

## **THE UK RESPONSE TO THE GLOBAL EFFORT AGAINST CARTELS: IS CRIMINALISATION REALLY THE SOLUTION?**

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**Abstract:** This article considers the increasing tendency for states to introduce criminal cartel regimes and notes that, despite this tendency, few jurisdictions, aside from the US, have been successful in imprisoning individuals involved in cartel conduct. The article examines why this might be, focussing on the difficulties and problems that have been encountered with the criminal cartel offence in the UK. The article discusses both theoretical and practical obstacles which appear, up until now, to have undermined the force and effectiveness of the UK regime and led to concerns about its scope. Given the difficulties identified, the article concludes that caution should be exercised before a state, intent on increasing deterrents to cartel activity, decides to criminalise such conduct. Rather, it recommends that such jurisdictions should consider not only criminalisation of cartel activity but whether steps to enhance civil enforcement might be a preferable and more efficient solution for increasing the force of, and respect for, cartel rules.

Keywords: cartels, deterrence, criminal law, Article 101, Competition Act 1998, Enterprise Act 2002, Enterprise and Regulatory Reform Act 2013, enforcement policy

JEL Codes: K21, L40 and L41

## 1. INTRODUCTION

Since the 1990s there has been growing international acceptance that 'hardcore' cartel activity<sup>1</sup> poses a serious threat to economies and consumers and constitutes 'the supreme evil of antitrust'<sup>2</sup> and 'the most egregious'<sup>3</sup> violation of competition law. Most antitrust systems now clearly prohibit cartel activity, treating it as an 'automatic' violation of the rules.<sup>4</sup> As consensus over the economic harm<sup>5</sup> caused by cartels and the need for clear rules prohibiting them has strengthened, debate has focused on the question of how best to reflect the seriousness of the offence, how to combat cartel activity and how to ensure that it is detected, deterred and punished.<sup>6</sup>

In section 2 of this article it is seen that international initiatives and greater multilateral and bilateral cooperation between competition authorities have significantly contributed to the dramatic shift in perceptions of, and attitudes towards, cartels and to a 'global trend toward enhanced sanctions combined with common enforcement techniques'.<sup>7</sup> Although this international convergence is occurring through a variety of legal techniques, which reflect the different histories and the diverse political, cultural and economic factors which have shaped the development of competition law and policy in each jurisdiction, '[a] truly global effort against hard core cartels has emerged'.<sup>8</sup> Around the world sanctions for those involved in cartel conduct have been mounting, leniency regimes are commonly being utilised as an important anti-cartel enforcement tool serving to destabilise cartels and encouraging a

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<sup>1</sup> Broadly anti-competitive arrangements between competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets, OECD Publication, 'Recommendation of the Council Concerning Effective action Against Hard Core Cartels' C(98)35/FINAL, of May 1998.

<sup>2</sup> *Verizon Communications v Law Offices of Curtis V Trinko*, (2004) 540 U.S. 398, 408. See eg, 'Fighting Hard Core Cartels: Recent Progress and Challenges Ahead' (OECD, 2003), and M. Monti, 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?' 3rd Nordic Competition Policy Conference, Stockholm, 11–12 Sept. 2000.

<sup>3</sup> OECD Publication C(98)35/FINAL, n 1.

<sup>4</sup> In the US, for example, cartel arrangements are, because of their pernicious effect on competition and lack of any redeeming virtue, considered to be illegal per se under section 1 of the Sherman Act of 1890, *Northern Pac R Co v United States*, 356 US 1, 5 (1958). Similarly, in the EU, cartels are presumed to violate Article 101 of the Treaty on the Functioning of the European Union (the 'TFEU') – they automatically infringe Article 101(1) – restrict competition by object – and, being naked, are incapable of satisfying the conditions for the legal exception set out in Article 101(3).

<sup>5</sup> See further nn 11-14 and surrounding text.

<sup>6</sup> Although enforcement by private individuals in civil proceedings may also deter violations this article focuses on public enforcement.

<sup>7</sup> See eg, GC Shaffer and NH Nesbitt, 'Criminalizing Cartels: A Global Trend?' University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No. 11-26, 3.

<sup>8</sup> ICN Cartels Working Group 'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties'(2005), 5.

'race to confess', and criminal cartel regimes are burgeoning.<sup>9</sup> Despite the rapidly increasing number of criminal cartel regimes, however, few jurisdictions, aside from the US, have been successful in imprisoning individuals involved in cartel conduct. This article considers why this might be, focussing on the difficulties and problems that have been encountered in the UK where a criminal cartel offence was enacted in 2002 (and amended and reformed in 2013).

Sections 3 and 4 discuss theoretical and practical obstacles which appear, up until now, to have undermined the force and effectiveness of the UK criminal cartel regime and led to concerns about its scope. Section 3 sets out the view that, although it is arguably tempting, as the UK Government has done, to use the criminal law as a form of preference-shaping disincentive to deter violations of anti-cartel rules, this approach does not consider whether there are any inherent differences between criminal and civil law which might prevent them appearing simply as different points on a continuous spectrum. Nor, therefore, does it consider whether there may be disadvantages associated with such a 'spectrum' approach. Section 3 thus examines what criminal law is, how it differs from civil law and concludes that there *is* something special about the criminal law, namely that it signals moral condemnation of the criminalised conduct. Further, it is argued in this section that as it has not been made clear how the original, or reformed, criminal cartel offence reflects or builds moral stigma<sup>10</sup> of prohibited conduct, there is a risk not only that it will continue to be ineffective but that its existence might damage the condemnatory force of the criminal law more generally. Section 4 goes on to examine substantive and procedural problems which have created practical difficulties in drafting, implementing and properly confining the scope of the criminal cartel offence and which seem likely to have contributed to its under-enforcement.

Given the risks and concerns identified, Section 5 concludes that caution should be exercised before a state, intent on increasing deterrents to cartel activity, decides to criminalise such conduct. Consequently, it recommends that such jurisdictions should consider not only criminalisation of cartel activity but whether steps to enhance civil enforcement might be a preferable and more efficient solution for increasing the force of, and respect for, cartel rules.

## 2. CRIMINALISATION OF CARTELS: A GROWING TREND?

Of all agreements, cartels most contradict the principles of the free market economy: the operators specifically conspire to eliminate the free play of competition between themselves. In addition they are costly to create and enforce,<sup>11</sup> harm efficiency<sup>12</sup> and are 'naked' - '[t]hey seek to restrict competition without producing any objective

<sup>9</sup> The term 'criminal' is used here in the traditional sense and distinctly to the broader use of that term used in the context of the European Convention of Human Rights, see especially n 24 and text.

<sup>10</sup> The different meanings of stigma are discussed further below, section 3.B.

<sup>11</sup> R. Van den Bergh and P. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn., Sweet & Maxwell, 2006), 5.2.1.2. See OFT 386, 'The development of targets for consumer savings arising from competition policy', Chap. 5.

<sup>12</sup> See eg, OECD Report 'Fighting Hard Core Cartels, 'Recent Progress and Challenges Ahead' (2003).

countervailing benefits'.<sup>13</sup> Indeed, the Organization of Economic Cooperation and Development ('OECD') has estimated that cartels cost society billions and thwart the gains sought to be achieved through global market liberalization.<sup>14</sup> In consequence, it has led an international effort to halt cartel conduct urging member countries to ensure that their competition laws effectually deter cartel conduct by, in particular, providing for effective sanctions.<sup>15</sup> Further, competition authorities now work together, particularly through the International Competition Network (the ICN),<sup>16</sup> but also through other formal and informal bilateral and multilateral arrangements, to combat cartels and to coordinate searches and investigations across jurisdictions.

In the EU, a network of competition authorities, the European Competition Network (ECN), comprised of the European Commission (the Commission) and the national competition authorities of the Member States (NCAs) are responsible for public enforcement of the prohibition of anticompetitive agreements set out in Article 101 Treaty on the Functioning of the European Union (TFEU). When enforcing Article 101, the Commission acts as an integrated decision-maker, deciding which cases to investigate, whether to initiate proceedings, whether an infringement has occurred and what sanctions should be imposed on undertakings in breach, in an administrative procedure. Regulation 1/2003, reflecting the more traditionally outcome-oriented, regulatory and empirical approach to competition and cartel regulation in the EU,<sup>17</sup> specifically provides that decisions adopted by the Commission using this procedure 'shall not be of a criminal law nature'.<sup>18</sup> Nonetheless, in line with the international trend, the Commission now considers fighting cartels to be one of its core priorities and over the last couple of decades has radically changed its policy and approach to ensure effective action against them. It uses strong language against cartels (Mario

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<sup>13</sup> M. Monti, 'Fighting Cartels Why and How?' 3rd Nordic Competition Policy Conference Stockholm, 11–12 Sept. 2000.

<sup>14</sup> The existence of such harm, however, does not on its own lead inevitably to the conclusion that criminal law must be used in order to deter the activity. As will be discussed in further detail below, the key to the use of criminal law is its unique ability automatically to signal society's moral condemnation of the activity, and this is in turn dependent on a combination of both harm and an assessment of the moral culpability of the defendants in producing that harm. Indeed for some theorists, this culpability is of *greater* significance than the harm produced. See, e.g. A Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1987-1988) 19 *Rutgers Law Journal* 725, esp 742.

<sup>15</sup> See especially OECD Publication C(98)35/FINAL, above n 1. See also eg OECD Policy Brief, 'Hard Core Cartels—Harm and Effective Sanctions' (2002) and OECD Reports 'Fighting Hard Core Cartels' *ibid* and 'Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation' (2005).

<sup>16</sup> An ICN International Anti-Cartel Enforcement Workshop has been held each annually since 1999 and the ICN Cartels Working Group prepares reports (see eg *Cartel Settlements* (2008) and *Cooperation between Competition Agencies in Cartel Investigations* (2006)) and papers (see eg 'Defining Hard Core Cartel Conduct', n 8). See also Shaffer and Nesbitt, n 7

<sup>17</sup> C Harding and J Joshua, *Regulating Cartels in Europe* (OUP, 2nd ed, 2010), Chap II.

<sup>18</sup> [2003] OJ L1/1, art 23(5), but see n 24 and text. A further issue is whether cartel activity should be criminalised at the EU level, see eg, W Wils, 'Is Criminalisation of EU Competition Law the Answer?' (2005) 28(2) *World Competition* 17. Until recently the EU's competence in the sphere of criminal law was relatively limited, see eg, S Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press, 3<sup>rd</sup> ed 2011).

Monti, for example, famously described them as 'cancers on the open market economy'<sup>19</sup>), its procedures have become more prosecutorial in nature, it frequently adopts a number of cartel infringement decisions each year and imposes massive fines on 'undertakings'<sup>20</sup> found to have participated in the breach<sup>21</sup> which are not out of line with those imposed on corporations in the US following criminal proceedings. The Commission has also increased international cooperation focused on the elimination of hardcore cartel activity, adopted and honed a leniency programme<sup>22</sup> and introduced a procedure for the settlement of cartel cases.<sup>23</sup>

An integrated agency model, where a single agency undertakes investigative, enforcement, and adjudicative functions, is also utilised in a number of EU Member States (including in the UK), as a mechanism for enforcing EU and national competition laws. A number of concerns have been arising about this model of enforcement, especially at the EU level. First, there is unease about the radical changes in the nature of the Commission's approach. This, combined with the recognition that antitrust fines (designed to have deterrent effect) are to be treated as *de facto* 'criminal' charges<sup>24</sup> within the meaning of Article 6(1) European Convention for the Protection of Human Rights ('ECHR'), has led to increasingly vociferous claims that the EU enforcement structure is not sufficient to comply with Article 6 ECHR and, in particular, to ensure the investigated undertakings' right to a fair trial.<sup>25</sup> Case law of the European Court of Human Rights (ECtHR) indicates, however, that the integrated agency model for competition enforcement is compatible with Article 6 so long as certain conditions are satisfied.<sup>26</sup> In particular, the administrative body's preliminary decision-taking procedures must be governed by sufficiently strong procedural guarantees and its decisions must be subject to sufficient judicial control by a body with 'full

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<sup>19</sup> M. Monti, 'Fighting Cartels Why and How?' 3rd Nordic Competition Policy Conference, Stockholm, 11–12 Sept. 2000. See also eg, 'ACCC Chiefs Past and Present in Stand Against Price Fixing', CCH News Headlines (Sydney), 25 June 2007.

<sup>20</sup> Any entity engaged in economic activity, frequently corporations, see Case C-41/90, *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21.

<sup>21</sup> See DGComp's Statistics on cartels, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>22</sup> See <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

<sup>23</sup> See <http://ec.europa.eu/competition/cartels/legislation/settlements.html>.

<sup>24</sup> And in spite of their characterisation in Regulation 1/2003 as administrative charges. The term criminal has its own distinct meaning in ECHR case law, see eg, *Engel v Netherlands* (1979-80) 1 EHRR 647, *Stenuit v France* [1992] ECC 401, Case C-272/09P, *KME Germany AG v Commission*, 10 February 2011 (Opinion of AG Sharpston), D Slater, S Thomas, D Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2009) *European Competition Journal* 97.

<sup>25</sup> See, in particular, eg, I Forrester, 'Due Process in EC competition cases: A distinguished institution with flawed procedures' (2009) *EL Rev* 817 and W Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition* 5.

<sup>26</sup> See especially *A Menarini Diagnostics SRL v Italy*, 43509/08, ECtHR, 21 September 2011

jurisdiction' on questions of fact and of law and with power to quash challenged decision in all respects.<sup>27</sup>

Second, and conversely perhaps, the view is increasingly being articulated that these penalties are not sufficient to deter cartel behaviour which is easily hidden and reaps significant profits. Corporate<sup>28</sup> fines do not target individuals responsible, may have spill-over effects (penalising innocent shareholders, employees and creditors) and would need to be impossibly high to ensure deterrence.<sup>29</sup>

'To deter cartel activity, the sanctions imposed on cartel participants must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity. Moreover, the disutility of the sanctions must outweigh the expected gain by enough to account for the fact that the sanctions may not be imposed at all and would be imposed, if at all, after the gains had been realised.'<sup>30</sup>

Indeed, some studies reinforce the view that corporate fines are not the highest concern to companies<sup>31</sup> and may not be deterring recidivism in the EU.<sup>32</sup> Consequently, it is more frequently being advocated that control which recognises the role that individuals play in instigating, or not preventing, competition law infringements is required.<sup>33</sup> In the US, for example, violation of the Sherman Act is a felony and, for some time, both Republican and Democratic administrations have

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<sup>27</sup> See *ibid* and eg, W Wils, 'The compatibility with fundamental rights of the EU antitrust enforcement system in which the European Commission acts both as investigator and as first-instance decision maker' (2014) 37(1) *World Competition* \*\*\*.

<sup>28</sup> The EU competition law prohibitions are directed at 'undertakings' and do not provide sanctions for 'individuals' who are not themselves undertakings, but see S Thomas, "Guilty of a Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law" [2012] *JECLAP* 11 and A Jones, 'The Boundaries of an Undertaking' [2012] 3(2) *European Competition Journal* 301, n 138.

<sup>29</sup> See eg, Wils n 18, OECD 'Hard Core Cartels—Harm and Effective Sanctions', n 15, 96–8, J. Connor, 'Optimal Deterrence and Private International Cartels' Purdue Working Paper, 2006, E. Combe and C. Monnier, 'Fines against hard core cartels in Europe: The myth of over enforcement' [2011] *Ant Bull* 235, B Wardaugh, 'Closing the Deterrence Gap: Individual Liability, the Cartel Offence and the BIS Consultation' [2011] *Comp Law* 175.

<sup>30</sup> GJ Werden, 'Sanctioning Cartel Activity: Let the Punishment fit the Crime' [2009] *European Competition Journal* 19, 28.

<sup>31</sup> See eg, OFT Report, Drivers of Compliance and Non-compliance with Competition Law (May 2010).

<sup>32</sup> J. Connor, 'Recidivism Revealed: Private International Cartels 1999-2009' (2010) 6(2) *Competition Policy International* 3, but see W Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35(1) *World Competition* 5. In the US, it appears that no corporation or individual convicted for cartel activity has been engaged in another cartel prosecuted in the US, see GJ Werden SD Hammond BA Barnett, 'Recidivism Eliminated: Cartel Enforcement in the United States since 1999' *Georgetown Global Antitrust Enforcement Symposium* September 2011.

<sup>33</sup> See n 36 and eg, OFT Report, n 31 and A Hoel, 'Crime Does Not Pay but Hard-Core Cartel Conduct May: Why it Should be Criminalised' (2008) 16 *Trade Practices Law Journal* 102. Individual sanctions do not necessarily have to be criminal in nature, see e.g. A Khan, 'Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?' [2012] 35(1) *World Competition* 77, 82 and below section 5.

aggressively pursued both corporations and individuals involved in cartel activity in criminal proceedings.<sup>34</sup> Where violations are found, US Courts not only impose fines on corporations and individuals responsible, but sentence individuals to prison.<sup>35</sup>

US enforcers, working with and through organisations such as the OECD and the ICN, have not been shy about advocating their view that tough sanctions against cartels are required, and that imprisonment of individuals provides the most effective deterrent to cartel behaviour.<sup>36</sup> This rhetoric, combined with the perceived success of the US criminal programme, has led many jurisdictions to introduce, or to consider introducing, criminal regimes for cartel behaviour, or certain forms of it (such as bid rigging). More than 20 states now have criminal cartel offences, whilst others have specific offences against bid-rigging.<sup>37</sup>

In the UK, for example, the Government concluded in 2001 that, in addition to provision for corporate fines and the ability to disqualify directors of companies found to have committed a competition law infringement,<sup>38</sup> there was a strong case for introducing criminal provisions addressed to individuals involved in cartel activity.<sup>39</sup> Custodial sentences for individuals would 'focus the mind of potential cartelists',<sup>40</sup> would be more likely to deter cartels and would be fairer than corporate fines. UK competition rules are therefore now founded on a combination of civil and criminal laws. Not only may administrative, or private civil, proceedings be brought against 'undertakings' which have violated Article 101 and/or Chapter I of the Competition Act 1998 (CA98)<sup>41</sup> (the UK equivalent of Article 101), but, since 2003, individuals engaged in cartel agreements<sup>42</sup> may violate the criminal cartel offence introduced in the Enterprise Act 2002 (EA02).<sup>43</sup> To maintain consistency with EU law, the UK

<sup>34</sup> DI Baker 'Punishment for Cartel Participants in the US: A Special Model?' in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), 27. See further section 3.

<sup>35</sup> See eg, the charts set out on the Department of Justice Antitrust Division's website, <http://www.justice.gov/atr/public/criminal/264101.html>.

<sup>36</sup> See speeches by SD Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' Feb 25 2010, 11, SD Hammond 'Cornerstones of an Effective Leniency Programme' November 2004, 8 and BA Barnett, 'Criminalization of Cartel Conduct-The Changing Landscape' 3 April 2009

<sup>37</sup> See A Stephan, 'Lessons from the UK's Experience of Criminalising Cartels' (24 September 2012) presentation at *The Antitrust Enforcement Symposium*, Pembroke College, Oxford and Shaffer and Nesbitt, n 7 ('More than thirty countries have criminalized cartel conduct in some form. All but five have done so since 1995 and over twenty since 2000, and the list is growing.')

<sup>38</sup> EA, s. 204, amending the Company Directors Disqualification Act of 1986.

<sup>39</sup> Department of Trade and Industry (DTI) White Paper *A World Class Competition Regime*, (CM 5233). See also Joint Treasury/DTI Report 'The UK's Competition Regime'.

<sup>40</sup> Joint Treasury/DTI Report 'The UK's Competition Regime' 2001 and OFT365, 'Proposed criminalisation of cartels in the UK' A report prepared for the OFT by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM (November 2001), 1.4.

<sup>41</sup> The CA98 brought into effect prohibitions of anti-competitive agreements and practices modelled on Articles 101 and 102 TFEU (the Chapter I and II prohibitions respectively).

<sup>42</sup> EA02, Part 6 (which came into effect on 20 June 2003).

<sup>43</sup> The offence is extraditable.



criminal cartel offence was created entirely separately from the administrative one<sup>44</sup> and made applicable only to individuals not to 'undertakings'. Further, a dishonesty<sup>45</sup> requirement was incorporated into the original offence which was intended, in particular: to ensure that the regime would not be applicable to individuals engaged in activities which would be lawful under the civil regime (for example, because they produce countervailing benefits and so are compatible with Article 101/CA98 on account of their pro-competitive effects);<sup>46</sup> to signal the seriousness of the offence; to make it more likely that courts would impose custodial sentences; and to reduce the risk that the offence would be categorised as 'national competition law' for the purposes of Regulation 1/2003.<sup>47</sup> 'Whilst it was recognised at the time that the inclusion of a dishonesty requirement was an imperfect means of achieving these objectives, it was seen as the best available option'.<sup>48</sup>

It is well known that, in spite of this marked increase in preference for criminalisation across the world, successful deployment of criminal enforcement models has not proved easy outside of the US. In some jurisdictions (such as Ireland), for example, authorities have successfully prosecuted individuals, but have been unable to persuade courts to imprison offenders.<sup>49</sup> In the UK, the deterrent effect of the cartel offence has been weaker than intended 'because there have been so few completed cases to date'.<sup>50</sup> Rather than the six-ten prosecutions per year predicted,<sup>51</sup> only three individuals, in relation to a single cartel - the *Marine Hoses* cartel,<sup>52</sup> were convicted and sentenced to prison during its first ten years. The only other criminal prosecution brought, of British Airways employees, spectacularly collapsed when it emerged that certain evidence had not been properly disclosed by the OFT, causing significant

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<sup>44</sup> As recommended by OFT365, n 40 and below section 3.

<sup>45</sup> Under *R v Ghosh* [1982] QB 1053, see further nn 103-104 and text.

<sup>46</sup> But without allowing the criminal trial to be muddled by complicated economic evidence arguments based on the legal exception criteria of Article 101(3)/CA98, see below section 4.A.

<sup>47</sup> See *IB v The Queen* [2009] EWCA Crim 2575. The Government's concern has been that if the cartel offence were to constitute national competition law it would become impossible to bring criminal proceedings where parallel proceedings were brought at the EU level. The UK authorities would then have to comply with the principle of supremacy and framework for cooperation between the Commission and national competition authorities (NCAs) set out in Regulation 1/2003 and enforcement would essentially be relegated to purely domestic cartels. This is perceived to be a difficulty in Ireland, see P Massey and JD Cooke, 'Competition Offences in Ireland: The Regime and Its Results', in Beaton-Wells and Ezrachi, n 34.

<sup>48</sup> A Nikpay, 'Cartel Enforcement: Past, Present and Future' Speech 11 December 2012 and *ibid*, paras 1.9-1.12 and Chap 2.

<sup>49</sup> See eg, T Calvani and KM Carl, 'The Competition Act 2002, ten years later: lessons from the Irish experience of prosecuting cartels as criminal offences (2013) 1(2) *J Antitrust Enforcement* 296.

<sup>50</sup> Department for Business Innovation and Skills (BIS), *A competition regime for growth: a consultation on options for reform* (March 2011) (the Consultation Document).

<sup>51</sup> OFT365, n 40, 3.6.

<sup>52</sup> See OFT Press Release, 'Three Imprisoned in first OFT Criminal Prosecution for Bid-rigging' (June 11, 2008); *R v Whittle, Brammar & Allison* [2008] EWCA Crim 2560. But see A Nikpay, 'Cartel Enforcement: Past, Present and Future' Speech 11 December 2012.

embarrassment to the OFT.<sup>53</sup> In its 2010 consultation on reform of the UK competition law regime, the Government concluded that the most important contributing factor responsible for the dearth of criminal cases and the weakening of the offence's deterrent effect had been the incorporation of the dishonesty requirement into the offence.<sup>54</sup> Following consultation,<sup>55</sup> it went on to remove the dishonesty requirement from the offence and to add statutory exclusions and defences instead.<sup>56</sup> These changes, introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA13), will come into force in April 2014 along with other significant changes to the UK competition law regime, including the creation of a single Competition Markets Authority (the CMA).

This article takes the view that although incorporation of a dishonesty requirement is likely to have been a factor in the criminal regime's lack of success, it is by no means clear that it was the decisive factor. Rather, it considers that the most fundamental problem has been that the Government has not engaged sufficiently with the question of why criminalisation is necessary and appropriate at all for individual cartel behaviour. Further, that the Government has underestimated the substantive and practical problems arising from criminalisation<sup>57</sup> and, in particular, from the operation of parallel civil and criminal cartel regimes. As these wider matters have not been addressed by the 2013 reforms, there is a concern that they may persist.

### **3. THE UK PERSPECTIVE: IS CRIMINALISATION LEGITIMATE?**

#### **A. THE EXPANDING USE OF CRIMINAL LAW IN THE REGULATORY CONTEXT**

The drive for criminalisation in the UK resulted not from a public sense of 'moral outrage' and a bottom-up (or backward-looking) process, but from a top-down (forward-looking) one, driven by the international initiatives described above and the Government and OFT who were eager to introduce greater deterrents to cartel activity. This approach reflects the UK Government's willingness more generally to utilise a variety of alternative offences and enforcement tools – civil/ administrative and criminal - as mechanisms for promoting and encouraging compliance with a regulatory objective.<sup>58</sup> This means that civil and criminal offences in the UK

<sup>53</sup> See *OFT withdraws criminal proceedings against current and former BA executives*, press release 47/10 (10 May 2010), *R v George, Burn, Burnett and Crawley* [2010] EWCA Crim 1148 and J Joshua, 'The BA cartel trial: The OFT got the wrong type of high-impact outcome in this case' [2010] 29 June *Competition Law Insight* 13.

<sup>54</sup> Notwithstanding the lack of live evidence of difficulties arising during the course of a jury trial in a contested case, the government has concluded that is more likely than not that the inclusion of the 'dishonesty' element in the cartel offence is in fact inhibiting the OFT in prosecuting cases. 'Dishonesty' seems to be particularly difficult to prosecute in a white collar criminal environment. BIS 'Growth, competition and the competition regime: Government response to consultation' (May 2012), 7.8.

<sup>55</sup> Consultation Document, n 50.

<sup>56</sup> See EA ss 188A-B, as amended by the ERRA13, s 47.

<sup>57</sup> The failure of the *British Airways* prosecution, for example, appeared to have resulted most immediately from procedural failings.

<sup>58</sup> See generally Law Commission Consultation Report 195, 'Criminal Liability in Regulatory Contexts: A Consultation Paper' (2010).

frequently overlap and administrative proceedings occur where criminal proceedings are also potentially possible. Indeed as the Regulatory Enforcement and Sanctions Act 2008 permits a wide range of sanctions to be used by regulators in administrative proceedings (for example, fines, public censure, and/or compensatory or restorative sanctions) which may be as severe as, and in some instances indistinguishable from, those that might result following criminal proceedings in the criminal courts, regulators have many options.<sup>59</sup>

This approach, as well as contributing to a significant blurring of the line between civil and criminal law, has arguably resulted both in the overuse of criminal law, outside of its traditional context, and its under-enforcement.<sup>60</sup>

## B. WHAT IS CRIMINAL LAW?

In determining whether it might be justifiable to use criminal law as a mechanism simply for deterring cartel activity, an important initial question is whether there is something distinctive about criminal law which requires it to be kept separate from civil law, and if so what that is. It is relatively straightforward to point to a series of descriptive criteria which are traditionally associated with criminal, as opposed to civil, regimes. Nonetheless, it is difficult to use these to define what is understood as 'criminal law'. Although therefore criminal law frequently: deals with public or third party as opposed to private harm;<sup>61</sup> reflects a difference between private and state prosecution of wrongdoing;<sup>62</sup> incorporates a *mens rea* requirement;<sup>63</sup> involves social stigma or disapproval<sup>64</sup> or stronger investigative powers<sup>65</sup> and correspondingly

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<sup>59</sup> J Black in Law Commission Consultation Report 195, n 58, Appendix A

<sup>60</sup> See further section 4. Under-enforcement arises in this situation because of the tendency for enforcement agencies to rely principally on easier-to-prove administrative regimes and administrative sanctions, with criminal law being used only as a last and final resort, see R Macrory, Regulatory Justice: Making Sanctions Effective (Better Regulation Executive)(Final Report, November 2006), The Regulatory Enforcement and Sanctions Act 2008 (RESA), J Black *ibid*, Appendix A, M Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Edward Elgar, 2012), 215-224 and R White, 'Civil Penalties: Oxymoron, Chimera and Stealth Sanction' [2010] LQR 593.

<sup>61</sup> See, e.g. SE Marshall & RA Duff, 'Criminalisation and Sharing Wrongs' (1998)11 *Canadian Journal of Law and Jurisprudence* 7, R Bowles, M Faure and N Garoupa, 'The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications' (2008) 35 *Journal of Law and Society* 389, 391-2; R Nozick, *Anarchy, State and Utopia* (Oxford, Blackwell, 1974), 65-71; L Becker, 'Criminal Attempt and the Theory of the Law of Crimes' (1974) 3 *Philosophy and Public Affairs* 262 and G Lamond, 'What is a crime?' (2007) 27 *Oxford Journal of Legal Studies* 609.

<sup>62</sup> See P Robinson, 'The Criminal-Civil Distinction and the Utility of Desert', (1996) 76 *Boston University Law Review* 201, 204, Bowles, Faure and Garoupa, *ibid*, 391 and G Williams, 'The Definition of Crime', (1955) *Current Legal Problems* Ch 7, 123.

<sup>63</sup> Bowles, Garoupa and Faure, n 61. See also Wils, n 39 and J Coffee, 'Paradigms Lost: the Blurring of the Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101 *Yale Law Journal* 1875, 1878.

<sup>64</sup> Bowles, Garoupa and Faure n 61, and Coffee, *ibid*.

<sup>65</sup> See, e.g. Coffee, n 63.

stronger rights of defence;<sup>66</sup> is concerned<sup>67</sup> with punishment,<sup>68</sup> retribution,<sup>69</sup> or communication of values and not compensation (the concern of civil law);<sup>70</sup> the difficulty with all of these 'distinctions' is that counter-examples can generally be given. Thus as far as the public nature of criminal harm is concerned<sup>71</sup> private prosecutions, although rare, can be brought in English criminal law, while conversely, public intervention can equally be civil rather than criminal. Further, criminal law does not always require mens rea, since it contains offences of strict liability<sup>72</sup> and there is not a perfect match between criminal law and the generation of stigma, or a perfect division between compensation as opposed to punishment, retribution or communication of values.<sup>73</sup> Indeed, it has already been seen that is now common within the administrative sphere to provide for 'penal' sanctions, enforced by a public agency in an administrative procedure, and that, so long as certain conditions are satisfied, this appears to be compatible with the ECHR. A second problem is that even if, for example, there are valid distinctions which can be drawn, such as the different burden of proof in criminal, as opposed to civil law, or the exclusive ability of the criminal law to imprison,<sup>74</sup> these are purely descriptive and do not explain *why* criminal and civil law are regarded as different systems or indeed whether they should be.<sup>75</sup> Answers to this more normative question vary.

Lamond, for example, argues that crimes are the sorts of serious wrongs that warrant state punishment of the wrongdoer.<sup>76</sup> Only *grave* 'wrongs that manifest an unwillingness to be guided by the value violated' thus merit punishment under the criminal law. Indeed, Lamond argues that as 'part of the value of criminal law lies in its constituting the most serious form of censure and condemnation open to a

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<sup>66</sup> *ibid.*

<sup>67</sup> J Coffee, 'Does "Unlawful" mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law', (1991) 71 *Boston University Law Review* 193.

<sup>68</sup> Thus, for example, Tadros argues that it is punishment that ought to guide us in determining what to criminalize, V Tadros, 'Criminalisation and Regulation', University of Warwick School of Law legal Studies Research Paper No 2009-08.

<sup>69</sup> See, e.g. H Packer, *The Limits of the Criminal Sanction*, (OUP 1968) and D Galligan, 'The Return to Retribution in Penal Theory' in C Tapper (ed) *Crime, Proof and Punishment: Essays in memory of Sir Rupert Cross*, ( Butterworths, 1981).

<sup>70</sup> See Coffee, n 67, 208 and Bowles, Faure and Garoupa, n 61. See also D Seipp, 'The Distinction between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59.

<sup>71</sup> See Coffee, *ibid* and references n 61. For a response to Duff and Marshall specifically, see Lamond, n 61 In relation to the *mens rea* requirement there are of course crimes of strict liability.

<sup>72</sup> On which see further, e.g. Lamond, n 61 and A Duff, *Answering for Crime* (Hart 2007), chapters 4 and 6.

<sup>73</sup> D Friedman, 'Beyond the Tort/Crime Distinction' (1996) 76 *Buffalo University Law Review* 103, 110.

<sup>74</sup> Although even this has not always been the case, see further Bowles, Faure and Garoupa, n 61, fn 35.

<sup>75</sup> See Robinson, n 62.

<sup>76</sup> Lamond, n 61, 631.

community – in singling out certain conduct for this treatment', the relationship between the legal and lay concepts of crime is 'symbiotic'.<sup>77</sup>

The criminal cartel offence, however, presents an example of the criminal law being expanded beyond a body of law which derives from, and presupposes, some moral delinquency.<sup>78</sup> The public in the UK have not habitually been disapproving of cartels. Rather, they have 'traditionally been tolerant of, if not positively welcoming',<sup>79</sup> of them. Even following the introduction of the cartel offence, it does not appear that public attitudes towards cartels have changed: survey evidence indicates that attitudes have remained weak and that there is not great public support for the offence or a consensus that price fixing is morally wrong.<sup>80</sup>

On the other hand, the contrary view is that there is no such essential distinction between civil and criminal law and that it is legitimate to use criminal law in the way the Government has done as simply another form of preference shaping disincentives. This approach<sup>81</sup> asks 'what makes particular combinations of choices more or less appropriate for dealing with particular kinds of offences in a particular society?'<sup>82</sup> From this perspective, civil law and criminal law 'are simply two regions on the law's continuum of deterrent threats'<sup>83</sup> and the decision about whether an activity should constitute a criminal offence will 'be based on a comparison between alternative methods of controlling the activity and is not, in general, intrinsic to the activity'.<sup>84</sup>

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<sup>77</sup> *ibid.*, 612. He thus takes the view that while designating conduct as criminal is meant to convey the seriousness of the wrongdoing, it is crimes of mens rea which best fit this conception of criminality

<sup>78</sup> Ashworth and Zedner note that over 3000 new offences were created under the Labour Government first elected in 1997, many of which do not conform to the historical paradigm of criminal law, A Ashworth and L Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 22.

<sup>79</sup> J Joshua, 'Can the UK Cartel Offence be Resuscitated' in Beaton-Wells and Ezrachi, n 34, 145 relying on M O'Kane, *The Law of Criminal Cartels: Practice and Procedure* (OUP 2009), 17-22

<sup>80</sup> See eg, A Stephan 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Competition Law Review* 123, A Stephan, 'The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal' in Beaton-Wells and Ezrachi, n 34, 381, J Joshua, 'Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future' (2010) *theantitrustsource* August, 5 and Norris n 119.

<sup>81</sup> Traditionally described as an economic, or 'law and economics' approach, See, e.g. Bowles, Faure and Garoupa, above n 61., Robinson, n 62, 205. It begins with Cooter's distinction between 'prices' on the one hand and 'sanctions' on the other, R Cooter, 'Prices and Sanctions', (1984) 84 *Columbia Law Review* 15. However, as will become apparent in what follows, it should not be assumed that the results of such an approach will be at odds with those achieved through alternative philosophical approaches.

<sup>82</sup> D Friedman, n 73, 110.

<sup>83</sup> Robinson, n 62, 205, citing S Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (1985) 85 *Columbia Law Review* 1232, 1235 and R Posner, 'An Economic Theory of the Criminal Law' (1985) *Columbia Law Review* 1193. See also Coffee, n67, 222 arguing that from this 'perspective, both tort and criminal law are simply means of controlling externalities'.

<sup>84</sup> Bowles, Faure and Garoupa, n 61, 415.

Instead, the first question is whether an activity should be 'priced' or 'sanctioned'.<sup>85</sup> If sanctions are necessary then the question is how they can be made effective, which is in turn dependent on a number of factors.<sup>86</sup> Following this approach there is a role for criminal law<sup>87</sup> when (i) the balance comes down against the use of civil sanctions (perhaps imposed by administrative agencies)<sup>88</sup>; or (ii) where it is necessary to impose serious non-monetary sanctions unique to the criminal law, such as imprisonment, which, has low social utility.<sup>89</sup> From this perspective, therefore, except where these serious non-monetary sanctions are involved (see further below), there is no inherent relationship between the sanction and the criminal/civil distinction – rather the relationship is between the sanction and the potential error costs it involves and the procedural protections which are necessary to counteract them: it does not demand the choice of one particular system of law (civil/criminal) over the other.

The problem with this latter view is that it does not explain why it is then that 'every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle'.<sup>90</sup> Thus while it might be possible to start from scratch and allocate the roles of private law, administrative sanctions and criminal sanctions according to this account, it does not explain why criminal law is, in so many places,<sup>91</sup> a wholly separate system. Why, as Robinson puts it, have societies not simply adopted a single system in which adequate deterrent sanctions exist? Any need for greater safeguards in the case of greater penalties could have simply been given within one unitary system, rather than 'wasting' 'the criminal law's special procedural safeguards on the large number of less serious criminal cases in which the sanction is no greater than would be available under civil law. The answer, Robinson suggests, is that criminal liability 'signals moral condemnation of the offender'<sup>92</sup> and 'a distinct

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<sup>85</sup> See further Cooter, above n 81. Prices are extracted for doing what is permitted, whereas sanctions are detriments imposed for doing what is forbidden. Whether prices or sanctions are chosen is dependent on whether lawmakers can most easily determine the external cost of the relevant activity or the socially optimal level of it.

<sup>86</sup> For example, a low probability of detection will necessitate an increase in the ultimate sanction in order to retain the necessary degree of deterrence (Bowles, Faure and Garoupa, n 61). The use of punitive damages as a sanction is an option, but may create perverse incentives for the bringing of claims (Coffee, n 67, 231); the use of administrative as opposed to criminal sanctions may mean that the enforcing agency has particular expertise, but conversely can involve coordination costs such as agency capture (Bowles, Faure and Garoupa at 407, citing P Fenn and C Veljanovski, 'A Positive Economic Theory of Regulatory Enforcement' (1988) 98 *Economic Journal* 1055).

<sup>87</sup> And of course the greater procedural protection it provides, given that the stakes and thus error costs are higher.

<sup>88</sup> As a result of the considerations noted in n 86.

<sup>89</sup> As compared with, for example, compensation which is received by the victim. Bowles, Faure and Garoupa, n 61 at, 405-6. See also V Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 *Harvard Law Review* 1477.

<sup>90</sup> Robinson, n 62, 202.

<sup>91</sup> Listed by Robinson, *ibid*, 201.

<sup>92</sup> *ibid*, 203-206. The notion of moral condemnation here is of a particular, narrow and serious form; there will often be activities which attract moral stigma which would not be considered worthy of the specific and serious signal of condemnation provided by criminal law. For example, in western legal systems adultery is not a criminal offence and there is no suggestion that it should become so.

criminal justice system is the only way to effectively express condemnation and to gain the practical benefits of doing so... by creating a special *criminal* label and widely disseminating the notion that this label has a different, condemnatory meaning, the system enhances its ability to communicate a clear condemnatory message. Without a distinct criminal system, it would be more difficult to convey the message that some cases signal condemnation yet others do not.<sup>93</sup> Thus, he concludes, even 'utilitarians ought to want to maintain and sharpen the criminal-civil distinction because it enhances the system's power to reduce crime efficiently'.<sup>94</sup>

This account also explains why imprisonment is exclusively used in the criminal sphere. On the one hand, imprisonment could, in theory, be justified purely on the basis of prophylaxis or deterrence, in which case there would be no reason why it could not be used outside the criminal sphere.<sup>95</sup> However, this is not how imprisonment currently does operate. First, it is not available outside criminal law, and this does not appear to be merely a matter of chance. Second, the factors taken into account in deciding whether or not to impose a criminal sentence and if so how long it should be, do not simply reflect ideas of incapacitation from further offending or deterrence.<sup>96</sup> It appears, therefore, that imprisonment is inherently, as well as practically, unique to criminal law, and that the ability to impose a sentence of imprisonment is part of the criminal law's moral signalling function. The imposition of a sentence of imprisonment does therefore necessitate the use of a distinct criminal law process.

This conclusion on the distinctiveness of criminal law fits well both with Lamond's desire to retain the 'doctrinal purity' of criminal law and with the view of those who regard criminal law simply as part of 'a preference-shaping system of disincentives'<sup>97</sup> but who rely on the role of 'stigma' as a potential advantage of the criminal system.<sup>98</sup>

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For further discussion of the concept of stigma and in particular the distinction between psychological (felt) and normative (justifiable) stigma, see J Stanton-Ife, 'Strict Liability: Stigma and Regret' (2007) *Oxford Journal of Legal Studies* 151, especially 156 onwards.

<sup>93</sup> *ibid*, 208.

<sup>94</sup> *ibid*, 212.

<sup>95</sup> As noted above, from the point of view of deterrence there is no inherent connection between any given sanction and a particular system of law (civil/criminal), provided that whichever system of law is used, adequate procedural protections are available to counterbalance the greater error cost and lack of social utility of the sanction in question

<sup>96</sup> Thus, for example, Criminal Justice Act 2003, s 142(1) lists 5 purposes of sentencing to which a sentencing court must have regard, which includes punishment as well as deterrence, rehabilitation, public protection and reparation. The Sentencing Guidelines Council's Guideline on Seriousness elaborates on these principles by saying that a sentence must start by considering the seriousness of the offence, which will be the key factor in deciding the length of a custodial sentence. 'The seriousness of an offence is determined by two main parameters': the culpability of the offender and the harm caused or risked by the offence. Culpability is then determined by reference to the offender's mens rea, i.e. intent, recklessness, knowledge or negligence. [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_seriousness\\_guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf)

<sup>97</sup> Robinson, n 62. See also D Friedman, n 82 and Bowles, Faure and Garoupa, n 84.

<sup>98</sup> See, e.g. Bowles, Faure and Garoupa, n 61, 406-7, although they note that stigma may encourage rather than deterring career criminals. See also Khanna, n 89, 1492 and 1497 onwards and R Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University law*

It also suggests that, when considering whether conduct should be criminalised, there should not be too great deviation from what is regarded, or should be regarded, as being reprehensible and deserving of such stigma; there is a need to be wary of forward-looking reasoning which undermines the backward-looking force of criminal law. This does not mean that the criminal law cannot be used to shape or change society's view of the acceptability of a particular activity. What it does mean, however, is that the criminal law should not be utilised simply as a mechanism for creating deterrence without addressing the issue of moral stigma.<sup>99</sup> If criminal law is to have an educative role, it must make clear what is morally reprehensible about the activity in question.<sup>100</sup>

In determining whether to criminalise conduct, it is also important to pay attention both to what *has* been made criminal but also to what has *not* (Katz's problem of non-felonious villainy).<sup>101</sup> The credibility of the criminal law may be undermined if one activity is criminalised while another, apparently equally delinquent activity, is not, unless there is a coherent technique for distinguishing between the two.

### C. IMPLICATIONS FOR THE UK CRIMINAL CARTEL OFFENCE

#### i. A forward-looking approach to criminal law

It has been seen that at the time the original criminal offence was adopted cartels were not perceived to be morally wrong. Rather, criminalisation was driven by a top-down, forward-looking process.<sup>102</sup> It has also been seen that complications can arise where a backward-looking approach to the criminal law is not adopted. In the context of the criminal cartel offences these difficulties were compounded by the decision to incorporate a dishonesty requirement within the original offence. The challenges

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*Review 1*, 19. Indeed even Williams', n 62, technical approach warns that '[w]hen the concept of crime is weakened by being made to take in the vast number of summary offences under statute, the tendency must be for the word with its associations to lose its former emotive effect' Thus confining the definition of crime 'to the more serious offences would have the beneficial result that the legal meaning would correspond more closely with the popular one' 114-115. Indeed, although they start from different premises, there is a large degree of convergence between the two approaches. Lamond, although he starts from a more deontological perspective, nevertheless acknowledges that various practical considerations must also play a role in the decision to criminalise certain conduct, n 61, 628. Conversely, community standards are important in ascertaining how much of an activity is optimal from a consequentialist perspective (Coffee, n 67, 227.

<sup>99</sup> In either of Stanton-Ife's senses of the word, n 92.

<sup>100</sup> Normative stigma, in order to generate the necessary psychological moral stigma Stanton-Ife, n 92. See also Robinson n 62, Epstein, n 98, especially 20-1 and nn 107-108 and text.

<sup>101</sup> L Katz, 'Villainy and Felony: A Problem Concerning Criminalisation' (2002) 6 *Buffalo Criminal Law Review* 480. See also Williams, n 62 where it was pointed out that in fact many of the examples Katz gives of supposedly non-felonious villainy are actually now criminal in England and Wales.

<sup>102</sup> The difference between the two could in some ways be characterised by the distinction between focusing exclusively on the harm produced and focusing on both the harm and an assessment of the moral culpability of the defendant.



presented by the *Ghosh* test,<sup>103</sup> which requires a jury to make both a moral assessment of whether the defendant's behaviour is dishonest by the standard of reasonable and honest people and an assessment of whether the defendant realised that he was acting dishonestly by this standard, are great enough in the context of ordinary criminal laws such as theft.<sup>104</sup> It is questionable, however, whether juries would be willing to conclude that a defendant had acted dishonestly in concluding a cartel agreement, in circumstances where the jurors would be unlikely to have pre-existing instincts about the kind of conduct involved and also might be swayed by arguments that, for example, the defendant had not benefited personally and/ or had justifications for how he had behaved (for example, trying to avoid redundancies or business closure).<sup>105</sup> It seems difficult therefore to use dishonesty as a mechanism for *signalling* the seriousness of an offence and bolstering the view that it should be morally condemned when dishonesty relies upon, and presupposes, a pre-existing sense of moral stigma in order to function: 'it does not seem possible 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 own bootstraps in this way, any attempt to do so risks damaging both the process of cartel criminalisation and the criminal law more generally.'<sup>106</sup>

In its consultation on reform the Government recognised that the dishonesty requirement was likely to be hindering successful prosecution of cartels. In the actual reforms, however, it did not address the questions which seem naturally to follow from such an acceptance: if cartel behaviour is not considered to be dishonest why then should the conduct be criminalised at all? To be successful it seems that, as in other areas of white collar crime where, arguably, 'the public learns what is criminal from what is punished, not vice versa',<sup>107</sup> the new and reformed criminal law must play a role in shaping and changing/educating views of the conduct, explaining *why* it is that even if the behaviour is not dishonest it should nonetheless be morally condemned and so permitting moral stigma to be generated. Even if therefore the removal of the dishonesty requirement from the UK offence makes convictions more straightforward, this action alone will not guarantee that censure will follow convictions or indeed that judges will be willing to imprison those convicted.<sup>108</sup> Rather, in addition, steps must be taken 'to create, in part through the process of criminalisation itself, a strong sense of the unacceptability of the conduct in question, within the industry in question and beyond':<sup>109</sup> the process must help build an

<sup>103</sup> See n 45.

<sup>104</sup> See, e.g. A. Halpin, "The Test of Dishonesty" [1996] *Criminal Law Review* 283.

<sup>105</sup> See eg, The Australian National University Centre for Competition and Consumer Policy, Working Paper ACCC Enforcement and Compliance Project: the Impact of ACCC Enforcement Activity in Cartel Cases, May 2004.

<sup>106</sup> R Williams, 'Cartels in the Criminal Landscape' in Beaton-Wells and Ezrachi, n 34, 298-9 and P Whelan, 'The Case for Adoption of BIS's 'Option 4'' (2012) *European Competition Journal* 589, 592.

<sup>107</sup> Coffee, 'Paradigms Lost', n 63, 1889; Coffee 'Does 'Unlawful' Mean 'Criminal'?', n 70, 223-24.

<sup>108</sup> This has been a difficulty in a number of jurisdictions, including Ireland, Canada and Japan, see e.g. Calvani and Carl, n 49.

<sup>109</sup> Law Commission Consultation Report 195, n 58, 4,9

understanding of *why* cartel conduct warrants official censure, moral condemnation and involves a harm-related moral failing<sup>110</sup> so that that it goes beyond achieving deterrence and punishment. If these steps are not taken, the law will not be able to benefit from the deterrent effect of precisely this moral signalling function which it sought to harness through the criminalisation process. Further, 'conviction may generate little stigma, little by way of deterrence may be achieved, and little by way of punishment may be justified. Consequently, the criminal law is liable to fall into disrepute, in the eyes of both prosecutorial agencies, and those subject to regulation, alike'.<sup>111</sup> The success of a criminal regime is also dependent upon the message about the 'wrong' of cartel behaviour not being undermined by not criminalising equally anticompetitive behaviour - the problem of non-felonious villainy outlined above.

These are important points which, arguably, explain the success of the US criminal regime.<sup>112</sup> In the US, the criminal nature of antitrust law – for corporations and individuals alike - has been a trait since its inception. Not only has the Sherman Act of 1890 always provided that violations of its core antitrust provisions are criminal in nature (originally misdemeanours, now felonies) and set out the maximum fines and periods of imprisonment that may follow for those found to be in breach, but the antitrust system as a whole has always benefitted from public support. Indeed, the passage of the Sherman Act 1890 was specifically a reaction to 'populist outrage' about the conduct of the 'trusts' and a recognition that there was a pressing need to do something about them.<sup>113</sup> Populist support (rather than agency pressure) also drove Congress's decision to transform Sherman Act violations from misdemeanours into serious felonies.<sup>114</sup> This background has facilitated eventual<sup>115</sup> acceptance that individuals responsible for violations should be held accountable for those breaches. 'Thus what seems to distinguish the US is public willingness—almost without debate—to treat individuals who participate in cartels as serious criminals who should be treated in the same way as embezzlers, stock swindlers and other economic thieves.'<sup>116</sup>

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<sup>110</sup> *ibid.* See also eg A Stephan, 'The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal' in Beaton-Wells and Ezrachi, n 34, 381

<sup>111</sup> *ibid.*, 4.6-7.

<sup>112</sup> See also eg, Shaffer and Nesbitt, n 7 ('In Australia, survey evidence suggests a majority of that country's public now views antitrust offenses in moral terms, following an extensive public relations campaign by the Australian competition authority. The survey indicates that 42% of the public believe that cartel conduct should be a crime, and since 2009 it now is.')

<sup>113</sup> See WL Letwin, 'Congress and the Sherman Antitrust Law: 1887-1980' (1956) 23 *University of Chicago Law Review* 221, 235. and *Standard Oil Co of New Jersey v United States* 221 US 1, 50 (1911).

<sup>114</sup> Baker, n 34 and Werden, n 30.

<sup>115</sup> Even then it has taken a long time for criminalisation of antitrust conduct to become accepted, see eg, Werden, n 30.

<sup>116</sup> Baker, n 34, 27. Shaffer & Nesbitt, n 7 ('Criminalization implicates moral judgments that vary with sociocultural context. U.S. antitrust law has long exhibited a moral dimension, which facilitates the use of criminal sanctions against individuals in cartel cases. In contrast, "there appears to be (at least outside North America) no strong feeling on the part of the wider public about the inherent criminality of price fixing and like practices." National competition authorities

## ii. Generating moral stigma and distinguishing other anticompetitive conduct

In order to generate moral stigma, therefore, it would seem to be crucial for it to be identified with sufficient clarity what is morally reprehensible about cartel conduct; and what features of such activity distinguish it from other anticompetitive conduct which is not criminalised.

The new criminal cartel offence contains no mens rea requirement but applies to horizontal price fixing and other cartel activity,<sup>117</sup> unless one of the statutory exclusions (EA02, section 188A) or defences (EA02, section 188B) apply. The former specifies certain circumstances in which the cartel offence is not committed – broadly where (i) 'relevant information', sufficient to establish that the offence might apply, is notified to customers or a person requesting a bid, or is published, or (ii) if the agreement is made to comply with a legal requirement. The latter incorporates defences to the commission of the cartel offence - broadly where the individual can show that he or she (i) did not intend that the nature of the arrangements would be concealed from customers or the CMA or (ii) took reasonable steps to disclose his or her actions to a legal advisor.

It could be argued that because, for example, the new regime 'carves out' agreements which had been notified or published and/or which have not been concealed or hidden from legal advisors, that a connection can be made between the covert and secretive agreements prohibited by the offence and the concept of 'deception', fraud or other offences against which there is a moral norm.<sup>118</sup> If it was the Government's aim in the new legislation to so link the new offence, the connection is at best indirect; the core of the new version of the offence targets price fixing and other cartel arrangements<sup>119</sup> not deception. Deception, or at least a failure to disclose, or false representation is only implied. Further, deception per se is not a criminal offence. Thus section 2 of the Fraud Act 2006 creates an offence (under section 1) where a person makes a false representation, but only if (s)he does so dishonestly and intending to make a gain or cause a loss or risk of loss.<sup>120</sup> In addition, and more fundamentally, however, it is submitted that this approaches the issue from the wrong

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outside of North America recognize this uphill battle and thus view public education about the evils of cartel offenses as a central component of their missions...').

<sup>117</sup> EA02, s 188 (essentially, agreements between individuals to make reciprocal arrangements that relate to at least two undertakings and whose purpose is to fix prices, restrict output, allocate markets or rig bids).

<sup>118</sup> See eg, P Whelan, 'Cartel Criminalization and the Challenge of Moral Wrongfulness' (2013) 33(3) *Oxford Journal of Legal Studies* 535 and B Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32(3) *Legal Studies* 369.

<sup>119</sup> In *Norris v Government of the United States of America* [2008] UKHL 16 the House of Lords (now Supreme Court) confirmed that price fixing did not amount to a 'conspiracy to defraud' at common law unless some aggravating factor was present: eg, fraud, misrepresentation, violence or intimidation.

<sup>120</sup> Further, the Fraud Act itself is hardly uncontroversial and it is not universally accepted that it maintains rather than undermines the criminal law's moral signalling function, see further D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] *Crim LR* 193 It is not clear that offering goods for sale at a cartelised price would be sufficient for liability even under the wide ranging 2006 Fraud Act.

direction. Criminal law is a last resort and should be used as such. The question therefore should not be whether it is ex post facto possible to justify a criminal offence by finding some, albeit indirect, connection to the core of criminal law. Rather it should be whether it has been sufficiently established that only criminal law can truly address and signal the moral delinquency inherent in cartel conduct - in this case this clearly has not been done.

The Government has also not made it clear why cartels have been singled out and treated differently from other types of anti-competitive agreements and single firm conduct. Although it could be again argued that the Government has sought, through the new exclusions and defences to link the offence with the fact that cartels frequently involve an element of secretive conspiracy (they are covert or involve a 'spiral of delinquency'<sup>121</sup>), are easy to conceal, are designed to clearly subvert the process of competition with the objective of increasing the members' profits whilst causing significant economic harm to markets and customers which is 'manifest, considerable, and calculable',<sup>122</sup> it is not clear that these factors alone are sufficient justification for criminalising cartel activity but not other seriously anti-competitive conduct. Other conduct prohibited by the antitrust laws may also cause significant economic harm, even if it may not be so great or as easy to quantify and/or the conduct may be harder to conceal.<sup>123</sup> Such conduct may also involve an element of secretive concertation (because the conspirators wish to hide the existence of any serious competition law violation),<sup>124</sup> a calculated defiance of the antitrust laws and/or an element of abuse of individual or collective corporate power - this is the reason why significant corporate fines have been imposed on infringing undertaking(s) for a number of different type of antitrust violations. Indeed the largest fine ever imposed by the Commission on a single undertaking was the €1.06 billion fine levied on Intel<sup>125</sup> - not for participating in a cartel, but for abuse of its dominant position.

The strongest argument for criminalising cartels, but not other conduct targeted by the antitrust laws, seems to rest on the fact that, not only do cartels restrict competition between competitors and cause significant harm, but that they are 'naked': they do not involve cooperation which is reasonably necessary to generate efficiencies or otherwise benefit consumers.<sup>126</sup> The conduct does not, therefore, necessarily seem to require an element of secrecy or deception but is targeted because it constitutes a frontal assault on the principle of competition, is relatively easy to identify and to

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<sup>121</sup> Harding and Joshua, n 17, 149.

<sup>122</sup> *ibid.*

<sup>123</sup> Further, although it is arguable that in these cases corporate fines may operate as a more effective deterrent, this does not seem to provide a sufficient justification for distinguishing the types of conduct from a moral point of view.

<sup>124</sup> See also eg, *Norris* n 119 where the House of Lords held that secrecy cannot in itself render price-fixing criminal under the common law conspiracy to defraud. Rather an aggravating factor is required, see n 119.

<sup>125</sup> *Intel* 13 May 2009 ( IP/09/745 and MEMO/09/235 ).

<sup>126</sup> See n 13.

distinguish from pro-competitive behaviour,<sup>127</sup> is clearly condemned by competition law rules<sup>128</sup> and inflicts great economic harm which should be prohibited rather than taxed.<sup>129</sup> These points are not drawn out in the legislation which, on the contrary, has been deliberately designed not to engage with them (see further section 4.A below). It would seem essential, however, that these aspects of cartel conduct should be clear, if a case for criminalisation is to be built and if an anti-cartel culture is to 'evolve' to the point that it is natural to view cartel activity as a serious crime.

### **iii. Why are individuals but not corporations criminally liable for cartel conduct?**

In the US and Canada the legislator and/or enforcers have sought to draw a clear line between conduct subject to civil and criminal enforcement respectively. Criminal enforcement – against corporations and individuals - is reserved for concealed hardcore cartel activity. Other agreements are reviewed only in civil proceedings. In the UK, however, although the legislature has striven to separate and differentiate the criminal offence from the civil one, no line has been drawn between cartel conduct which is subject to criminal enforcement and conduct which is not. Rather, both criminal and civil enforcement is feasible and, indeed, may be required in hardcore cartel cases - individuals may be prosecuted criminally for their participation in a cartel, but the undertaking, through which the individual acted and which directly benefits from the offence, can only be investigated in an administrative procedure. In *Marine Hoses*, for example, the undertakings involved were fined following investigation by the Commission, whilst the individuals involved were prosecuted criminally and imprisoned.<sup>130</sup> In the absence of a coherent justification for this difference in treatment, the 'non-felonious villainy' problem arises as the criminal law is allowed to signal moral opprobrium in a random and inconsistent fashion: the signal about the moral culpability of perpetrators becomes confused.

The rationale for treating undertakings and individuals resulted from the Government's desire to maintain consistency with EU law (for the undertakings) whilst at the same time seeking to separate the criminal offence from the civil regime with the objective of ensuring that its enforcement would not be compromised by virtue of it being characterised as 'national competition law' within the meaning of Article 3 Regulation 1/2003.<sup>131</sup> Other justifications for this distinction in treatment might exist, however. For example, it could be argued that it is not intelligible or desirable to criminalise the conduct of corporations, there is no point in doing so – since corporations feel no shame and cannot be imprisoned, and/or that it is the individuals not the legal person that are, in reality, responsible for the violation.

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<sup>127</sup> In relation to other conduct, such as resale price maintenance or single firm conduct it is much more difficult to distinguish anticompetitive from pro-competitive conduct, see eg, Werden, n 30

<sup>128</sup> See n 4.

<sup>129</sup> See Werden, *ibid* and Cooter, n 81

<sup>130</sup> See n 52.

<sup>131</sup> [2003] OJ L1/1.

Criminalisation of the conduct of corporations can, however, be intelligible and desirable in certain circumstances. Indeed, as corporations are systems with a culture that exists independently of the specific personnel in the company, corporate policy can be regarded as the corporation's 'purpose',<sup>132</sup> containing a synthesis and compromise of the views of the individuals involved. Consequently, in some cases the intentionality which can be said to lie behind the policy may be one more appropriately attributable to the company than to any particular individual or individuals within it.<sup>133</sup> Where this is the case corporations do, arguably, possess the two conditions necessary for blameworthiness; the ability to make decisions and to fail, inexcusably, to perform an assigned task. Indeed, criminal liability may be required to express 'the community's condemnation of the wrongdoer's conduct by emphasising the standards for appropriate behaviour' and 'defeat[ing] the wrongdoer's valuation of the worth of some person or good.'<sup>134</sup>

This also suggests that it is not possible to justify a clear allocation of criminal responsibility for a violation between the corporation and individual respectively. Rather, it reinforces the view that cartels have both a collective corporate and a human dimension. Although, therefore, cartel conduct could result from an individual's defiance of corporate policy, and his hiding of the conduct from senior management and general counsel, so too could it result from a corporate culture that condones or encourages such behaviour – whether directly or indirectly.<sup>135</sup> This indicates that even though it may be important that 'management is sufficiently incentivised to take a personal interest in facilitating compliance with the company's legal obligations',<sup>136</sup> and it may be questioned whether corporate sanctions alone can be effective in deterring cartels,<sup>137</sup> the question of who should accept responsibility for the conduct and bear the sanctions is complex and may differ significantly from case to case.

It seems difficult, therefore, to justify a rule which assumes that it is the individual alone who should be held morally culpable for a cartel infringement through criminal proceedings. There should be the possibility at least of treating corporations and

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<sup>132</sup> See, e.g. E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1.

<sup>133</sup> See, e.g. J Gobert, 'Corporate Criminality: four models of fault' (1994) 14 *Legal Studies* 393, B Fisse and J Braithwaite, 'The allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1986-1988) 11 *Sydney Law Review* 468, 478 and J Ohlin, 'Group Think: the law of conspiracy and collective reason' (2008) *Journal of Criminal Law and Criminology* 147, 173. French (P French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984) calls this process the CID; Corporation's Internal Decision-Making structure. See also B Hermalin, 'Economics & Corporate Culture' <http://ssrn.com/abstract=162549> or <http://dx.doi.org/10.2139/ssrn.162549>.

<sup>134</sup> L Friedman, 'In defense of corporate criminal liability', 23 *Harvard Journal of Law and Policy* 833.

<sup>135</sup> And indeed this is one of the reasons why corporate criminal liability is in fact intelligible and desirable, even when the criminal law is understood, as described above, as a method for signalling community moral opprobrium.

<sup>136</sup> A Khan, 'Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?' [2012] 35(1) *World Competition* 77, 80.

<sup>137</sup> See nn 28-33 and text.

individuals equally: 'the allocation of individual and corporate responsibility for cartel conduct should not depend on whether the enforcement proceedings are civil or criminal'.<sup>138</sup> This does not automatically mean that criminal liability should be extended to corporate acts as well, however. On the contrary,<sup>139</sup> where the coherence of criminal law is already being stretched by expanding its reach to the conduct of corporations (unnatural subjects of the criminal law),<sup>140</sup> even greater care should be taken to ensure that liability is attached only to conduct considered to be morally stigmatic enough to justify criminalisation.

#### **4. THE UK REGIME: SUBSTANTIVE AND PROCEDURAL PROBLEMS IN CRIMINALISATION**

##### **A. SUBSTANTIVE PROBLEMS: DEFINING THE OFFENCE**

The decision to layer a criminal cartel offence on top of the administrative one has, in addition to the theoretical problems discussed above, created both substantive and procedural difficulties, which may have contributed to both a lack of clarity about the scope of the offence and its under-enforcement.

As the criminal offence does not exactly mirror the civil counterpart it seeks to reflect and supplement, a core difficulty has been to ensure that the offence is not over-inclusive. Although designed to apply to only a subset of agreements prohibited by Article 101/Chapter I CA98, the legislature has not found it easy provide a sufficiently clear legal definition of such activity<sup>141</sup> which distinguishes the problematic hardcore cartel conduct targeted from conduct which is not targeted and which would not infringe the civil prohibition. In particular, the criminal offence is not designed to reach benign or pro-competitive horizontal cooperation agreements which might require some restrictions on the competitors' price setting or output, for example: agreements amongst competitors to charge a common price in a blanket licence agreement for artistic works; the fixing of interchange fees in a payment system; syndicated bank loans and/or certain insurance underwriting.

In some jurisdictions, the criminal legislation draws a clear distinction between these different types of conduct. In Canada, for example, although price-fixing, market allocation and output restriction agreements between competitors are illegal per se and

<sup>138</sup> B Fisse, 'Recent OFT Cartel Decisions Illustrate Fundamental Flaws in UK Cartel Law' October 2009

<sup>139</sup> See further P Robinson, 'Criminalisation Tensions: Empirical Desert, Changing Norms & Rape Reform' (February 10 2012). *The Structures of the Criminal Law*, Duff, Farmer, Marshall Renzo & Tadros, eds, 2011: University of Pennsylvania Law School Public Law and Legal Theory Research Paper Series Research Paper No 10-14, available at SSRN: <http://ssrn.com/abstract=1584779>.

<sup>140</sup> In the cartel context, therefore, reputational loss may not be of significant concern for the undertakings involved – indeed, if all or virtually all firms on the market have been involved in the cartel, customers will have little choice but to continue transacting with them. See eg, J Armour, C Mayer and A Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets', (September 14, 2012). Oxford Legal Studies Research Paper No. 62/2010; ECGI - Finance Working Paper No. 300/2010.

<sup>141</sup> '[T]he elements of the ... offence should be clearly defined so as not to risk a contravention of Article 7 of the European Convention on Human Rights', *ibid*, 2.1

can be prosecuted criminally there is a statutory ancillary restraints defence for restraints which are directly related to and reasonably necessary to give effect to a broader or separate agreement among the parties (such agreements are reviewable only under the civil rules). In the UK, the Government has not wished to allow criminal trials to be muddled by allowing this kind of economic and efficiency criteria to be raised by the defendant. Rather, it has sought to ensure that the offence will not prohibit agreements which would be lawful under the civil rules through indirect means. The dishonesty requirement proved to be a poor mechanism for bridging weakness in the objective definition of the prohibited conduct.<sup>142</sup> It also appeared that it was unlikely to achieve the Government's objective of excluding economic evidence from criminal trials.<sup>143</sup> In the debate that led up to the reform of the cartel offence, the Government accepted this.

The Government will hope, therefore, that that the incorporation of exclusions, combined with statutory defences and prosecutorial guidance, will prove a better mechanism for doing so. As, however, the legislation has again approached the problem 'indirectly', and this time in an extremely formalistic manner, it is not clear that it will fare better. On the contrary, the language utilised in the new legislation, which is not familiar to competition lawyers, is already causing considerable turbulence in the business community and fear that the criminal offence applies too broadly, encompassing a number of benign ventures between competitors. Prosecutorial Guidance setting out when prosecution is (or is not) likely to be in the public interest, is unlikely to be of much immediate comfort to business-people concerned that they may have committed a criminal offence and about the wider consequences that follow from a criminal offence having been committed (for example, money laundering issues, the nullity of the agreement and the possibility of extradition), not to mention rule of law concerns with such an approach.<sup>144</sup> Even if, therefore, the new offence is certain enough to survive the relatively un-exacting requirements of Article 7<sup>145</sup> it seems possible that the offence will have the effect of

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<sup>142</sup> Harding and Joshua, n 17. See also BIS, A Competition Regime for Growth: A Consultation on Options for Reform, March 2011, para 6.11 and OFT365, n 40.

<sup>143</sup> See n 46 and text and *IB v The Queen* [2009] EWCA Crim 2575.

<sup>144</sup> See the CMA's Consultation on Prosecution Guidance for the cartel offence, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243709/5-cartel-offence-prosecution-guidance-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243709/5-cartel-offence-prosecution-guidance-consultation.pdf). Some jurisdictions, such as the US, have however also defined criminal antitrust offences broadly and relied on judicial interpretation and the exercise of prosecutorial discretion to confine, over time, its application to established, secretive hard-core cartel offences. In the US it has, over a long period of time, become clear that price fixing which is ancillary to an efficiency enhancing integration is not illegal per se under section 1 and officials at the DOJ Antitrust Department have sought to clarify that they will only criminally prosecute agreements with no possible legitimate business or economic justification and which have been concluded in secret with pre-emptive cover-ups – scenarios in which defendants cannot reasonably argue that they did not grasp the illegality of their conduct. See speech T Barnett, Seven Steps to Better Cartel Enforcement, 2 June 2006. The development of defined circumstances in which criminal prosecutions will be brought has been critical to the efficient administration of justice in the US.

<sup>145</sup> For discussion that the offence is sufficiently certain, see P. Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71(3) *Cambridge Law Journal* 67.



detering the conclusion of some pro-competitive arrangements and undermining the Government's objective of putting in place a competition regime for growth.

## B. PROCEDURAL DIFFICULTIES

It has been seen that the co-existence of two separate civil and criminal cartel regimes requires one process for proceeding against legal entities and another for proceedings against individuals.<sup>146</sup> Further, that as no coherent moral justification has been provided for this difference in treatment there is a danger that the message about the criminality of the individual's behaviour is being undermined. Another problem is that the set-up is cumbersome procedurally. It requires the exercise of different enforcement models (one judicial and one administrative) for the different proceedings, the use of different enforcement powers<sup>147</sup> and the exercise of extreme care to ensure that one process is not compromised by the other. In some circumstances, the criminal and administrative processes may even be handled by two different agencies, as was the case in *Marine Hoses* for example.<sup>148</sup> As criminal investigations and proceedings are also more resource intensive than administrative ones and significantly more risky, enforcers may be encouraged to side-step all of these complications by side-lining the criminal offence<sup>149</sup> and bringing administrative proceedings instead. In 2009, for example, the OFT did not bring criminal proceedings but imposed major fines on construction firms engaged in bid-rigging with competitors<sup>150</sup> and recruitment agencies<sup>151</sup> engaged in price fixing, stating that both cases involved serious and significant violations. These decisions 'highlight the dangers of loss of credibility and compromise of deterrent impact where an enforcement agency describes a cartel case as serious yet gives no explanation, or an unconvincing explanation, for not bringing criminal proceedings'.<sup>152</sup>

## 5. CONCLUSIONS

The UK's criminal cartel offence has not, to date, been a success and the Government has accepted that it has not had the deterrent effect desired. On the contrary, the events which have unfolded appear to confirm that dangers are inherent in the use the criminal law to prohibit conduct to which no pre-existing moral stigma is attached. Criminalisation in such circumstances risks undermining its ability to provide an

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<sup>146</sup> See P Whelan, 'Cartel Criminalisation and Due Process: The Challenge of Imposing Criminal Sanctions Alongside Administrative Sanctions within the EU' (2013) 64(2) *Northern Ireland Legal Quarterly* 143. Another difficulty, not discussed here, is to find a workable method of combining a leniency policy with a criminal regime.

<sup>147</sup> Although the administrative investigation may be conducted in line with PACE and other forms of criminal procedural protection in order to preserve any evidence gathered for admissibility in a criminal trial, OFT 515, *Powers for investigating criminal cartels*, January 2004.

<sup>148</sup> See n 52.

<sup>149</sup> See n 59 above

<sup>150</sup> *Construction Companies – bid rigging* (21 September 2009)

<sup>151</sup> *Construction Recruitment Forum* (29 September 2009).

<sup>152</sup> See B Fisse, 'Recent OFT Cartel Decisions Illustrate Fundamental Flaws in UK Cartel Law' October 2009.

effective deterrent and the moral signalling function of the criminal law more generally. It remains to be seen whether the 2013 reforms will be sufficient to overcome the problems with the offence identified. It does not appear, however, that the Government has yet taken sufficient steps to develop an anti-cartel culture and/or to identify the specific features of cartel activity that might be used to build a consensus that moral condemnation, and criminalisation, of cartel conduct is warranted. In addition, the continuing existence of an overlapping administrative offence is liable to further weaken the force of the criminal law both by undermining the message about criminality that the Government is trying to create and by incentivising the CMA to sidestep more complex and risky criminal proceedings. Conversely, while it may not deter cartel activity, uncertainty about the scope of the new offence might chill beneficial cooperation between competitors, by leading to undesirable risk-aversion and to the over-commitment of firm resources in the avoidance of risk.

The difficulties that have been encountered in the UK should provide salutary lessons for other countries considering how best to combat and to deter cartels. Indeed, given the significant obstacles to criminalising cartel activity identified, serious consideration should be given to the question of whether, alternatively, civil liability might be expanded to provide a more efficient and effective mechanism for increasing deterrence.<sup>153</sup> First, concerns about sanction insufficiency could be addressed. For example, if corporate fines are believed to be insufficient to ensure deterrence, the category of actors liable under civil rules could be expanded, perhaps to encompass individuals directly involved<sup>154</sup> (although absolute personal liability must certainly be un-indemnifiable and un-shiftable,<sup>155</sup> this does not mean that it must be criminal in nature<sup>156</sup>) or other actors such as lawyers, underwriters, outside directors or accountants who possess privileged information about the company and have the capacity to influence firm behaviour to ensure compliance with the law (gatekeeper

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<sup>153</sup> See generally eg see ICN Cartel Working Group Paper, 'Defining Hard Core Cartel Conduct', n 8. Care would need to be taken to ensure that procedural protections in any civil/administrative process are sufficient to safeguard the investigated entity's rights, see nn 24-26 and section 3.B.

<sup>154</sup> See nn 32-40 and text and R Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1983-84) 93 *Yale Law Journal* 857 who identifies three circumstances in which corporate liability might be insufficient: asset insufficiency, where the firm cannot pay the law's price for the wrong done; sanction insufficiency, when the legal system cannot charge a high enough price to deter (which might include situations of asset insufficiency) and enforcement insufficiency, when the legal system cannot detect or prosecute a significant proportion of offences, see also n 29 and text).

<sup>155</sup> See, for example, A Khan, 'Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?' and John Armour and Jeffrey N. Gordon, 'Systemic Harms and Shareholder Value', forthcoming (2014) 6 *Journal of Legal Analysis*, available at <http://ssrn.com/abstract=2307959>.

<sup>156</sup> In the UK, the EA02 provides for the disqualification of directors of companies involved in a violation of the civil rules, but the procedure has not yet been used, See, for example, A Khan, 'Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?'. A number of countries have power to impose fines on individuals as well as undertakings in administrative proceedings, see ICN Cartel Working Group Paper, 'Defining Hard Core Cartel Conduct', n 816, 64-65 see Kraakman, n 154, 865.

liability<sup>157</sup>). Further a broader array of civil sanctions could be considered, including individual fines or non-monetary sanctions such as disqualification orders and/or punitive injunctions for corporations.<sup>158</sup>

Second, the issue of enforcement insufficiency could be addressed.<sup>159</sup> Indeed, Becker's research on major felonies in the US suggests that the probability of detection had a greater impact on the commission of (major felony) offences than the level of punishment.<sup>160</sup> Steps could therefore be taken to encourage greater public enforcement, private enforcement (particularly stand-alone actions, Landes and Davis, for example, conclude following a study of forty successful private antitrust cases, that more than half the underlying violations were first uncovered by private attorneys rather than government enforcers<sup>161</sup> and that private litigation 'probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the DOJ'<sup>162</sup>) and to increase the probability of detection. Although leniency regimes are now routinely operated by antitrust enforcers, a broader range of actors could be drawn in. In the context of corporate fraud, for example, Dyck, Morse and Zingales demonstrate that actors with no residual claim in the firms involved, such as employees, non-financial-market regulators and the media,<sup>163</sup> can play a key role in fraud detection. Not only do such people gather considerable relevant information as a by-product of their normal work, they also have broad range of incentives for uncovering fraud. Such incentives include journalistic reputation, avoidance of potential legal liability, and, crucially, monetary reward, see for example the Federal Civil False Claims Act, also known as the *qui tam* statute.<sup>164</sup> Similar provisions are also used for the detection of tax evasion,<sup>165</sup> and can be used in the antitrust context.<sup>166</sup>

In conclusion, it seems that there are significant difficulties and obstacles involved in introducing an effective criminal cartel offence. For jurisdictions considering how best to increase the deterrent effect of their anti-cartel rules it might, therefore, be

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<sup>157</sup> Kraakman, n 154, 888-96.

<sup>158</sup> See e.g. n 156 and B. Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in Beaton Wells and Ezrachi, n 34.

<sup>159</sup> The expression is Kraakman's, n 154, 867.

<sup>160</sup> See G Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 *Journal of Political Economy* 169.

<sup>161</sup> R Lande and J Davis, 'Benefits from Private Antitrust Enforcement: Forty Individual Case Studies', (2007-8) 42 *University of San Francisco Law Review* 879, 880. But see, GJ Werden, SD Hammond and BA Barnett, 'Deterrence and Detection of Cartels: Using all the Tools and Sanctions' Speech 1 March 2012.

<sup>162</sup> *ibid.*

<sup>163</sup> A Dyck, A Morse and L Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) LXV *Journal of Finance* 2213.

<sup>164</sup> *ibid.*, 2216 and 2251.

<sup>165</sup> *ibid.*

<sup>166</sup> In the UK, for example, the OFT offers, subject to conditions, financial rewards to those who proffer information about cartel activity, see <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards#.Un994vm-1cY>.

sensible to consider a full range of possible options, including whether liability should be individual and/or corporate, criminal and/or civil before it is concluded that individual criminal liability is the solution.<sup>167</sup>

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<sup>167</sup> See eg, Jonathan Djanogly MP in Standing Committee prior to the enactment of the original offence Hansard, HC Standing Committee B, Enterprise Bill, Fifth Sitting, April 23 2002, Col 162 ('Another important concern is that there is something of a presumption that criminal sanctions are necessarily a more effective way of remedying the problem of cartels than civil penalties. ... The current movement is away from criminal towards civil penalties... Criminal prosecution in such cases simply does not work, not least because juries must discuss and consider what are often commercial rather than criminal issues in the traditional interpretation of criminality') and A MacCulloch, 'Honesty, morality and the cartel offence' [2007] ECLR 355, 356.