

The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support

ELÉONORE MAY MICHELS*

The UK introduced a cartel offence to strengthen deterrence of the cartel prohibition and to send a message that cartel participation is morally wrong. However, due to a lack of public and political support, the offence did not achieve the desired deterrent effect. The original cartel offence failed to recognise that there is not yet a common belief that cartel participation is wrong. While the 2013 amendments removed the dishonesty requirement in an attempt to facilitate prosecution, the defences that were put into place are so easily met that liability can easily be avoided. The defences portray a continued lack of political support. The harm and moral wrongfulness of cartels should be emphasised to strengthen public and political support.

I. Introduction

This article argues that the criminalisation of competition law in the United Kingdom (UK) has failed due to a lack of public and political support. The fines imposed under the civil administrative system are inadequate to effectively dissuade companies from colluding with their competitors. The manipulation of the London Interbank Offered Rate (LIBOR) by UK and international banks¹ and the signs of potential collusion between the big six energy providers in the UK² suggest that for companies in two of the largest sectors of the UK economy, the risk of enforcement is outweighed by the expected benefits of collusion.

* L.L.M (UCL).

¹ Michael Kobelenz, Kenneth Labatte and Carrie Turner, 'LIBOR: Everything You Ever Wanted to Know but Were Afraid to Ask' (2013) *The Journal of Business, Entrepreneurship & The Law* 281.

² Michael Kavanagh, 'Competition watchdog to investigate energy prices' *Financial Times* (24 July 2014) <<http://www.ft.com/cms/s/0/6f459062-133c-11e4-925a-00144feabdc0.html#axzz3BssEErPm>> Accessed 24 July 2014.

Criminal sanctions for individuals who engage in the making and carrying out of cartel agreements can greatly add to deterrence by way of introducing a risk that companies cannot financially compensate for.³ Furthermore, by emphasising the moral wrongfulness of the behaviour, criminal sanctions can ensure greater compliance with the prohibition against engaging in cartel. If the harm and moral wrongfulness of the cartel conduct would more widely be understood, more people may refrain from participating in cartels, because (i) they do not want to break a moral norm, or (ii) they fear social condemnation and alienation resulting from breaking a moral norm⁴, or because (iii) individuals estimate the risk of detection and prosecution to be higher when they agree with a law and its application to them.⁵ The UK government introduced a cartel offence in 2002 to strengthen deterrence⁶ and to send out a moral message that cartel participation is wrong.⁷

However, the deterrent effect of the cartel offence is undermined if there is no public and political support for the offence. This article begins with analysing why sanctions should be introduced for individuals and argues for morality to play a central role in justifying those sanctions. In the second part the article critically evaluates why the original cartel offence that introduced in 2002 had failed in practice. The third part is devoted to portraying the fact that the underlying problems of the cartel offence are a lack of public and political support for the offence. In this regard, the article describes how the recent amendments to the cartel offence are the epitome of a lack of political support. The article stresses the need for an agreement with the law governing cartel offence, drawing lessons from a comparison to the insider dealing offence. It suggests that support can be strengthened by emphasising the harm and moral wrongfulness of cartel conduct.

II. Justifying sanctions for individuals

1. The reasons why sanctions for individuals should be introduced

a) The inadequacy of corporate fines

³ Stuart M. Chemtob ‘Antitrust deterrence in the United States and Japan’ (Competition Policy in the Global Trading System, Washington DC, 2000) <<http://www.justice.gov/atr/public/speeches/5076.pdf>> Accessed 15 July 2014.

⁴ Andreas Stephan, ‘The Battle for Hearts and Minds’: The Role of the Media in Treating Cartels as Criminal’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 393.

⁵ Caron Beaton-Wells and Christine Parker, ‘Justifying criminal sanctions for cartel conduct: a hard case’ [2012] *Journal of Antitrust Enforcement* 1, 11-12

⁶ Angus MacCulloch, ‘The cartel offence and the criminalisation of United Kingdom competition law’ (2003) *Journal of Business Law* 616, 616.

⁷ Anthony Hammond and Roy Penrose, *Proposed Criminalisation of Cartels in the UK* (Report prepared for the OFT, November 2001), paras 2.5 -2.6.

Cartel agreements between undertakings, including price-fixing, output restrictions, market sharing and bid-rigging agreements, are prohibited at EU level by Article 101 Treaty on the Functioning of the European Union (TFEU) and at national level by the Chapter I prohibition of the Competition Act 1998 (the Act), unless the agreement is exempted by Article 101(3) TFEU or section 9 of the Act. Exemption is highly unlikely for hard-core cartel agreements. A fine is imposed if an undertaking is found to have breached the prohibition. The fine is meant to deter and to punish.⁸ It punishes the undertaking for violating the competition rules, aims to recoup the unlawful gain that it made from its violation, and seeks to send out a moral message that the behaviour is wrongful.⁹ The deterrence function is both individualistic and general. The prior form seeks to prevent recidivism, while the latter aims to discourage other undertakings from infringing the competition rules by creating a credible threat of penalties.¹⁰

The general deterrence theory presupposes that undertakings are rational economic actors seeking to maximise their welfare,¹¹ who weigh the costs and benefits of a particular act in order to decide whether or not to engage in it. Accordingly, a calculating undertaking considering cartelisation can be deterred from breaching the prohibition, if the expected fine, taking into consideration the probability of detection and enforcement, exceeds the expected gain.¹² For fines to have a general deterrent effect, they should therefore be set at the level of the expected gain multiplied by the inverse of the probability of detection and enforcement.¹³ Where the expected fine outweighs the expected benefits, companies will have a greater incentive to implement effective compliance programmes.¹⁴ The idea is that any failure to do so would be met with shareholder outrage and a demand for new management.¹⁵

However, corporate fines are at present not sufficiently deterrent. As the probability of detecting a cartel is relatively low, approximately 16%,¹⁶ cartel fines

⁸ Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, para 141.

⁹ Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) *World Competition* 183, 194.

¹⁰ Donald I Baker and Barbara A Reeves, 'The Paper Label Sentences: Critiques' (1977) *Yale Law Journal* 619, 619.

¹¹ Cento Veljanovski, *Economics of Law* (2nd edn, IEA 2006), 49.

¹² Wils 'Optimal Antitrust Fines' (n 9).

¹³ *Ibid*, 195.

¹⁴ Maurice Stucke, 'Morality and antitrust' (2006) *Columbia Business Law Review* 443, 482.

¹⁵ *Ibid*. Although the ability of shareholders to effectively demand a change in management is questionable, even at an optimally deterring fining level, as shareholding may be dispersed and/or indirect.

¹⁶ Wouter P.J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer Law International 2002) 201.

would have to be very high to have an effective general deterrent effect. Wils has estimated that fines would need to be set at 150% of the undertaking's annual turnover in the cartelised good.¹⁷ Similarly, the White Paper that preceded the introduction of the UK cartel offence found that fines would have to be increased by a factor of six to ten to be truly deterrent¹⁸. They may need to be even higher due to 'optimism bias', as Weinstein found that people generally tend to be over-optimistic in assessing their personal risks.¹⁹ Such high sanctions are unlikely to be imposed, as they would in most cases exceed a company's ability to pay and force them into liquidation. This would cause many undesirable side effects including job losses, devaluation of securities for creditors,²⁰ and competition in the market would ironically be reduced rather than improved with the exit of the company. Fines are therefore currently capped at 10% of the turnover of the undertaking at national²¹ and EU level.²² However, at this lower level corporate fines are not effectively deterrent and fail to create adequate incentives for companies to ensure that their employees respect the competition rules.

Nor are the fines sufficiently punitive. From a punitive perspective the fine is meant to send a strong message that cartel conduct is wrongful and will not be tolerated. However, if the current fining level is too low, so that the expected fine does not outweigh the expected benefit, the sanction may be regarded as a tax as opposed to a punishment. Consequently, rather than signalling that cartel conduct is unacceptable; it implies that the conduct is permitted provided that the tax for it is paid.²³ There is, therefore a broad consensus that corporate fines alone are not enough to deter cartel conduct.²⁴

b) Prison sentences for individuals will add to deterrence

Sanctions for individuals should be introduced to strengthen deterrence²⁵ and punishment. Such sanctions should not be limited to fines, as these are easily

¹⁷ Ibid.

¹⁸ Department of Trade and Industry, *A World Class Competition Regime* (Cm 5233, 2001), para 7.14.

¹⁹ Neil D. Weinstein, 'Optimistic Biases about Personal Risks' (1989) *Science* 1232, 1232.

²⁰ Wils 'Optimal Antitrust Fines' (n 9), 18 -20.

²¹ Competition Act 1998, s 36(8).

²² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 23(1).

²³ Gregory Werden and Marilyn Simon 'Why price-fixers should go to prison' (1987) *The Antitrust Bulletin* 917, 933.

²⁴ OECD, 'Cartels: Sanctions against Individuals' (2003) <<http://www.oecd.org/competition/cartels/34306028.pdf>> Accessed 30 July 2014, 7.

²⁵ Ibid.

absorbed by the firm,²⁶ particularly where corporate fines are below the optimal level, as undertakings will have an incentive to participate in the cartel and reimburse any employee's cartel fine.²⁷ Preventing undertakings from refunding their employees is difficult, since such laws can be circumvented by either ex ante giving the employee a payment for the risk of a fine, or by ex post compensation through wage increases,²⁸ bonuses or promotions. Furthermore, as with fines for undertakings, fines for individuals risk being regarded as a tax, which would weaken the moral message of the sanction and thereby reduce its deterrent effect. Instead, non-indemnifiable sanctions for individual cartelists are needed to supplement corporate fines.

Prison sentences significantly increase general deterrence, as to 'the businessman ... prison is inferno',²⁹ so that the introduction of a non-monetary cost into the equation³⁰ breaks down the 'conventional risk-award analysis'.³¹ They also carry a unique stigma, because the embarrassment of a prison term is much greater than a fine.³² This is reinforced by the fact that prison sentences are also more newsworthy than fines.³³ The fear of criminal conviction and the possibility of incarceration should deter individuals from participating in cartel activity, or if they are directed by their managers, they should have a greater incentive to inform the competition authorities.³⁴ Anecdotal evidence supports the proposition that the fear of imprisonment adds to deterrence. Evidence collected in the Lysine cartel portrays that meetings were purposefully organised outside of the United States in an attempt to avoid the criminal sanctions of the US Department of Justice (DOJ).³⁵ Companies engaged in international cartel also often first apply for leniency in the United States.³⁶ In the UK, an Office of Fair Trading (OFT) survey found that

²⁶ Arthur Linman, 'The Paper Label Sentences: Critiques' (1986) Yale Law Journal 619, 631.

²⁷ Peter Whelan, 'Report Examining the Desirability of Introducing Criminal Sanctions for Cartel Activity' (2014) <<http://www.kkv.fi/globalassets/kkv-suomi/ajankohtaista/tiedotteet/2014/whelan-selvitys-27-5-2014.pdf>> Accessed 20 July 2014, para 2.14.

²⁸ Stucke 'Morality and antitrust' (n 14), 483.

²⁹ Linman, (n 26), 630.

³⁰ Chemtob (n 3).

³¹ Linman, (n 26), 630.

³² Richard Posner, *Antitrust Law: An Economic Perspective* (OUP 1976), 89

³³ Werden and Simon (n 23), 934.

³⁴ Diana Guy, 'The UK's experience with criminal law sanctions' in Cseres, Schinkel and Vogelhaar (eds) *Criminalisation of Competition Law Enforcement* (Edwar Elgar 2006), 248.

³⁵ Wouter P.J. Wils, 'Is Criminalisation of EU Competition Law the Answer?' (2005) World Competition 117, 151.

³⁶ Scott D. Hammond, 'Corner Stones of an Effective Leniency Program' (ICN Workshop on Leniency Programs Sydney, 2004) <<http://www.justice.gov/atr/public/speeches/206611.htm>> Accessed 1 August 2014.

companies and lawyers regard criminal sanctions to be the most important sanction in achieving deterrence of competition violations.³⁷

c) Individual responsibility

Criminal sanctions should not be regarded as merely a means of improving deterrence. They are appropriate in their own right, as they address the responsibility of the individual employee in setting up and maintaining the cartel, a factor that corporate fines are not directly concerned with. After all, ‘individuals, not corporations, meet in hotel rooms to fix prices ... and criminal antitrust enforcement needs to personalise the crime to effectively deter future price fixing’.³⁸

It is far more effective to discipline employees with criminal sanctions than leaving this to undertakings themselves. Companies can essentially only discipline their employees with a demotion or a dismissal. This is, however, not a very effective deterrent for employees who engage in price-fixing to deal with the pressures of their work, for instance as a means to meet profit goals, as they also risk demotion or dismissal for poor performance.³⁹ Moreover, they may even regard the risk of dismissal for poor performance to be greater than the chance of the adverse consequences of their secret cartel being exposed. For instance, when General Electric was involved in price-fixing in the 1950s, its executives were under significant pressure to reach financial goals and could expect to be fired for a failure to meet them. This motivated them to collude with their competitors.⁴⁰ A price-fixing executive may also be aware that it will take several years for the cartel to be exposed and prosecuted, by which time he may have already left.⁴¹

Firms may even decide against disciplining employees found to have been engaged in cartel agreements, as it may be ‘disruptive, embarrassing for those exercising managerial control, [and encourage] whistleblowers’.⁴² In the Virgin/BA passenger fuel surcharges case, Virgin’s board decided against firing its most senior director

³⁷ Whelan, ‘Report Examining the Desirability of Introducing Criminal Sanctions for Cartel Activity’ (n 27), para 2.19.

³⁸ Stucke, ‘Morality and antitrust’ (n 14).

³⁹ Wils, *Optimal Enforcement of EC Antitrust Law* (n 16), 208.

⁴⁰ Maurice E. Stucke, ‘Am I a Price Fixer? A behavioural Economic Analysis of Cartels’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 275.

⁴¹ Whelan, ‘Report Examining the Desirability of Introducing Criminal Sanctions for Cartel Activity’ (n 27), para 2.13.

⁴² Caron Beaton-Wells and Brent Fisse, ‘US Policy and Practice in Pursuing Individual Accountability for Cartel Conduct [2011] Antitrust Bulletin 277, 299.

engaged in the collusion and publicly declared their full support for him.⁴³ BA not only retained an executive involved in the infringement, but even promoted him to the board of directors.⁴⁴

Distinct sanctions for individuals are also more adept at addressing and deterring principal agent problems. A principal agent problem arises in the cartel context, where an undertaking has not encouraged its employees to engage in anti-competitive conduct, or may even have discouraged them through compliance programmes, yet a rogue manager nevertheless does collude with its competitors on his own initiative. In these circumstances a fine should still be imposed on the undertaking in order to create strong incentives for the company to invest in ensuring that its personnel complies with the competition rules.^{45, 46} Yet, a sanction for the individual carteliser would more effectively address the employee's personal responsibility and creates a greater deterrence for others who may consider fixing prices on their own accord.

2. Morality cannot be excluded from the cartel criminalisation debate

Proponents of cartel criminalisation have mainly focused on the use of criminal sanctions for individuals to increase deterrence. The general deterrence theory has a consequentialist forward-looking view and focuses on punishing the infringer to deter others from breaching the rules. Fittingly, cartel conduct has often been described as *mala prohibitum* as opposed to *mala in se*.⁴⁷ Many authors therefore do not look back at what is morally wrong about the cartel conduct itself. Andreas Stephan, for example, regards the societal harm inflicted by cartels to be so vast that the use of criminal sanctions is justified to deter future harm. He thus asserts that 'criminal cartel offences should simply be accepted as a necessary tool with which to punish, and more importantly, deter harmful cartel conduct'.⁴⁸

⁴³ Alistair Osborne, 'Virgin boss caught up in BA price fixing case' *The Telegraph* (14 July 2009) < <http://www.telegraph.co.uk/finance/newsbysector/transport/5820700/Virgin-boss-caught-up-in-BA-price-fixing-case.html> > Accessed 1 August 2014.

⁴⁴ Michael Peel, 'BA sales chief on price-fixing charge to join board' *Financial Times* (28 November 2008) < <http://www.ft.com/cms/s/0/7902ab56-bceb-11dd-af5a-0000779fd18c.html#axzz3BssEERpm> > Accessed 2 August 2014.

⁴⁵ Werden and Simon (n 23), 931.

⁴⁶ Vindicating the firm in such a case may also compel other companies to further disguise their support for the cartel participation of their employees, so that they can benefit from the extra profits of price-fixing while avoiding a fine from the competition authorities, and simply let one of their employees take the blame. It would also be morally wrong for a firm to benefit from the extra cartel profits without having to pay a fine for breaching the competition rules.

⁴⁷ Stucke 'Morality and antitrust' (n 14), 445.

⁴⁸ Andreas Stephan, 'Why morality should be excluded from the cartel criminalisation debate' (2012) *New Journal of European Criminal Law* 127, 127.

The deterrent function of criminal sanctions for individual cartelists is indeed essential. However, as imprisonment necessarily curtails an individual's freedom, an essential human right,⁴⁹ I believe that a cartel offence should contain a backward looking element that addresses the moral wrongfulness of cartel behaviour in order to justify its intrusion of this fundamental right. Such an approach would respect the individual's autonomy and their separateness of person. Cartel criminalisation should adopt a hybrid approach between deterrence and retribution. 'Deterrence may be the reason that we seek to argue for the existence of a criminal offence, but other retributive justifications may also be important to justify why a particular individual is being held accountable, and explain the severity of the punishment'.⁵⁰

Moral opprobrium is also the foundational element of the criminal law, its distinguishing factor, and can justify a restriction of a person's freedom.⁵¹ The creation of criminal offences that fail to identify the grounds for its condemnation risks trivialising criminal sanctions and ultimately their deterrent effect.⁵² 'When the criminal law is overused it will lose its distinctive stigma'.⁵³

Besides, by emphasizing the moral harm of cartel behaviour public support for criminal sanctions may be strengthened.⁵⁴ A survey conducted in the UK in 2007 found that only one in ten supported incarceration,⁵⁵ although 63% did consider the conduct to be dishonest.⁵⁶ Strengthening agreement with the law by exposing the wrongfulness of cartel conduct and the great social and economic harm that is inflicted is likely to reduce the number of infringements. Internalisation of the norm would increase compliance. Yet, greater agreement with a criminal cartel offence may also indirectly increase deterrence, as Individual cartelists tend to predict the risk of detection and enforcement to be greater if they believed the law and its application to their conduct to be just.⁵⁷

⁴⁹ ECHR, Article 5 in accordance with the Human Rights Act 1998.

⁵⁰ Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) *The Competition Law Review* 7, 19.

⁵¹ Henry M. Hart Jr., 'The aims of the criminal law' (1958) *Law and Contemporary Problems* 401, 404.

⁵² Sanford H. Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) *University of Chicago Law Review* 423, 444.

⁵³ John C. Coffee, JR., 'Does 'unlawful' mean 'criminal'?': Reflections on the disappearing tort/crime distinction in American law' (1991) *Boston University Law Review* 193, 201.

⁵⁴ Stucke 'Morality and antitrust' (n 14), 490.

⁵⁵ Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) *Competition Law Review* 123, 133.

⁵⁶ *Ibid*, 135.

⁵⁷ Beaton-Wells and Parker (n 5).

a) The moral wrongfulness of cartel conduct

The economic harm inflicted by cartels is essentially two-fold. Cartel agreements are set up to raise prices to a supra-competitive level to increase profits. The extra margin of profit that is made by raising the price above the normal competitive price is known as an overcharge. This uncompetitive wealth transfer from consumers to the cartelists is the first type of harm caused by a cartel. The second form of harm relates to the reduction in quantity resulting from the price increase. It thus refers to the units that consumers would have bought at the competitive price but are no longer consuming at the supra-competitive price. This loss of consumer satisfaction is described as a deadweight loss.⁵⁸ As colluding firms no longer compete with each other for customers, a loss of innovation and research and development is also often associated with cartels.

The harmful consequences of profit cartels are thus clear. However, ‘what makes an act morally wrongful is some intrinsic violation of a freestanding moral rule or duty, rather than the act’s consequences’.⁵⁹ Public recognition of cartel behaviour as morally wrong in itself is still remarkably low in the UK. Wrongfulness of the conduct should, therefore, not merely be explained as setting up and/or maintaining a cartel. For ‘it is not possible for the law to begin with a forward-looking offence in order to enhance enforcement and, without more, expect it to be successful in sending backward-looking signals of moral censure. The law cannot pull itself up by its bootstraps in this way’.⁶⁰ Instead, its wrongfulness should be explicated as breaching a well-established moral norm. Cartel conduct could be regarded as breaching the moral norms against stealing, deceiving, cheating or subverting the competitive process.

b) Stealing

Cartel conduct may be conceptualised as a form of stealing. Indeed, Joel Klein regards collusion as ‘theft by well-dressed thieves’.⁶¹ Stealing is defined by Stuart Green as ‘an intentional and fundamental violation of another’s rights of ownership

⁵⁸ Werden and Simon (n 23), 924.

⁵⁹ Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006), 39.

⁶⁰ Rebecca Williams, ‘Cartels in the Criminal Law Landscape’ in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011), 298.

⁶¹ Joel I. Klein, ‘The War against International Cartels: Lessons from the Battlefield’ (Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law and Policy New York, 1999) <<http://www.justice.gov/atr/public/speeches/3747.htm>> Accessed 5 August 2012.

in something that is capable of being bought or sold'.⁶² Firstly, what is stolen from the consumer is the overcharge.⁶³ Due to the higher price, consumers have less money to spend on other goods or services, so that the overcharge can be represented as something that is capable of being bought or sold.⁶⁴ Secondly, to meet the definition, the cartel victims must have a right to the overcharge. Some would argue that, provided it was a lawful transaction, the consumer lost his ownership right to the overcharge when he voluntarily paid the supra-competitive rather than the competitive price. However, if the cartel victim's right to the overcharge is recognised in private damages cases, then there is no reason why it should not be recognised here as well. Thirdly, the violation of the victim's right must be fundamental. Once the overcharge is transferred to the cartelists, the cartel victim is unable to exercise his rights in the overcharge, so that the violation of his right would be fundamental.⁶⁵ Lastly, the violation needs to be intentional. A direct intention is found in criminal law where the actor aims to bring about the result or believes that he can attain a goal by bringing about the result.⁶⁶ Executives may engage in cartels for different reasons. Some may simply fix prices to raise profits. They simply intend to obtain the overcharge, so that they would fit the former type of intention. Others may participate to achieve some other objective, such as preventing lay-offs, ensuring a promotion or to reconcile with their competitors after a damaging price war.⁶⁷ These price-fixers would then have the latter form of intention.

c) Deceiving

Cartel conduct could also be regarded as a deception. A deception essentially involves that 'a message is communicated, with an intention to cause a person to believe something that is untrue and a person is thereby caused to believe something that is not true'.⁶⁸ While cartelists usually do not expressly state that their prices are competitive when they are not, such a message may be implicit in their conduct. If consumers assume that goods or services are competitively priced in the market, then the cartelists by offering their goods or services on the market and by keeping their price-fixing agreement a secret, may implicitly signal to

⁶² Green (n 59), 89-91.

⁶³ Caron Beaton-Wells, 'Capturing the criminality of hard core cartels: the Australian proposal' (2007) *Melbourne University Law Review* 675, 701.

⁶⁴ Peter Whelan, 'Cartel Criminalisation and the Challenge of 'Moral Wrongfulness' (2013) *Oxford Journal of Legal Studies* 535, 544.

⁶⁵ *Ibid*, 547.

⁶⁶ *Ibid*, 548.

⁶⁷ Neil Warwick, 'The Psychology of Cartels' (2012) *New Journal of European Criminal Law* 181, 182.

⁶⁸ Whelan, 'Cartel Criminalisation and the Challenge of 'Moral Wrongfulness' (n 64), 550.

consumers that their prices are competitive when they in fact are not.⁶⁹ To date no empirical evidence exists that proves that consumers indeed presume that goods or services are competitively priced. Yet, such assumptions may well prevail, as a public survey found that 63% of the UK public regarded price-fixing as dishonest.⁷⁰ Such an assumption could also be regarded as a ‘manifestation of the presumption of innocence’.⁷¹ Lastly, the intention to mislead can be grounded on the price-fixers’ efforts to conceal their agreement.⁷²

d) Cheating

Alternatively, it could violate the moral norm against cheating. Cheating encompasses the situation where a person, X, intentionally ‘seeks an [unfair] advantage by violating a rule that Y is believed to be obeying’.⁷³ The rule violated by a cartel agreement is the Article 101 TFEU or Chapter I prohibition. To further meet the definition, the conduct must have sought to attain an advantage over another person or group. There are three potential victims of the price-fixer’s cheating: his competitors, his customers and the final consumers of the cartelised goods or services.

Adhering to the cartel prohibition involves a certain self-restraint on an undertaking, a restraint not to collude with competitors. By foregoing that self-restraint the price-fixer obtains an advantage over those competitors that do adhere to the prohibition. The unfair gain is the ‘[indulgence] in one’s will’.⁷⁴ However, this unfair advantage only arises where X’s competitors do follow the competition rules. Yet, for X to be able to profitably raise his prices, his competitors also need to participate in the agreement.

Instead, the cartelist could be obtaining an advantage over his customers in a downstream market. Provided, that his downstream customer has not cartelised their own market, the customer would be adhering to the self-restraint of the prohibition that the cartelists does not, which would be the unfair advantage that the cartelist, X, seeks to obtain over its customer, Y.

Lastly, the cartelist may also be regarded as obtaining an advantage over its final consumer. Unlike the previous situation where the cartelist and its downstream customer are both meant to adhere to the same rule, in this situation the consumer

⁶⁹ Ibid, 552.

⁷⁰ Stephan, ‘Survey of Public Attitudes to Price-Fixing as Cartel Enforcement in Britain’ (n 55), 135.

⁷¹ Whelan, ‘Cartel Criminalisation and the Challenge of ‘Moral Wrongfulness’ (n 64), 553.

⁷² Ibid, 554.

⁷³ Green (n 59), 66.

⁷⁴ Whelan, ‘Cartel Criminalisation and the Challenge of ‘Moral Wrongfulness’ (n 64), 560.

is not subject to exactly the same rule. Instead, there may be ‘a breach of one in a set of different rules in the market place; the quid pro quo for expecting adherence to the rule of prohibiting cartel activity by the potential cartelist is the consumer’s adherence to a different market-based rule, which she is capable of breaching (such as not submitting a vexatious complaint to the antitrust authorities)’.⁷⁵

Alternatively, the cartelist may be regarded as cheating himself. The cartelist would then be breaking the cartel prohibition, to gain an unfair advantage over himself.⁷⁶ The advantage that the cartelist gains is the extra profit margin that he makes when he colludes, as opposed to the lower profits from competitive prices.

e) Subverting the competitive process

Quite similarly, MacCulloch regards the wrongfulness to be the subversion of the competitive process. She argues that ‘cartel behaviour is wrong in that the act of making or implementing a cartel arrangement denies the marketplace of the legitimate expectation of a competitive process’.⁷⁷ The cartelist thus subverts the competitive system. This again assumes that society legitimately expects markets to be competitive. Arguably, the UK free economy, as Western economies more generally, is indeed based on an expectation of competition.

Overall conceptualising cartel conduct as breaching the norms against cheating and subverting the competitive process fit best in the competition law architecture, with its focus on ‘normal competition’⁷⁸ or ‘competition on the merits’.⁷⁹

f) A spiral of delinquency

The infringers’ efforts to conceal their conduct, in full awareness of its illegality further increases the moral wrongfulness. A ‘spiral of delinquency’⁸⁰ ensues, in which the already wrongful behaviour is aggravated ‘by their determination to defy the prohibition and take steps to avoid detection’.⁸¹

III. The failure of the cartel offence in practice

⁷⁵ Ibid, 558.

⁷⁶ Green (n 59), 10.

⁷⁷ Angus MacCulloch, ‘The Cartel Offence: Defining an Appropriate ‘Moral Space’ [2012] European Competition Journal 73, 84.

⁷⁸ Case 85/76 *Hoffman-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, para 6.

⁷⁹ Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 111.

⁸⁰ Christopher Harding and Julia Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010), 51.

⁸¹ Ibid.

1. The background to the introduction of the cartel offence

Prior to the introduction of the cartel offence, two cases that had attempted to try price-fixers under the common law were unsuccessful. Firstly, in *Norris v US*⁸² the US authorities had requested the UK to extradite Ian Norris, a former chief executive of a company engaged in a cartel, to the US, where he faced charges for price-fixing. To be extradited the offence with which Norris was charged in the US had to also qualify as a criminal offence under English law. While the lower courts were willing to view the defendant's endeavours to conceal the cartel as dishonest and the price-fixing agreement as a common law conspiracy to defraud⁸³, the House of Lords rejected this view. The House of Lords did not consider secret price-fixing to be criminal under common law, without any aggravating circumstances, such as fraud, violence or intimidation.⁸⁴ The Court referred as far back as the case *Mogul Steamship*⁸⁵ of 1892 to strengthen this point.⁸⁶ Similarly, in *R v Goldshield Group plc and others*⁸⁷ the court held that price-fixing was not dishonest in itself and not an adequate ground for a conspiracy to defraud, yet it could be part of a broader conspiracy.⁸⁸

Following the failures under the common law, the Hammond-Penrose Report,⁸⁹ a White Paper,⁹⁰ and political pressure from the US DOJ,⁹¹ the UK government introduced a cartel offence by the Enterprise Act 2002, to supplement and strengthen the system of administrative fines for undertakings already in place.⁹² The main rationale was to strengthen deterrence.⁹³ The introduction of the cartel offence marked a shift from a previous European style to a more distinctly American approach.

2. Criminalisation at national level within the wider EU enforcement architecture

⁸² *Norris v United States of America* [2008] UKHL 16, [2008] 1 AC 920.

⁸³ *Norris v United States of America* [2007] EWHC 71, [2007] 1 WLR 1730.

⁸⁴ *Norris* (n 82), [21].

⁸⁵ *The Mogul Steamship Case* 23 QBD 598; [1892] AC 25.

⁸⁶ *Norris* (n 82), [14] – [21].

⁸⁷ *R v Goldshield plc and others* [2008] UKHL 17, [2009] 1 WLR 458.

⁸⁸ *Ibid*, [18].

⁸⁹ Hammond and Penrose (n 7).

⁹⁰ Department of Trade and Industry (n 18).

⁹¹ US DOJ, 'Press Release: Charles A. James Statement regarding proposed amendment to the U.K.'s antitrust laws' (*Department of Justice*, 28 November 2001) <http://www.justice.gov/atr/public/press_releases/2001/9611.htm> accessed 15 August 2014.

⁹² *IB v R*, [2009] EWCA Crim 2575, [2010] 1 Cr App Rep 16, [21].

⁹³ MacCulloch, 'The cartel offence and the criminalisation of United Kingdom competition law' (n 6).

At the time of drafting the offence the relationship between national enforcement and the EC competition regime was in flux. There was significant uncertainty of how the European Commission's modernisation programme would reshape the EC's enforcement regime.⁹⁴ The OFT had carefully consulted the European Commission in order to ensure that the UK offence would fit properly in the EC enforcement architecture.⁹⁵ Yet, the drafters deliberately distanced the offence from Article 81 EC, now Article 101 TFEU, and the Chapter I prohibition of the Competition Act 1998.⁹⁶

The modernisation regime, introduced Regulation No 1/2003,⁹⁷ which clarified that Member States are permitted to provide for criminal enforcement of Article 101 and 102 TFEU and their equivalents in national law. Article 5 holds that 'the competition authorities of the Member States shall have the power to apply Articles [101 and 102 TFEU] in individual cases [and] for this purpose, they may take decisions imposing fines, period penalty payments, *or any other penalty* provided for in their national law'.⁹⁸ The phrase 'or any other penalty' covers imprisonment, as envisaged by Article 12(3), which refers to 'custodial sanctions'.⁹⁹ However, Member States cannot criminalise the enforcement of only their national competition laws. The principle of equivalence¹⁰⁰ requires that enforcement of EU law by national competition authorities or national courts must be at least equivalent to what is provided for the infringement of national law.¹⁰¹

3. The 'original' cartel offence

When the cartel offence was initially introduced, s. 188 Enterprise Act 2002 held that 'an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or to implement, or to cause to be made or implemented arrangements between at least two undertakings that: fix prices, limit or prevent supply, limit or prevent production, divide markets or bid-rig'.¹⁰² The offence thus only captures hard-core cartel agreements and pursuant to section 189 only applies to horizontal agreements.¹⁰³

⁹⁴ Mark Furse and Susan Nash, 'Partners in crime – the cartel offence UK law' [2004] 15 *International Company and Commercial Law Review* 138, 144.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.

⁹⁸ *Ibid.*, Article 5 (emphasis added).

⁹⁹ *Ibid.*, Article 12(3).

¹⁰⁰ Case 45-76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043 para 15.

¹⁰¹ Wils, 'Is Criminalisation of EU Competition Law the Answer?' (n 35), 136.

¹⁰² Enterprise Act 2002, s. 188 (before amendment).

¹⁰³ *Ibid.*, s. 189.

Notably the offence does not directly refer to the Article 101 TFEU or the Chapter I prohibition. While, this was in part influenced by the uncertainty of the European Commission's modernisation plans, the greatest concern for the drafters were the Article 81(3) EC exceptions (now Article 101(3) TFEU) and the individual exemptions under s.4 of the Competition Act 1998. There was a concern that a direct reference to those provisions may impel defendants to raise arguments about the creation of benefits,¹⁰⁴ which would greatly complicate trials. Such complication would be unnecessary, particularly where the conditions for the Article 101(3) exception and the individual exemption under the Competition Act are unlikely to be met for hard-core cartels under the administrative procedure for undertakings.

To emphasise the seriousness of the offence, the maximum penalty on conviction or indictment is five years imprisonment and/or a fine.¹⁰⁵ On summary conviction, the penalty is imprisonment for a term not exceeding six months and/or a fine.¹⁰⁶

a) Actus reus

The actus reus of the offence is committed by an agreement to do one of the prohibited activities, so that it is one of preparation and organisation, not of materialisation. 'The agreement is therefore the pivotal element [of the actus reus] of the offence'.¹⁰⁷ The meaning of the term 'agreement' in competition law and English criminal law can be regarded to be compatible. In competition law the notion 'centres around the existence of a concurrence of wills between at least two parties'.¹⁰⁸ Similarly, in English criminal law, an agreement is seen as a meeting of minds.¹⁰⁹

b) Mens rea

The mens rea of the original offence was dishonesty. The Enterprise Act did not provide for a statutory meaning of dishonesty, so that the *Ghosh*¹¹⁰ notion of dishonesty under common law was to apply. The *Ghosh* test consists of an objective and a subjective element. First, the jury must consider whether the

¹⁰⁴ Hammond and Penrose, (n 7).

¹⁰⁵ Enterprise Act 2002, s 190(1)(a).

¹⁰⁶ Ibid, s 190(1)(b).

¹⁰⁷ Julian Joshua and Christopher Harding, 'Breaking up the hard core: the prospects for the proposed cartel offence' (2002) *Criminal Law Review* 933, 936.

¹⁰⁸ Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, para 69. Quoted with approval by the ECJ in Cases C-2/01 P, C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG* [2004] ECR I-23, para 79.

¹⁰⁹ Joshua and Harding (n 107).

¹¹⁰ *R v Ghosh* [1982] QB 1053; [1982] 3 WLR 110; [1982] 2 All ER 689; (1982) 75 Cr App R 154 (CA).

defendant was acting dishonestly according to the standard of reasonable and honest people. If so, the jury must be convinced that the defendant realised that what he was doing was dishonest by those standards.¹¹¹

The dishonesty element was introduced to exclude benign or pro-competitive conduct from the ambit of the offence, and to signal the seriousness and the moral wrongfulness of the offence. Hammond-Penrose expressed that the dishonesty requirement would ‘signal that the offence is serious and should attract a substantial penalty and ... it would go a long way to preclude a defence argument that the activity being prosecuted is not reprehensible’.¹¹² The authors thus considered that by sending this message juries would be persuaded to convict and judges to impose strict sentences.¹¹³ Harding and Joshua contend that the drafters may have introduced the dishonesty element out of an ‘uneasy awareness that their definition of the actus reus was so confusing and elusive that ‘dishonesty’ might give the jury something meaty they could get to grips with’.¹¹⁴

4. The original cartel offence can be considered to have been a failure

To date there has only been one completed successful case under the original cartel offence. In this case three directors, Bryan Allison, David Brammar and Peter Whittle were prosecuted for their participation in the *Marine hoses* cartel.¹¹⁵ The three had been arrested in the US, and in a push for the UK’s first cartel offence precedent, the US authorities negotiated a plea bargain with the defendants and the OFT. Under the agreement the three would be returned to the UK if they plead guilty to the cartel offence.¹¹⁶ Accordingly, the three plead guilty in the UK courts. Judge Rivlin in the Southwark Crown Court, however, imposed sentences notably longer than those negotiated in the US.¹¹⁷ On appeal against the length of the sentence, the Court of Appeal reduced the terms.¹¹⁸ Hallett LJ even indicated that, in the absence of the agreement, the court might have reduced the sentences even further.¹¹⁹

¹¹¹ Ibid, [689].

¹¹² Hammond and Penrose, (n 7), para 2.5.

¹¹³ Ibid, para 1.10.

¹¹⁴ Joshua and Harding, (n 107), 939.

¹¹⁵ *Marine Hoses* (Case COMP/39406) Commission Decision of 28.1.2009 [2009] <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39406/39406_1902_1.pdf> Accessed 6 August 2014.

¹¹⁶ US DOJ, ‘United States v Bryan Allison, David Brammar and Peter Whittle’ (*Justice*, 12 December 2007) <<http://www.justice.gov/atr/cases/allison.htm>> accessed 14 August 2014.

¹¹⁷ *Whittle* [2008] EWCA Crim 2560, [2009] UKCLR 247, [11]-[13].

¹¹⁸ Ibid.

¹¹⁹ Ibid, [31].

A second success is due to follow soon. On 27 January 2014 the OFT announced that it had charged Peter Nigel Snee under the original cartel offence for his participation in the galvanised steel tanks cartel.¹²⁰ On 17 June, Mr Snee is reported to have pleaded guilty.¹²¹ The case is likely to be regarded as a great achievement for the new Competition and Markets Authority (CMA). However, as this was another uncontested trial, its importance should not be overstated.

Per contra, the first contested trial dramatically failed. Following the exposure that BA and Virgin Atlantic had fixed fuel surcharges on transatlantic passenger routes, as a result of Virgin's leniency application, four BA executives were charged with the cartel offence.¹²² The case, however, fell apart even before the offence could really be tested. The OFT had largely depended on Virgin's lawyers to gather evidence for the case.¹²³ While the trial had already started some 70,000 new emails in evidence were found, which previously were thought to have been lost. The OFT's critical procedural failures cause the trial to completely collapse.¹²⁴ The OFT's fiasco mainly resulted from its inexperience as a criminal prosecutor.¹²⁵

While, the original cartel offence has had some limited success, its success is solely attributable to the guilty pleas. Even though the one and only contested case never came to the point where the offence could actually be tried, the collapse of the case was so drastic that it harmed the legitimacy of the offence and the OFT as a prosecutor and reduced any threat of conviction,¹²⁶ thereby vitiating the deterrent effect of the offence and its main reason of existence. The original cartel offence can therefore be regarded to have failed in practice.

5. The problems of the dishonesty requirement

¹²⁰ OFT, 'Press release 2014 – Man faces charge in criminal cartel investigation' (27 January 2014) < <http://webarhive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2014/04-14> > Accessed 10 August 2014.

¹²¹ Caroline Binham, 'Former MD pleads guilty in UK industry price-fixing case' *Financial Times* (17 June 2014) < <http://www.ft.com/cms/s/0/5c4d05b6-f60f-11e3-a038-00144feabdc0.html#axzz3BJDIVdVg> > Accessed 17 June 2014.

¹²² Julian Joshua, 'DOA: Can the UK Cartel Offence be Resuscitated?' in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011), 140.

¹²³ Martin Hickman, 'BA price-fixing trial collapses after discovery of new evidence' *The Independent* (11 May 2010) < <http://www.independent.co.uk/news/uk/home-news/ba-pricefixing-trial-collapses-after-discovery-of-new-evidence-1970542.html> > Accessed 10 August 2014.

¹²⁴ Joshua (n 122), 141.

¹²⁵ Andreas Stephan, 'How dishonesty killed the cartel offence' [2011] 6 *Criminal Law Review* 446, 456.

¹²⁶ *Ibid.*

Even if the OFT had handled the prosecution of the BA executives more effectively, the cartel offence was doomed to fail. The dishonesty requirement was inherently flawed. Firstly, the dishonesty requirement was intended to operate as a filter, ensuring that only the most serious cartel agreements would be prosecuted. However, in competition law the seriousness of an infringement centres on the harm that is inflicted, rather than the defendant's state of mind as under *Ghosh*, so that dishonesty is a completely ineffective filter.¹²⁷

Secondly, the dishonesty element was included to preclude defence arguments that the conduct was not reprehensible. However, rather than avoiding defences, the element may invite them. Under the second subjective leg of the *Ghosh* test, a defendant may try to raise a defence that at the time of committing the offence he believed he was acting honestly according to the standards of ordinary honest people. He may thus try to raise a 'Robin-Hood defence',¹²⁸ by arguing for instance that in a time of economic downturn he participated in a cartel to avoid layoffs. As the judge is barred from directing the jury on what dishonesty means,¹²⁹ the jury may be persuaded to find that the second condition was not met.

Lastly, the dishonesty element was meant to signal the moral wrongfulness of cartel behaviour. Yet, in this regard the drafters also critically misunderstood the operation of the *Ghosh* dishonesty test. Rather than developing new community norms, the first element of the test seeks to reflect current norms.¹³⁰ As there is no clear broad consensus in the UK that cartel conduct is dishonest,¹³¹ a trial under the original offence may even fail at this first step. The drafters thus seemed to have fallen foul of the bootstrap problem.

All considering, the drafters of the original offence seem to have failed to grasp the subtle notion of dishonesty in English law and may have been misled by a 'deceptively simple name for a complex concept'.¹³²

III. A lack of public and political support

1. The underlying problem: a lack of public support

¹²⁷ Brent Fisse, 'The Cartel Offence: Dishonesty' (2007) 35 Australian Business Law Review 235, 239-40.

¹²⁸ Angus MacCulloch, 'Honesty, Morality and the cartel offence' (2007) 28 European Competition Law Review 353, 358.

¹²⁹ Joshua (n 122), 151.

¹³⁰ *Ibid*, 148.

¹³¹ Stephan 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain', (n 55).

¹³² Anthony Arlidge, Jacques Parry, *Arlidge and Parry on Fraud* (3d ed, Sweet & Maxwell 2007), para 2-002.

Although the problems encountered with the dishonesty element implicate that it was ill-advised to include the requirement in the offence, the real issue at the heart of these complications is a lack of public support for the offence. The lack of support in the courts can be seen prior to the introduction of the offence in *Norris*¹³³ and *Goldschield*¹³⁴ in which the House of Lords did not consider cartel behaviour to be dishonest of itself. This attitude prevailed post introduction. In *Whittle*¹³⁵ the judges of the Court of Appeal were very benevolent to the defendants, depicting them to each be of good character and empathising with their loss of livelihoods and the strains on their families.¹³⁶ This was reflected in the court's readiness to reduce their sentences. The public survey conducted in 2007 confirms that support for the cartel offence is generally lacking under the British public, as only a small majority considers cartel conduct to be dishonest and only one in ten supported prison sentences.¹³⁷

2. The 2013 amendments: a lack of political support

In response to failed BA prosecutions, the Government decided to amend the cartel offence¹³⁸ by the Enterprise and Regulatory Reform Act 2013 (the 'Reform Act'). To remedy the issues raised by the dishonesty requirement, the element was removed from the offence.¹³⁹

To counter the wider scope of the new offence, several exclusion and defences were introduced. Under the new notification exclusion an individual will not commit an offence if it notified its customers of the arrangement prior to them agreeing to purchase the goods or service.¹⁴⁰ The new publication exclusion provides that an individual will not commit an offence if relevant information about the arrangement is published, in the manner specified by an order by the Secretary of State, before the arrangement is implemented.¹⁴¹ The Reform Act retains the bid-rigging notification exclusion, under which an individual will not commit an offence if the person requesting bids is given relevant information about

¹³³ *Norris* (n 83).

¹³⁴ *Goldschield* (n 87).

¹³⁵ *Whittle* (n 117).

¹³⁶ *Ibid*, [29].

¹³⁷ Stephan 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain', (n 55).

¹³⁸ Department for Business Innovation & Skills, 'Growth, competition and the competition regime: Government response to consultation' (2012). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf>, 10.

¹³⁹ Enterprise and Regulatory Reform Act 2013, s 47(2).

¹⁴⁰ Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013, s 188A(1)(a).

¹⁴¹ *Ibid*, s 188A(1)(c).

the bid-rigging arrangements before or at the time of making the bid.¹⁴² For the purpose of these exclusions relevant information must include (i) the name of the undertakings involved in the agreement, (ii) a description of the nature of the agreement, (iii) the goods or services affected by the agreement, and (iv) any other information as may be required by the Secretary of State.¹⁴³ Lastly, an individual does also not commit an offence where the agreement was made in order to comply with a legal requirement.¹⁴⁴ These exclusions are meant to distinguish between hard-core cartel agreements and benign or pro-competitive arrangements. The exclusions will operate as a much more effective filter than the previous dishonesty requirement, as hard-core cartelists are unlikely to expose their secret agreements through publication or notification, as this would invite intervention by the competition authorities. These exclusions are a clear improvement to the dishonesty requirement and are to be welcomed.

The reform also introduced three statutory defences. It will be a defence for an individual to show that he did not intend that the nature of the arrangement would be concealed from (i) his customers before they agreed to purchase the goods or services,¹⁴⁵ or (ii) from the CMA.¹⁴⁶ It will also be a ‘defence for an individual to show that before making the agreement, he took reasonable steps to ensure that the nature of the arrangements would be disclosed to a professional legal adviser for the purposes of obtaining advice about them before their making or their implementation’.¹⁴⁷ Whilst it is still to be seen how the courts will interpret these defences, on a literal interpretation they are deeply concerning. These defences merely concern the ‘spiral of delinquency’,¹⁴⁸ but fail to address the moral wrongfulness of cartel behaviour, which goes far beyond the lying and deceiving of keeping the cartel agreement a secret, as discussed in Section I.

At most these circumstances should be mitigating factors that justify a reduction in the sentences imposed, but should not exonerate an otherwise guilty cartelist. Of the three defences, the legal advise defence is the poorest. Firstly, there is no need to actually obtain legal advise. The defence merely requires an individual to take *reasonable steps* to do so, which makes it a very easy defence to meet in practice, provided some evidence of an intention to contact a legal advisor can be produced. Secondly, the Act fails to specify whether the legal advisor must be an external advisor, or can be part of the in-house legal team. The CMA guidance indicates

¹⁴² Ibid, s 188A(1)(b).

¹⁴³ Ibid, s 188A(2).

¹⁴⁴ Ibid, s 188A(3).

¹⁴⁵ Ibid, s 188B(1).

¹⁴⁶ Ibid, s 188B(2).

¹⁴⁷ Ibid, s 188B(3).

¹⁴⁸ Harding and Joshua (n 80).

that in their view both are covered.¹⁴⁹ However, counsel from an in-house team should not be accepted, as their advice may not be impartial due to their lack of independence.

It is questionable whether this position can be maintained following *Akzo and Ackros* in which the ECJ held that in-house legal council could not be treated the same as external counsel as their status as employees affects their ability to exercise professional independence, however this judgment was made in relation to legal privilege in Commission investigations.¹⁵⁰ Thirdly, there is no obligation to follow the advice given, and as the legal advisor is presumably under no duty to inform the CMA, the harm inflicted by the cartel is not avoided. Lastly, while the defence is intended to distinguish between harmful and harmless or pro-competitive agreements, it in fact distinguishes between individuals who are well enough advised by the firm's in-house legal team to (take reasonable steps to) seek legal advice and those who are not so advised. These defences should not have been introduced, yet, hopefully the courts' interpretations will be able to mitigate some of the worst concerns.

Arguably, the ease with which the defences, and particularly the legal advice defence, can be met, portray that Parliament did not really intend to strengthen the enforcement of the cartel offence. This indicates a continued lack of political commitment to the offence. While the new CMA, with its *Snee* case¹⁵¹ and by charging another two directors linked to the same cartel,¹⁵² is sending out a strong message that it intends to strictly enforce the cartel offence, any resulting deterrent effect from this is greatly undermined by the new defences.

Instead, a real political commitment to the offence is needed. The newly introduced defences should be removed to allow the cartel offence to have a real chance at successful prosecution, particularly in contested cases. Only if there is a real substantial threat of successful prosecution, will the cartel offence have a meaningful deterrent effect.

3. Why public and political support is needed

¹⁴⁹ CMA, 'Cartel Offence Prosecution Guidance: CMA 9' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_Offence_Prosecution_Guidance.pdf> Accessed 20 August 2014, para 4.24.

¹⁵⁰ Case C-550/07 P *Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd* [2010] 5 CMLR 19, para 44.

¹⁵¹ Binham, (n 121).

¹⁵² CMA, 'Two men face charges in ongoing criminal cartel investigation' (*gov.uk*, 11 July 2014) <<https://www.gov.uk/government/news/two-men-face-charges-in-ongoing-criminal-cartel-investigation>> Accessed 22 August 2014.

a) Overview

Support for the offence is essential for the new cartel offence to succeed. With no or little support employees may only follow the competition rules out of obedience to the law and fear of prosecution. Greater agreement with the law can actually change the business culture. If more business men recognise the harm of cartel conduct and its moral wrongfulness, they may be dissuaded from colluding with their competitors, as they do not wish to break a moral norm and/or be responsible for the harm inflicted. A better understanding of the harm may stop a genuine ‘Robin-Hood’ cartelists, as he becomes aware that anti-competitive agreements overall harm society and the economy more than he previously thought would benefit them. Even those directors who despite knowledge of the harm inflicted by cartels would still engage in them to further their own or their firm’s interest may be dissuaded if there is greater public and political support. Fear of public stigma and potential social alienation may dissuade them from engaging in the conduct.¹⁵³ Yet, internalisation of the norm may also strengthen the deterrent effect of the offence. Individuals seem to estimate the risk of detection and enforcement as greater when they agree with the law and its application.¹⁵⁴ ‘A guilty conscience magnifies the risk of detection and sanction’.¹⁵⁵ Robust public support would generate greater political backing, which would reduce the effect of lobbying for softer competition rules and ensure better enforcement of the offence¹⁵⁶ by creating an enforceable offence and supporting the prosecutor. Ensuring that the offence can be successfully prosecuted increases the risk of prosecution and in turn also strengthens deterrence.

b) An illustration of the importance of public and political support: Insider dealing

Much like the cartel offence, the criminal enforcement of the insider dealing offence struggled initially. However, following the economic crisis, public and political support increased significantly and it was this support that helped the Financial Services Authority (FSA) to strengthen its criminal enforcement and to ensure a number of successful prosecutions. The experiences of the criminal enforcement of this white-collar offence, therefore highlight the importance of public and political commitment.

Under s 52 of the Criminal Justice Act 1993, an individual will commit the offence of insider dealing where he has information as in insider and he deals in stocks or

¹⁵³ Stephan ‘‘The Battle for Hearts and Minds’’ (n 4).

¹⁵⁴ Beaton-Wells and Parker (n 5).

¹⁵⁵ Ibid.

¹⁵⁶ Stephan ‘‘The Battle for Hearts and Minds’’ (n 4).

shares whose price will be affected by that insider information when it is made public. An employee will, for instance, be guilty of insider trading where he knows about an imminent takeover that will greatly raise the value of shares, and buys shares in the company before this information is made public. In such a case the employee would buy shares at a lower price and directly benefit from his inside information as soon as the news becomes public and his shares gain in value. Similarly, an employee will commit the offence where he knows that the company is due to present a profit warning, which will lower the value of shares, and in light of this information he sells his shares. More complex conduct is also caught, such as ‘pump and dump’ and ‘trash and cash’.¹⁵⁷ In the former scenario the dealer already owns shares in a particular company and releases false positive information to inflate share prices and he then sells his shares at a more profitable level. Once it becomes apparent that the information was incorrect, share prices will fall again and investors who bought shares at the fabricated higher price will have been overcharged. Trash and cash, is the exact opposite. In such a transaction, the fraudster intends to purchase particular shares, but before buying them he initiates rumours that the company is performing poorly, so that share prices fall, and he then buys up shares at a lower price level. He will then profit as soon as the market recognises that the information was incorrect and prices rise again.¹⁵⁸ In these cases the ‘inside’ information is that the fraudster is aware that the information that affects the value of shares is incorrect.

The insider trading offence and the cartel offence are in many ways quite similar. In both cases the infringer makes a profit from dealing in the market place on secret information. However, while insider trading often does involve several people working together, in so-called ‘rings’,¹⁵⁹ the whole scheme can be perpetrated by a single individual. Per contra, cartels inherently involve collusion. From a moral perspective the two offences share resemblances. Insider dealing can also be perceived as cheating or going against ‘normal competition’ and thereby subverting the competitive process. The pump and dump, and trash and cash scenarios can be regarded as deceiving. Arguably, the pump and dump could also be seen as a form of stealing, where the fraudster obtains an unfair overcharge from those who bought his shares at an inflated price.

The two offences also face similar enforcement challenges. As for cartel agreements, the level of detection for insider dealing is low, because of the secret nature of the information and the efforts by the fraudsters to conceal their conduct.

¹⁵⁹ Simon Bowers, ‘Six sentenced for insider trading’ *The Guardian* (27 July 2012) <<http://www.theguardian.com/business/2012/jul/27/insider-trading-six-sentenced>> Accessed 22 August 2014.

Furthermore, much like the cartel offence, the criminal enforcement of insider dealing struggled at first. Between 1981, when the offence was first introduced, and 2010 there had only been 30 criminal cases, averaging to a little more than a year.¹⁶⁰ The low levels of prosecution raised concerns that having an offence but little, to no enforcement, may overall be worse to the economy than having no offence at all. Introducing a criminal offence may prevent some insiders from trading illegally. However, those insiders who are not dissuaded may deal with more intensity to counterbalance the risk of prosecution.¹⁶¹ ‘Enforcement is [thus] key. If insiders see the laws as being enforceable market quality will improve, if not market quality may deteriorate.’¹⁶² Due to the similarities between the offences, it may equally be true that the lack of enforceability of the cartel offence may mean that the economy may be better off having no offence than a badly enforced one. Those cartelists that despite the offence do decide to fix prices may fix prices at a higher level to outweigh the risk of prosecution, in the hope that they will get higher bonuses or a better promotion for even higher profits.

However, due to the financial crisis the public became more concerned with insider dealing¹⁶³ and demanded action. The FSA toughened its criminal enforcement and secured 11 prosecutions in the latter half of 2012 and 2013, including some high profile cases.¹⁶⁴ The new Financial Conduct Authority seems to be continuing this stricter approach. The experience of criminalising insider trading thus portrays that public and political commitment is essential to ensure enforceability and to guarantee a credible threat of enforcement, and without such a commitment the economy may ironically ‘be better off with no law ... than a good law’.¹⁶⁵

4. Strengthening support by emphasising the harm and moral wrongfulness of cartels

Low levels of support for the cartel offence mainly results out of a lack of understanding the harm inflicted by cartels and the moral wrongfulness of the conduct. There is little reporting on cartel cases compared to other offences that may be more sensational and less complex. Media reporting ‘[panders] to public

¹⁶⁰ Barnes (n 157), 176.

¹⁶¹ Utpal Bhattacharya and Hazem Daouk, ‘When No Law is Better than a Good Law’ [2009] *Review of Finance* 577, 585.

¹⁶² Bart Frijns, Aaron Gilbert and Alireza Tourani-Rad, ‘Do Criminal Sanctions Deter Insider Trading?’ (2011) Department of Finance, School of Business and Law, Auckland University of Technology <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785873> Accessed 30 August 2014, 5.

¹⁶³ Barnes (n 157), 174.

¹⁶⁴ ‘FSA and FCA enforcement action – Themes and trends’ (2014) (116) *Compliance Officer Bulletin* <http://www.traverssmith.com/media/1426296/ts4-_22663878-v1-compliance_officer_bulletin_-_may_2014.pdf> Accessed 7 August 2014, 3-4.

¹⁶⁵ Bhattacharya and Daouk (n 161).

tastes for drama and immediacy over complexity'.¹⁶⁶ For, 'the public understands more easily what it means for an old lady to have £5 snatched from her purse than to grasp the financial significance of corporate crime'.¹⁶⁷ The media seems to prefer more conventional and violent crimes because victims are thought to be more easily identified than in cartel cases.¹⁶⁸ However, the media can be attracted in the right types of cartel cases, which more directly affect the public, such as cases concerning final products or bid-rigging, where the money of tax payers is involved.¹⁶⁹

Informing the public of how cartels harm the economy and affect them directly will increase agreement with the cartel prohibition. Emphasizing the moral wrongfulness of the conduct and explicating how corporate fines are inadequately deterrent should ensure acceptance of prison sentences. As identified, the public perception of cartel conduct as morally wrong of itself is still notably low, so that it should be presented as breaching an already established norm, such as the norms against stealing, deceiving, cheating or subverting the competitive process. The media can play an influential role in delivering this information to the public.¹⁷⁰ 'Media coverage of cartel cases has the potential to challenge prevailing attitudes, shape values and attach a popular stigma to cartel practices'¹⁷¹ and can 'even [influence] the amount of attention given to [criminal cartel cases] by policy makers'.¹⁷²

The CMA can contribute by providing more information on how the cartel cases that it prosecutes have harmed the economy. Quantifying the exact amount of harm may, however, not be possible. The authority should choose its cases wisely in order to optimise media coverage. It should pick cases that are easier for the public to understand and agree with, such as cases concerning final products and bid-rigging, as they more directly affect them.¹⁷³ Arguably, the Libor scandal in 2012 could have been used to explicate the need for criminal sanctions for breaching the cartel prohibition. The European Commission did fine several banks for price fixing.¹⁷⁴ An opportunity was missed. However, depending on the outcome of the

¹⁶⁶ Yvonne Jewkes, *Media & Crime* (Sage 2008), 20.

¹⁶⁷ Steven Box, *Power, Crime and Mystification* (Routledge, 1983) quoted in Jewkes, *ibid.*

¹⁶⁸ Stephan 'The Battle for Hearts and Minds' (n 4), 387.

¹⁶⁹ *Ibid.*, 391.

¹⁷⁰ *Ibid.*, 384.

¹⁷¹ *Ibid.*, 393.

¹⁷² *Ibid.*, 384.

¹⁷³ *Ibid.*, 391.

¹⁷⁴ European Commission, 'Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry' (*europa.eu*, 4 December 2013) <http://europa.eu/rapid/press-release_IP-13-1208_en.htm> Accessed 26 August 2013.

phase 2 market investigation, the collusion in the energy sector may represent an ideal new chance.¹⁷⁵ Particularly, as the anticompetitive effect will have directly affected the public and as there is outrage that energy prices keep rising.¹⁷⁶

IV. Conclusion

Criminal sanctions for individuals have the potential to play a uniquely deterrent role in the fight against cartels. They introduce a risk that companies cannot compensate for, offer a solution to the principal agent problem, and address the responsibility of the individual who decides to participate in and enforce a cartel agreement, thereby preventing individuals to hide their wrongdoing behind a corporate entity.

Morality is central to the criminalisation programme as it explicates why a particular individual is held liable and justifies the severe intrusion of the infringer's liberty. Yet, morality can also be a crucial factor in ensuring agreement with the law and thereby increase compliance. Support for the prohibition and the offence will increase compliance by persuading individuals to not only comply with the competition rules out of simple obedience to the law, but explains that compliance is also the morally right choice. Moral agreement also adds to deterrence by inducing a fear that infringers will be socially condemned and potentially alienated if their breach of the moral norm is exposed. Furthermore, individuals seem to perceive the risk of detection and enforcement to be greater where they agree with a law and its application, which in turn strengthens deterrence.

The UK government attempted to strengthen the competition regime by introducing a cartel offence in 2002. It hoped that the threat of imprisonment would dissuade individuals from participating in cartels and believed that the inclusion of a dishonesty requirement would signal the moral wrongfulness of the behaviour, so that it could benefit from the additional deterrent effect of morality. The enforcement of the offence in practice dramatically failed due to the drastic procedural failures of its prosecutor. However, even with a more effective prosecution, the offence was doomed to fail because of its poor drafting. By leaving dishonesty to be defined under common law, and thus to be dependent on the view that cartel engagement is dishonest according to the standards of

¹⁷⁵ The outcome of the market investigation must be awaited. Yet, Ofgem has suggested that subtler forms of collusion may have been at play. See Kavanagh (n 2).

¹⁷⁶ Patrick Collinson and Miles Brignall, 'Why do the big six energy providers still refuse to pass on price falls?' *The Guardian* (30 August 2014) <<http://www.theguardian.com/money/2014/aug/30/energy-big-six-bill-gas-electricity-price-cuts>> Accessed 30 August 2014.

reasonable and honest people, the drafters failed to recognise that there is not yet a clear public consensus that the behaviour is morally wrong.

While the 2013 amendments removed the problematic dishonesty element, the offence remains difficult to enforce because of the ease with which the new defences can be met. Their inclusion indicates a lack of political support to make the offence enforceable. The experience of criminalising insider dealing has portrayed that public and political commitment to the offence is essential to ensure effective enforcement and that without a credible threat of enforcement the economy may be better off without a criminal offence than with a poorly enforced one.

If the new cartel offence is to succeed, greater public and political commitment is needed. Emphasizing the harm and moral wrongfulness of cartel conduct may strengthen support. The media can play an important role in communicating this information to the public. The CMA should choose its cases wisely to optimise media coverage, as the media generally prefers to cover conventional violent crimes rather than complex corporate crimes. The outcomes of the energy inquiry may provide a unique opportunity to strengthen public and political support.

