⁷⁹ (n 177) Col 837-8.

¹⁸⁰ *ibid*

As a conclusion, it may be stated that accepting an inherent wrongfulness may be a better option than blocking the whole process with ambiguity, so the abolishment or rejection of dishonesty is pertinent. Criminal law's shaping function and design of defences may contribute to the process, and the eagerness of the judicial posts is also crucial. Intent as the basic of the fault element may be an efficient distinguisher between criminal and civil matters; however, it should be designed in a form that does not allow its replacement with knowledge as is possible now in Australia. Knowledge, strongly associated with the elements of the offence, may provide a reliable vehicle in addition to intention, and so may be suggested for the UK. Employing 'belief' may cause vagueness and enable defendants to construct tricky defences, so its abolishment in Australia may be suitable for the purpose of promoting certainty.

V. Defences against the Cartel Offence in the UK and Australian Jurisdictions

1. Concept of Defence

Criminal law's classical means¹⁸¹ may not be suitable for the cartel offence, thus the need for specific defence mechanisms may arise. Despite the contra-arguments,¹⁸² as Williams indicates, defences may be necessary to avoid broadly drafted provisions and to secure moral credibility.¹⁸³ This approach seems consistent with the OECD's recommendation to exclude efficiency creating agreements.¹⁸⁴

There are two approaches to designing defences. In the first, a broad definition of the prohibited activity is given and then related defences are stated. In the second, the provision is defined in a narrow sense that already excludes the activities that may be qualified as a defence otherwise.¹⁸⁵ However, this situation causes controversy over whether there is a particular distinction between the definition of the offence and that of the defence.¹⁸⁶

¹⁸¹ Generally see Joel Samaha, *Criminal Law* (11th edn, Wadsworth 2013).

¹⁸² Richard Posner 'An Economic Theory of Criminal Law' (1985) 85 *Columbia Law Review* 1193-1232, 1206.

¹⁸³ Williams (n 2) 307.

¹⁸⁴ OECD (n 16) .

¹⁸⁵ *ibid*

¹⁸⁶ Glanville Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 256; George P Fletcher, *Rethinking Criminal Law* (1st eds Brown & Co 1978) 566-568.

2. Defences in the UK

After the reform, two main defence categories were created under the UK law. The first one stipulates the conditions that prevent the commitment of the offence and the second one specifies the defences that may be employed.

2.1. Grounds Preventing the Commitment of the Offence

The basic requirement provided in s.188 (A) to prevent the commitment of the offence may be summarised as ‘to give information’. The information that should be given by the offender includes the names of the companies, nature of the arrangement and affected products/services. Depending on the three situations enumerated in the Act, the addressee of the information varies. For instance, in the case of bid-rigging, providing information to the person requesting the bid relieves the potential offender. Moreover, with regard to arrangements affecting supply of goods or services, customers should be informed before the parties enter into that arrangement. Finally, the Act gives authority to the Secretary of State in any case to envisage the way that the information will be published before the arrangement is implemented.

Another ground that removes the responsibility of the offender in the mentioned section is to make an arrangement in order to comply with a legal requirement. However, it should be emphasised that due to a reference in paragraph 4 of this section, civil prohibitions, in other words, Ch1 and Ch 2 of Competition Act (CA 98) is excluded from the legal requirement rule.¹⁸⁷

2.2. Defences

In addition to the provisions mentioned above, s 188(B) of the Act also introduces additional defences. Accordingly, the defendant may firstly rely on the defence that he did not intend to conceal the nature of the agreement from the customers at all times before they entered into the agreement. The section also provides that the defendant may avoid punishment if he shows that he did not intend to conceal the nature of the arrangements from the Competition and Markets Authority at the time of making the agreement. The second defence envisaged in the section requires the defendant to show that reasonable steps were taken to ensure that the nature of the arrangement

¹⁸⁷ See Explanatory Notes to Enterprise and Regulatory Reform Act 2013, para 359.

would be disclosed to a professional legal adviser for the purposes of obtaining legal advice before their conclusion or implementation.

3. Exemptions for Cartel Offences in Australia

In Australia, exemptions for criminal liability are articulated with the same wording as those provided for civil liability. The term ‘exemption’ is preferred because those provisions have the effect of preventing the application of the prohibition rather than providing a defence. Although there are various exemptions for criminal liability, not all criminal law exemptions will be examined here.¹⁸⁸

Unlike the UK regime, Australian jurisdiction gives the ACCC a kind of marker/evaluator role for the applications made to it for obtaining an exemption. When fulfilling its duty, the ACCC weighs the public benefit stemming from the agreement against the harm resulting from lessening of competition.¹⁸⁹ The ACCC makes such an analysis, for example in applying the authorization exemption which is subject to a prior notification and available for contracts, but not for arrangements or understandings.¹⁹⁰ A similar analysis is also conducted for sector specific the liner shipping exemption which requires all benefits to be for the registered Australian exporters on importers.¹⁹¹ Another exemption is the joint venture exemption.¹⁹² To benefit from this the applicant is required to make a notification 28 days before the implementation of the agreement. Similarly to the authorisation exemption, for the joint venture exemption, the cartel provision in an arrangement or understanding is not sufficient, however the belief of the parties that the cartel provision took place in a contract is deemed enough.¹⁹³ The ACCC assesses herein whether there is a fake joint venture agreement to mask a secret cartel agreement. There is another exemption type that provides an automatic release from criminal liability.

¹⁸⁸ For defenses like as mental impairment, duress emergency, see Beaton-Wells and Furse (n 67) 261, fn 14-16.

¹⁸⁹ Beaton-Wells and Fisse (n 64) 325.

¹⁹⁰ Generally see ACCC, Authorization Guidelines June 2013, <<http://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf>> accessed 15 July 2013.

¹⁹¹ See Beaton-Wells and Fisse (n 67) 319.

¹⁹² See s 44ZZRO.s

¹⁹³ The lack of regulation for understanding and arrangement was criticized; see A Madialia, ‘Cartel Law Changes “Miss Point”’, *The Australian Financial Review*, 14 May 2009.

With respect to the collective bargaining, acquisition or joint advertising exemption, if the ACCC does not contest the notification of the parties for a certain period, it will be regarded that an exemption is granted. However, bid-rigging cases are not within the scope of this exemption.¹⁹⁴

In addition to the above mentioned ones, the anti-overlap exemption must also be mentioned.¹⁹⁵ This exemption rule applies to arrangements which are prohibited by other rules and therefore are not subject to criminal liability. Resale price maintenance and exclusive dealing cases may be given as examples of that kind of arrangements.

4. Concluding Remarks

In UK law, the defendant may rely on some grounds which are considered to prevent the commitment of the offence. These grounds seem to be based on providing information and so ensuring the transparency of the agreements. With an *argumentum a contratio* interpretation, this approach may be evaluated as an extension of the dishonesty element, and the exclusion of clandestine agreements may be seen as a moral link to the retribution theory.

The way of conveying information is left to the evaluation of the Secretary of State for other prohibition types. It must be emphasised that ‘publishing’, rather than ‘informing’ is required in this context. Cartelists are expected to make a self-assessment of their activity. This may cause uncertainties about the sufficiency of the information provided. Regarding the ‘complying with legal requirement’ condition, excluding civil prohibitions seems appropriate. By doing so, unlike Australian law, a certain distinction between criminal and civil may be drawn. However, the provision may be viewed as unrealistic because a price fixer, for instance, is very unlikely to publish a price fixing/market sharing agreement concluded with a rival.

As to the defences under s 188(B), it is possible to trace openness and dishonesty as well.¹⁹⁶ The section may be considered as being highly in

¹⁹⁴ See ss 44ZZRL and 44ZZRV.

¹⁹⁵ See generally Stephen Corones, *Competition Law in Australia* (5th edn, Thomson Reuters 2010) 321.

¹⁹⁶ The absence of intention to conceal was regarded as the absence of intention to mislead. See Peter Whelan, ‘Does the UK’s New Cartel Offence Contain a Devastating Flaw?’ <http://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/#_ftn3> accessed 21 July 2013.

favour of the defendant because the defendant does not have to do anything in order to benefit from this exemption since this may be the securest way of showing the 'intend not to conceal'. Perhaps the offence will be committed due to a lack of following s 188(A); however, as long as he/she stays inactive, he/she may be still able to benefit from the defence. Therefore, the wideness of this design may be criticized because it provides the opportunity to avoid the responsibility just by being motionless, but on the other hand it may also be thought of as a balance mechanism for broad prohibition.

A more problematic defence is to seek legal advice or more precisely to take reasonable steps to ensure that the nature of the arrangements would be disclosed to a professional legal adviser for the purposes of obtaining advice before their conclusion or implementation. This defence potentially invites more problems than the Ghosh test of the dishonesty element, because accepting just seeking legal advice as a defence will probably undermine its deterrence, given that it would be very easy to prove that legal advice was sought. For example, if a defendant claims that an e-mail was sent to the lawyer asking for legal advice but the lawyer did not reply, the defendant might meet the necessary requirement envisaged in the Act. In addition, this defence is provided independently of the content of the advice. Even if the advice is misleading, it will be sufficient to benefit from the defence. Stephan states that, when considering the legislation debate on the defence, it is seen clearly how business world put pressure to create a balance after the abolishment of the dishonesty.¹⁹⁷ He also suggests that 'taking reasonable measure to follow legal advice' might be the intention of the parliament and not following the advice would 'hardly be legitimate'.¹⁹⁸ Though there is no clear indicator for accepting the intention of the parliament in this way, this suggestion seems reasonable.

Australian law utilises a different approach as it does not provide any defence in the sense of the UK law. Rather, it sets out some exemptions that preclude the application of criminal offence provisions. This exemption system in Australia also relies on notification from the defendant and may require economic analysis. As in UK law, expecting a carteliser to be so

¹⁹⁷ Andreas Stephan, 'The UK's New Cartel Offence: It Could Be Alright on the Day' Competition Policy Blog <<http://competitionpolicy.wordpress.com/2013/07/09/the-uks-new-cartel-offence-it-could-be-alright-on-the-day/>> accessed 21.7.2013.

¹⁹⁸ *ibid.*

naïve and to notify the agreement does not seem realistic. Moreover, it may negate the criminalisation of cartels process, as creating a very broad defence area. Of course, distinguishing cartels from legitimate trade conduct is crucial and undertaking an economic analysis may be necessary; nevertheless, this is not sufficient to justify such a broad exemption. Instead of all those details, a simple notification rule could be provided. On this basis, it seems possible to state that the Australian exemption system is based on the deterrence theory, especially given its economic analysis approach.

VI. Conclusion

This article analysed the theoretical and practical aspects of the criminalisation of cartels in the UK and Australia. It looked into the two theories for justifying the criminalisation of cartels and found that none of these theories is sufficient alone. The deterrence theory neglects the determination of individual responsibility properly and relies heavily on the rationality of the offender, which is also undermined by surveys. The retribution theory lacks an explanation of why a conduct, even if it is immoral, must be subject to criminal sanctions and weak support in surveys demonstrates that deficiency. As an attempt to find a more solid theoretical basis, the hybrid approach discussed above seems notably practical. This approach takes deterrence as a starting point for the existence of the offence and employs the retribution theory as a limiting factor in order to eliminate an immediate need for the delinquency element.

The formulation of the cartel offence provision provides insights to comprehend the theory embraced. In this context, the article explored how these provisions are designed in the UK and Australian jurisdictions.

Regarding the physical elements, it may be said that both jurisdictions prohibits the act itself and ignores its actual harm, so they seem to embrace the deterrence theory in this context. Another common point is the efficacious design that makes it possible to capture also the third parties, which is highly pertinent. Australia, unlike the UK, adopts sanctions also for corporations and applies the same wording as civil contravention. This position may lead some difficulties in parallel enforcement and create complexities due to the ambiguities of the concepts.

As regards the fault elements, abolishing or rejecting the dishonesty element may be welcomed because it has potential to block the prosecution of cartels. The existence of intent in both jurisdictions seems a strong criminal indicator. However, ambiguity in the UK law regarding the term ‘intent’ and its substitutability with knowledge depending on the conditions in Australia is remarkable. The adoption of “knowledge” in the UK may provide a sounder basis for culpability, and the determination of liability and omission of ‘belief’ in Australia may create greater certainty and avoid tricky arguments. The absence of dishonesty in both jurisdictions may indicate departure from the retribution theory in terms of wrongfulness. However, intent and knowledge still provide a sound link in terms of culpability. Therefore, the suggested amendments regarding fault elements may strengthen the current position of the retribution theory in both jurisdictions.

Regarding the defence element of the offence, norm designs differ considerably in two jurisdictions. In the UK, giving or publishing relevant information regarding the arrangement is a factor preventing the commitment of the offence. Not to intend to conceal the arrangement and taking reasonable steps to seek legal advice are potential defences. Both of these aim at transparency and openness. In Australia, exemptions are used to prevent the application of both criminal and civil sanctions. The basis of this system is notification and economic analysis. The system in the UK may be considered as unrealistic because the offender cannot be expected to declare cartel arrangements, and as ineffective because of the weakness of the not to conceal and to seek legal advice defences. In Australia, the compatibility of the exemption system with criminal law seems controversial, the exemptions and ‘public benefit’ criteria for economic analysis are so broad. Instead, a basic rule regulating notification and a clearer sense of public benefit may be suggested. All in all, the openness objective and using the ‘not to conceal’ approach as moral element make the UK system closer to the retribution theory. Although the Australian model’s notification system appears to embrace this theory, relying on economic analysis makes it closer to the deterrence theory.