

The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure

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Abstract

The UK Cartel Offence was introduced in the Enterprise Act 2002 to challenge hard-core cartels and enhance the deterrent effect of the UK competition regime. In its initial phase of operation there was some success. However, a number of significant cases failed to secure convictions. This damaged confidence in the ability of the UK competition authorities to bring successful prosecutions, and ultimately questioned the usefulness of the Cartel Offence. This Chapter examines the problems that beset the original Cartel Offence and the lessons learned from the small number of prosecutions brought before the courts. It goes on to examine the reforms in 2013, that removed the controversial 'dishonesty' element from the offence, and replaced it with carve outs for openness and publication. Alongside the practical issues in relation to the development of the UK Cartel Offence consideration is also given to a parallel process which saw a form of consensus developing in the academic literature as to the nature of the wrong at the heart of individual cartel activity. It is suggested that this greater understanding can be used to direct efforts to rebuild confidence in the reformed UK Cartel Offence going forward. Increased importance should be given to the securing of good evidence of individual culpability in relation to cartel activity during the investigation phase. Once good evidence is secured, better prosecution cases can be built on the basis of the new narrative of wrongfulness for hard core cartel activity.

1. Introduction

The introduction of the Cartel Offence in the UK was met with much excitement by many in the UK competition law community. Much scholarly ink was spilled discussing the nature and shape of the offence introduced by the Enterprise Act 2002.¹ It is safe to say that the original offence was not without controversy, but in this chapter I do not intend to focus on the detail of that debate.² Here I intend to examine, not the rise of the cartel criminalisation in the UK, but its decline. We have not, yet, seen the official fall of this new empire, but its continued relevance is definitely in doubt.

The nature of the Cartel Offence introduced into the UK will be set out on section two. An attempt will be made to explain the choices which were made in its controversial structure. In section three I shall look at the practical failures which led to the first seeds of the institutional doubt which has plagued the UK Cartel Offence in its mid-life. Following that mid-life crisis there was a process of legislative reform that, while being well intentioned and having some positive aspects, had significant flaws and has proved in practice to have very limited impact. The institutional appetite for the Cartel Offence appears to have been fundamentally damaged.

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¹ See, for example, J Joshua, 'The UK's New Cartel Offence and its Implications for EC Competition Law: A Tangled Web' (2003) 28 *European Law Review* 620; A MacCulloch, 'The Cartel Offence and the Criminalisation of United Kingdom Competition Law' [2003] *JBL* 616-627; and J Lever & J Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence"' Part I, [2005] *ECLR* 90-97, Part II, [2005] *ECLR* 164-172.

² For a retrospective look at the genesis and first phase of the Cartel Offence in the UK see, Angus MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy?' in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (DUP 2010).

In the section four I shall examine a parallel but much more positive process – that is the scholarly debate around criminalisation. While enforcement activity in the UK was beset with problems, the scholarly community was making real progress, and reached a point of consensus that was perhaps surprising given the controversy in relation to the Cartel Offence’s first phase. There has now developed a broad consensus as to the key features and overall ‘shape’ of workable cartel criminalisation to guide future reform of criminalisation in other jurisdictions. This new understanding is, rather ironically, perhaps too late to help restore confidence in the UK Cartel Offence.

In the final section, section five, I turn to a prospective view. There have been unexpected, and largely unseen, benefits that stem from the introduction of the Cartel Offence in the UK. These have mostly been in the context of civil antitrust enforcement. While these potential benefits in civil enforcement cannot justify criminalisation in themselves, they do indicate that criminal investigatory powers have brought benefits to the competition law regime as a whole. Without active criminal cases it must, however, be questioned whether this use of criminal investigatory powers can be justified. For example, the focus on individual responsibility during the investigation phase has led to a growth in Competition Disqualification Undertakings as effective sanctions.³ The growing scholarly consensus does, however, suggest a way forward for the UK to prioritise certain types of cartel cases, and to give UK enforcement agencies a pathway to rebuild the institutional confidence in the Cartel Offence that currently seems lacking.

2. The Introduction of the Cartel Offence

The introduction of the original Cartel Offence into UK law was part of a wider policy to increase the deterrent effect of UK competition law as a whole. The criminal offence was not viewed as an extension of the criminal law, but rather as a new form of deterrence to complement the existing competition law armoury. It would create a deterrent for individuals who were involved in the most serious of competition law violations.⁴ This ‘instrumental’ approach to the introduction of the Cartel Offence followed from the strong orthodoxy that had developed in the competition law literature around ‘optimal deterrence’ in competition law sanctions.⁵ It was seen as vitally important that the competition regime developed sufficient sanctions to deter both undertakings, and the individuals within them, from engaging in cartel activity.

Section 188 of the Enterprise Act 2002 set out that an individual would commit an offence if they: ‘dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings’. The agreements must be one which ‘if operating as the parties to the agreement intend’ would (a) fix prices, (b) limit supply, (c) limit production, (d) divide supply, (e) divide customers, or (f) bid-rig. The offence therefore only seeks to capture hard core horizontal cartel activity, and only individuals who ‘intend’ to ‘dishonestly’, ‘make or implement’ those agreements.

The apparently complex drafting of the new offence had two main purposes: first, to narrow the offence to cover only ‘hard core’ cartels; and, second, to avoid overlap between the offence and the Art 101 TFEU prohibition. This latter concern was to ensure UK law’s compliance with the Art 3 of Regulation 1/2003.⁶ That provision seeks to avoid conflict between national competition law and the

³ For a fuller examination of the use of Competition Disqualification Orders and Undertakings, see Chapter 11 above.

⁴ See, Hansard, HC, Standing Committee B, Enterprise Bill, Fifth Sitting, Tuesday April 23, 2002, col 169.

⁵ See, for example, JM Connor and RH Lande, ‘The Size of Cartel Overcharges: Implications for US and EU Fining Policies’ (2006) 51(4) Antitrust Bul 983-1022, and WPJ Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (2006) 29(2) World Comp 183-208.

⁶ Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

EU prohibitions. By targeting individuals, as opposed to the economic entities captured by EU law, the UK Cartel Offence was a complement to the EU prohibition rather than being in conflict with it.⁷ The Cartel Offence also focuses on the 'intention' of the parties rather than the object or effect of the agreement.⁸ This absence of conflict was confirmed by the Court of Appeal in *IB v The Queen*.⁹ As the Cartel Offence does not go to the 'validity' of the cartel agreement itself it cannot be considered as 'national competition law' within the terms of Art 3 of Regulation 1.¹⁰ Another perceived advantage of the offence's focus on intention and form, as opposed to effects, was the perception that it would reduce the potential for complex economic evidence being raised before juries in criminal trials.

The other key feature of the offence which raised concerns at the time, and was to prove to be its most controversial aspect, was the inclusion of the dishonesty requirement.¹¹ There was concern that the need to prove dishonesty, in relation to the intricacies of cartel behaviour, much of which would be an unfamiliar world for jurors, would prove to be challenging for prosecutors. How would they set about proving that cartel members should have known that their behaviour was dishonest?¹² As we shall see shortly, those concerns were well founded. But the dishonesty requirement also served another important function within the offence. As the actus reus of the offence was broad (viz., 'making or implementing' hard core cartel arrangements), there was a need to narrow the offence through the mental element to avoid the over-criminalisation of otherwise benign behaviour. Those who made or implemented an arrangement caught by the offence, but thought it was legitimate - perhaps because it benefitted from the Art 101(3) TFEU exception, or simply where they were unaware of the nature of the arrangement - could seek to argue that they had not done so dishonestly. Notwithstanding the concerns about the need for, or efficacy of, the dishonesty requirement,¹³ it was made a keystone of the new offence.

The new UK offence created an exciting new tool for the OFT, but it was a significant departure from any experience they previously had in relation to bringing administrative enforcement proceedings. Their task was now to use their new powers effectively to enhance the deterrent effect of the UK competition regime. Before the Cartel Offence was introduced, an OFT commissioned Report, 'Proposed criminalisation of cartels in the UK'¹⁴ predicated that the number of likely prosecutions was at the lower end of six to nine per annum.¹⁵ It was also suggested that the 'cases themselves will probably be complex and the majority will be high profile'.¹⁶ The prediction as to numbers was optimistic, but to prediction of complexity proved to accurate.

⁷ See, Melanie Johnson, Hansard, HC, Standing Committee B, Enterprise Bill, Fifth Sitting, Tuesday April 23, 2002, col.167.

⁸ The contemporary debate around the nature of 'object' agreements following Case C-67/13 *Groupement des cartes bancaires (CB) v European Commission* EU:C:2014:2204 indicates that subjective intention can be an element in 'object' cases, but it is a much wider concept.

⁹ [2009] EWCA Crim 2575.

¹⁰ *ibid*, 34, 35, & 38. See, also, Peter Whelan, 'European Cartel Criminalization and Regulation 1/2003: Avoiding Potential Problems' in Adriana Almășan & Peter Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer 2017).

¹¹ See, for example, MacCulloch (n 2), and A Stephan, 'How dishonesty killed the cartel offence' [2011] 6 *Criminal Law Review* 446.

¹² See MacCulloch (n 1).

¹³ See MacCulloch (n 2) and Stephan (n 11).

¹⁴ A Hammond & R Penrose, 'Proposed criminalisation of cartels in the UK', OFT365, November 2001.

¹⁵ *ibid*, 3.6.

¹⁶ *ibid*, 3.7.

3. The Cartel Offence: A Mid-Life Crisis

3.1. *A Quiet Decline*

The high point of the Cartel Offence in the UK was arguably the conviction of several defendants in the *Marine Hose* case in 2008.¹⁷ That conviction was the result of effective international cooperation between the OFT and the US DOJ into UK nationals who were initially arrested in the US in relation to the activities of an international cartel, and were eventually returned to the UK, as a part of a US plea bargain. Their repatriation was subject to their admissions of involvement in the cartel to the UK authorities, while still in the US, and their arrest as they returned. All four pled guilty in the UK as required by their plea deal. This was the high point as the original sentences imposed were at the top end of those provided for in the sentencing guidelines and the sentencing remarks indicated the seriousness which the trial judge placed on the nature of the cartelists' wrongdoing.¹⁸ From this point on events began to take a less positive turn.

The three that plead guilty in *Marine Hose* all sought to challenge the sentences of 2½ or 3 years imprisonment handed down in 2008. When the case was heard before the Court of Appeal it became obvious that the reality of the *Marine Hose* convictions was well outside the norms of most UK criminal cases.¹⁹ The Court was obviously troubled by the fact that the appellants sought to appeal the length of their sentences, but were also keen to ensure that they were not reduced too much. This was clearly an unusual argument to be heard in a criminal appeal; but, it stemmed from a feature of the US plea deal – a minimum term of US imprisonment had been agreed under the plea deal, and if a lesser term were served in the UK additional time would need to be served in the US. The sentences set out in the US plea agreement ranged from 2½ years to 20 months.²⁰

The Court of Appeal was concerned that it did not hear argument from the appellants' counsel, as it would expect in a normal appeal. Because of the US plea bargain the Court did not look at the personal mitigation of the applicants in detail, but did note that they were of 'good character', they had cooperated with the authorities (including giving evidence in the US case), they had pled guilty at the first opportunity, and had lost their livelihoods. There was recognition that these factors would, in normal circumstances, have led to certain discounts in sentence.²¹ More interestingly, the Court stated they were 'much pressed with the argument that this case could not conceivably be one of the worst cases of its kind'.²² This comment raises an interesting question – how bad a cartel was this? It may not have been the largest in terms of monetary value, with an EU fine of €131m,²³ and it was certainly not on the scale of *Trucks* (€3.8bn) or *Monitor Tubes* (€1.4bn).²⁴ However, the Cartel Offence is, as we shall discuss later, not focused on the economic harm caused by the cartel. It is perhaps tempting for the courts to look to the sheer size of a cartel as some form of proxy for its seriousness, but that is not itself a sufficient gauge. The Cartel Offence rightly looks beyond the traditional economic harms of

¹⁷ CMA, 'Marine Hose: Criminal Cartel Investigation' (CMA, 14 November 2008) <<https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation>> accessed 12 February 2020

¹⁸ Judge Rivlin QC, *R v Whittle, Brammar & Allison*, Sentencing Remarks, Crown Court at Southwark, 11 June 2008.

¹⁹ *R v Whittle, Brammar & Allison* [2008] EWCA Crim 2560.

²⁰ *ibid*, 26.

²¹ *ibid*, 29.

²² *ibid*, 30.

²³ European Commission, 'Antitrust: Commission fines marine hose producers € 131 million for market sharing and price-fixing cartel', IP/09/137, 28 January 2009.

²⁴ European Commission, 'Cartel Statistics', <https://ec.europa.eu/competition/cartels/statistics/statistics.pdf>, accessed 15/04/2020

cartels; such as overcharge to customers.²⁵ It focuses on the personal culpability of an individual for their role within the cartel. If we consider the role of Whittle, for example, within the Marine Hose cartel it is difficult not to see his pivotal role as being an example of a high level of culpability. He originally worked within one of the cartel firms, but formed his own consultancy company to facilitate the operation of the cartel full-time. Using code names and communicating with email accounts not associated with the infringing companies, he facilitated the big-rigging process and monitored it through monthly reports.²⁶ All of these factors indicate that all those involved knew of the nature and scale of their wrongdoing and were taking steps to hide their activity from detection and continue to reap its unlawful benefits. Whittle was paid directly by each cartel participant for his role, but also accepted a so-called 'commission', which I would characterise as kickbacks, to allow individual cartelists to succeed on particular bids and 'cheat' the other members.²⁷ This is a clear example of the worst form of personal responsibility for managing and personally benefiting from clandestine cartel activity. Beyond coercion or threats, this is the highest level of culpability.

There is nothing the CoA judgment to explain in substance why they adopted the view that this case was not at the most serious end of the spectrum of cartel activity; other than they were 'much pressed' with argument to that effect.²⁸ The CoA indicated 'considerable misgivings' about disposing of the case in light of the argument heard, but reduced the sentences to bring them into line with the US plea agreement.²⁹ Notwithstanding the reductions, the CoA also indicated that if the proceeding had not been constrained by the US deal they might have, 'been persuaded to reduce the sentences further'.³⁰ Unfortunately, they did not give any further justification for this approach. The Court stressed that this finding was not to be of value as a guideline sentence, because of its very particular, and unusual, US/UK nature. As for future guidance they highlighted the factors set out in the Hammond Penrose Report which proceeded the introduction of the offence.³¹ It is difficult to see why many of these factors—gravity and nature, duration, culpability etc.—were not, as described above, at the 'top end' in relation to many aspects of the Marine Hose cartel.

While Marine Hose was perhaps a shaky start for the Cartel Offence it can probably be seen as its high point to date. That is because the Cartel Offence's next significant outing was such a low point; one that in practice may have caused such existential harm that the appetite for criminal prosecutions has never recovered. Much of the decline of the UK Cartel Offence can be traced back to the failure of the 'BA Four' prosecution.

It was clear from the outset that the BA case was going to be important for the success of the nascent offence,³² but its ignominious collapse during the trial itself was rightly seen as a disaster for both confidence in the Cartel Offence and in the OFT as a prosecution authority.³³ The OFT withdrew the prosecution case, offering no evidence against the accused, as it became apparent that it had not disclosed a significant number of emails to the defence, some of which may have been exculpatory in

²⁵ See, for example, Connor & Lande (n 5).

²⁶ Sentencing Remarks (n 18), 11-12.

²⁷ *ibid*, 12.

²⁸ *ibid*, 30.

²⁹ *ibid*, 31 & 32.

³⁰ *ibid*, 31.

³¹ Hammond & Penrose (n 14).

³² See, for example, A Stephan, 'The Trial that will Make or Break the UK Cartel Offence Begins Today: The British Airways Four', CCP Competition Law Blog, 1 April 2010.

³³ See A Stephan, 'Collapse of BA Trial Risks Undermining Cartel Enforcement', CCP Competition Law Blog, 12 May 2010.

nature.³⁴ There was no suggestion that this was a deliberate act by the authority, rather the problem appears to have stemmed from material not being provided to the OFT by the Virgin, who had blown the whistle on the cartel and applied for civil leniency.³⁵ The disclosure failure was ultimately fatal to the prosecution. It is clear that such a high profile failure has had a significant impact on the future of the offence itself, and the OFT's willingness to bring prosecutions in high profile cases. The OFT undertook an arm's length review of the case, Project Condor, in which it found that the threshold for prosecution, in terms of both evidence and public interest, was met.³⁶ However, '[w]ith the benefit of hindsight it was not ideal as the OFT's first contested case'.³⁷ The lessons surrounding evidence management and internal governance were important ones for the OFT to learn, but for the purposes of this chapter the most significant finding was that some features of BA case could have potentially 'undermine[d] the credibility of the prosecution with a jury'.³⁸ The particular features of this case that led to difficulties were that: 'the alleged cartel was a bilateral one in which the immunity applicant and its witnesses (who were also immune from prosecution) were equally implicated in the alleged offence. The reliability of the witnesses might be questioned'.³⁹ The defence case in the trial was that this was a 'world turned upside-down' where those who insisted that they had not acted dishonestly were tried on the basis of evidence given by those, including the Chief Executive of Virgin, who admitted acting dishonestly, but had been granted immunity and were getting away 'scot-free'.⁴⁰ The prosecution may well have found it challenging to present this as a just result to a jury.

Subsequent investigations under the Cartel Offence were often much more modest cases, in terms of both size and profile. A number of investigations were formally opened, and then closed on the basis of insufficient evidence.⁴¹ The only other contested trial was in relation to a number of relatively small UK firms in the Galvanised Steel Tank (GST) cartel. The cartel investigation focused on three companies, Franklin Hodge, Galglass and Kondea, which were involved in price-fixing, bid-rigging and market sharing, from 2005 to 2012, in the UK market for galvanised steel water tanks – a product often used in sprinkler fire systems for commercial premises. After one cartel participant, CST, sought leniency the CMA began a criminal investigation and were able to use their powers to make an audio-visual recording of a cartel meeting in July 2012. Initial charges were brought against Peter Nigel Snee on 13 January 2014 in relation to price fixing and bid rigging.⁴² Mr Snee went on to plead guilty to the charges. Two other men, Stringer and Dean, were charged in relation to the same cartel investigation on 30 June 2014.⁴³ The trial began in June 2015 and resulted in the latter defendants being acquitted, the CMA Press Release stating that, 'the jury were not persuaded that Mr Stringer and Mr Dean acted

³⁴ OFT, 'OFT withdraws criminal proceedings against current and former BA executives', OFT Press Release 47/10, 10 May 2010.

³⁵ For a review of Virgin's role in the failure to disclose as a leniency applicant see, OFT, 'Virgin Atlantic Airways immunity review', OFT1398, December 2011, https://webarchive.nationalarchives.gov.uk/20131101181358/http://oft.gov.uk/shared_oft/ca-and-cartels/OFT1398.pdf

³⁶ OFT, 'Project Condor Board Review', December 2010, <https://assets.publishing.service.gov.uk/media/556876fce5274a1895000008/Project_Condor_Board_Review.pdf>, 1.

³⁷ *ibid*, 2.

³⁸ *ibid*.

³⁹ *ibid*.

⁴⁰ See Alisdair Osborne, 'BA-Virgin case exposes the wacky world of whistle blowing', *The Telegraph*, 30 April 2010.

⁴¹ See, OFT, 'Agricultural sector: criminal cartel investigation', <https://www.gov.uk/cma-cases/agricultural-sector-criminal-cartel-investigation>; OFT, 'Automotive sector: criminal cartel investigation', <https://www.gov.uk/cma-cases/automotive-sector-criminal-cartel-investigation>; and, OFT, 'Commercial vehicle manufacturers: criminal cartel investigation', <https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-criminal-cartel-investigation>.

⁴² OFT, 'Man faces charge in criminal cartel investigation', OFT Press Release 04/14, 27 January 2014.

⁴³ CMA, 'Two men face charges in ongoing criminal cartel investigation', CMA Press Release, 11 July 2014.

dishonestly.⁴⁴ This gives us little to go on, but it is implicit that the CMA blamed the difficulty in proving the dishonesty of cartelists for the failure to secure a conviction.⁴⁵ The reaction of Peter Snee to his fellow cartelists' acquittal, after his guilty plea, was also not recorded. Snee was later sentenced to 6 months imprisonment—suspended for 12 months—and 120 hours of Community Service.

The reporting of the acquittals suggested that the defendants did not contest the facts as to their behaviour, but the defence presented them as being, 'motivated by honest considerations, including maintaining standards and keeping their businesses afloat in an increasingly competitive market',⁴⁶ and, were 'designed to avoid bankruptcy and redundancies, rather than to increase profit'.⁴⁷ It was also reported that a statement was released by Mr Dean's solicitor that the key issue in the trial 'was whether there was greed'.⁴⁸ That theme is reported to have been portrayed in 'theatrical style' in closing arguments.⁴⁹ It was reported that the jury were told that not every untruth was criminal (a compliment to your mother-in-law, may not be true, but would not be criminal), and the defendants 'worked hard and lived unflashy lives, driving second hand cars and paying off mortgages. The "evil" underpinning dishonesty - greed - was not present'.⁵⁰ The jury took less than 3 hours to decide that they were not dishonest and therefore acquit them of the charge.⁵¹

The arguments surrounding dishonesty have been well rehearsed in the competition law literature,⁵² but for ease of reference the test in England and Wales was that as set out in *Ghosh*.⁵³ It was confirmed by *R v George, Burns, Burnett and Crawley*⁵⁴ that proof of dishonesty was required of an individual, but that there was no requirement for mutual dishonesty between the parties. The *Ghosh* test had two parts. First, the 'objective' test – whether according to the ordinary standards of reasonable and honest people what was done was dishonest? And, secondly, the 'subjective' test – did the defendant himself realise that what he was doing was by those standards dishonest? In the context of the Cartel Offence we are largely concerned with the objective test. Did the jurors think that what these down-to-earth cartel participants—who led unremarkable lives, without greed, and drove second-hand cars—did was dishonest? The jury were not convinced by the prosecution case. There is no explicit reference to greed in the *Ghosh* test, but the references to greed and motivation in this case give an indication of the narrative that the defence presented to the jury; ordinary people, like you, working hard to save their businesses in difficult times. That narrative would not have worked in relation to BA case, but there you can perhaps see a related strategy. In that case it was far more difficult to portray

⁴⁴ CMA, 'CMA statement following completion of criminal cartel prosecution', 24 June 2015.

⁴⁵ See their post acquittal statement, *ibid*.

⁴⁶ See Chris Bryant, 'Defendants Acquitted in Criminal Cartel Trial' (Bryan Cave Leigton Paisner LLP, 3 July 2015) <<https://www.bclplaw.com/en-US/insights/defendants-acquitted-in-criminal-cartel-trial.html>> accessed 5 August 2020. For the nature of the arrangements see, CMA Decision, 'Galvanised steel tanks for water storage - main cartel infringement', Case CE/9691/12, 19 December 2016, and CMA Decision, 'Galvanised steel tanks for water storage - information exchange infringement', Case CE/9691, 19 December 2016.

⁴⁷ King & Wood Mallesons, 'Water tank directors cleared of dishonest criminal cartel conduct' (King & Wood Mallesons, 3 July 2015) <<https://www.kwm.com/en/uk/knowledge/insights/water-tank-directors-cleared-of-dishonest-criminal-cartel-conduct-20150703>> accessed 5 August 2020.

⁴⁸ *ibid*.

⁴⁹ Norton Rose Fulbright, 'Criminal cartel offence in UK: public attitudes' (Norton Rose Fulbright, June 2016) <<https://www.nortonrosefulbright.com/en-gb/knowledge/publications/3436c26a/criminal-cartel-offence-in-uk-public-attitudes>> accessed 5 August 2020.

⁵⁰ *ibid*.

⁵¹ *ibid*.

⁵² See the discussion in Section 2 of this Chapter.

⁵³ *R v Ghosh* [1982] EWCA Crim 2. The *Ghosh* test was overturned by the UKSC in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, I shall return to this point later in the Chapter.

⁵⁴ *R v George, Burns, Burnett and Crawley* [2010] EWCA Crim 1148

the cartel participants as ‘everymen’, but the defence could seek to rely on the apparent intrinsic unfairness of one half of bilateral arrangement being threatened with a lengthy term of imprisonment, while their co-conspirators walked away on the basis of an immunity deal. Both of these cases highlight the dilemma in Cartel Offence case selection. It is vital that the prosecutor is able to build up a clear evidential picture of not just an overview of the cartel, but of the individual’s culpability within that arrangement. It was simply not sufficient to show that a ‘bad’ cartel existed, you also needed to prove that there were ‘bad’ people inside the cartel. Their actions must be such that they demonstrated they were acting in a manner that deserves sanction. It may be that the competition law community are absolutely convinced with regard to the opprobrium deserved of individuals within cartels,⁵⁵ but that was not the view of the jury in GST. If you cannot show that those involved were acting beyond the moral pale, it will be very difficult to secure a conviction.

The final noteworthy case in the story of the original iteration of the UK Cartel Offence is the Precast Concrete Drainage Products cartel. There is, however, relatively little public information available on the criminal case. In March 2016 Barry Cooper, a Director of Stanton Bonna (UK) Ltd (SB), was charged with the Cartel Offence. Over a year later, in June 2017, the CMA decided that charges would not be brought against any other individuals in relation to that three party cartel. It is not clear how the cartel came to the attention of the OFT. The criminal investigation formally began in March 2013, but the OFT had clearly been tipped off earlier and had consequently begun surveillance of a number of cartel meetings, between August 2012 and March 2013, which were recorded and became a part of both the criminal and civil investigations. None of the participants had sought individual leniency when the investigation was initiated. Once the civil cartel investigation was underway, in November 2013, SB applied for civil Type B leniency, a lesser form of leniency available after an investigation has started, and began to cooperate with the investigation. That leniency was partial and after the criminal case had concluded SB, along with another cartel member CPM Group (CPM), entered into settlement discussions with the CMA. The other participant in the cartel, FP McCann (FPM), contested the CMA’s characterisation of their involvement in the cartel throughout the investigation, arguing that they had been competing throughout. It is, then, perhaps rather surprising that Barry Cooper, the senior executive from SB who had attended the recorded meetings, was the only individual charged with the Cartel Offence.⁵⁶ Mr Cooper plead guilty to the charge on 21 March 2016. It wasn’t until June 2017 that the CMA announced that none of the other active participants were to be charged.⁵⁷ The only insight we have into the inner workings of the cartel is the evidence presented by the CMA in the civil infringement decision. From that is somewhat puzzling why Cooper was singled out. One might assume that he was the ringleader of the ‘pigeon club’, as they were know by some participants,⁵⁸ but that does not appear to be the case. The evidence presented by Cooper and his counterparts from CPM, who were both cooperating with the CMA investigation, which was corroborated by the recordings, did not present him as the ringleader. In fact, in the meetings themselves it was not Cooper who directed the discussions. The evidence from CPM was that the representatives from CPM and FPM usually took the lead as they were, ‘the two more powerful characters’ who ‘kept things in check, maintaining discipline during the meetings’.⁵⁹ The main characteristic which distinguished Cooper appears to have been that he was more forthright in his knowledge of the unlawful nature of his activities, he took more explicit steps to hide the nature of the arrangements from senior figures in the company, and did more to ensure his staff did not depart from the arrangement. Cooper had

⁵⁵ At this point there is an antitrust tradition to refer to a particular US Supreme Court judgment, but I shall resist that temptation.

⁵⁶ CMA, ‘Man charged in CMA criminal cartel investigation’, CMA Press Release, 7 March 2016.

⁵⁷ CMA, ‘Supply of precast concrete drainage products: criminal investigation’, Case CE/9705/12, Update 13 June 2017.

⁵⁸ CMA Decision, ‘Supply of products to the construction industry (pre-cast concrete drainage products)’ Case 50299, 23 October 2019, 4.57.

⁵⁹ *ibid*, 4.79.

undertaken competition compliance training in 2006, but had avoided signing the compliance documents as he knew he was breaking their terms.⁶⁰ He was eventually required to sign the documents in 2011 and, even though he knew that he was breaching its terms, he did so.⁶¹ His internal conflict in signing those compliance documents was apparent in the evidence he gave to the CMA. In the civil decision the CMA noted that his evidence was to some extent ‘internally inconsistent and contradictory’, but it was consistent as to the key aspects of the cartel, and was supported by other evidence.⁶² The final element that distinguishes his participation was that Cooper was the sole individual responsible for cartel activity in his undertaking. He monitored all activity, and ensured that others in the company implemented the cartel arrangement; even going so far as to reprimand them if they departed from its policy.⁶³ Without better evidence it is difficult to draw firm conclusions, and without access, in particular, to the recordings of the meetings, it is hard to shake off the suspicion that there may be a ‘the customer is our enemy’ moment somewhere on those tapes,⁶⁴ but if there was, why did the CMA not use it to bolster its civil case? The evidence we do have points to the fact that Cooper was central to the cartel, largely being personally responsible for the activity in relation to his undertaking, and with good evidence, especially in relation to the avoidance of signing the compliance documents, that he knew what he was doing was unlawful. That may well have given the CMA confidence that they could make out a clear case for dishonesty in relation to his individual conduct. There was not the same evidence in relation to the other individual participants at the cartel meetings.

An examination of the Cartel Offence prosecutions to date leaves us with a pretty disappointing picture. A few relatively minor successes, and a significant, and embarrassing, failure. It is no surprise that the CMA seems to have adopted the position that the best way forward was not only to learn from the mistakes that had been made in these early cases, but also to press for reform. Its focus for reform was the dishonesty element of the Cartel Offence that they had found so troublesome in relation to their prosecution cases at trial. Despite their limited success bringing prosecutions before the courts, the CMA were much more successful in their pressure to reform the offence.

3.2. *The Reshaping of the UK Cartel Offence*

The early failures of the UK Cartel Offence led quickly to criticism and calls for reform.⁶⁵ That process began with a consultation and BIS proposals for reform.⁶⁶ The main proposal for the Cartel Offence was to remove the dishonesty element.⁶⁷ It was, however, impossible to simply excise that part of the offence without creating another set of problems. The requirement to prove dishonesty made it more difficult for the prosecution to make out their case, but it also stopped the offence from ‘overreach’ – where it would catch otherwise benign behaviour which had the explicit or tacit approval of civil antitrust prohibitions. There are two main types of behaviour with which we might be able to illustrate

⁶⁰ *ibid*, 2.84.

⁶¹ *ibid*.

⁶² *ibid*, 2.88 & 2.89.

⁶³ See, for example, the comments from the FPM employee in the CMA Decision, *ibid*, 4.60.

⁶⁴ This is a reference to the infamous tapes of the Lysine Cartel meetings in the US in the 1990s, see John M Connor, “‘Our Customers Are Our Enemies’: The Lysine Cartel of 1992-1995’ (2001) 18 *Review of Industrial Organisation* 5.

⁶⁵ See for, example, my contribution to the 10 year retrospective on UK Competition law reforms, Angus MacCulloch, ‘The UK Cartel Offence: Is Honesty the Best Policy?’ in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (DUP, 2010), and M Furse, ‘The New Cartel Offence: “Great for a Headline But Not Much Else”’ 32(5) *European Competition Law* 223.

⁶⁶ Department for Business, Innovation & Skills, ‘A Competition Regime for Growth: A Consultation on Options for Reform’, BIS/11/657, March 2011, and Department for Business Innovation & Skills, ‘Growth, Competition and the Competition Regime: Government Response to Consultation’, URN 12/512, March 2012.

⁶⁷ ‘Growth, Competition and the Competition Regime’, *ibid*, Section 7.

this issue. Firstly, horizontal agreements, that fall within the terms of the offence, but because of their positive aspects are authorised by competition law; for instance, the joint selling of sports TV broadcast rights, or credit card interchange fees. These beneficial agreements need to be ‘carved out’ of the criminal offence. The other group is less obvious, but also important. As the Cartel Offence prohibits both the ‘making’ and ‘implementing’ of cartel arrangements, it is important to distinguish between those who knowingly implement the cartel arrangement, and those that simply follow instructions from their managers and, without knowledge of arrangement, operationalise a cartel. An example of that would be the salespeople in Stanton Bonna who complied with the instructions of their manager without knowing the pricing policy came from the ‘pigeon club’.

The BIS proposal was to remove the dishonesty element, and it consulted on four potential options to subsequently narrow the potentially wide scope of the offence: 1) the introduction of prosecutorial guidance; 2) the introduction of a ‘white list’ of permitted agreements; 3) the introduction of a ‘secrecy’ element; or, 4) defining the offence to not include agreements made openly. The Government’s preferred option was to remove agreements made openly from the offence.⁶⁸ The response to the consultation process showed no consensus, with several of the options getting support, but the Government decision was to retain their preferred choice of option 4.⁶⁹ The removal of the dishonesty element was largely accepted by most commentators,⁷⁰ and the remaining debate surrounded the changes that would be necessary to replace that element and make the Cartel Offence more effective. When the Enterprise and Regulatory Reform Bill was introduced to the Parliament in April 2013, the new carve-outs of ‘openness’ and ‘publication’ were included. However, towards the end of the Bill’s passage through Parliament other amendments were introduced with almost no scrutiny.

The final version of s.47 of the Enterprise and Regulatory Reform Act 2013 which received Royal Assent made useful amendments that improved the offence, as discussed above, but also introduced a number of problematic new provisions.⁷¹ Alongside the removal of the dishonesty element from s.188(1) of Enterprise Act 2002, s.47 of ERRA 2013 introduced new ‘carve outs’ to the offence by inserting ss.188A and 188B into the 2002 Act. Section 188A(1)(a) sets out an ‘openness’ carve out: if the parties to an agreement give customers ‘relevant information’ about the arrangement before they enter into ‘agreements for ... supply’.⁷² A separate ‘publication’ carve out, under s.188A(1)(c), is available if relevant information is published before the arrangement is implemented. The ‘relevant information’ is defined in s.188A(2) to include the parties to the arrangement, its nature, and why it might be an arrangement to which the s.188(1) offence might apply. Concerns were raised in the consultation about commercial confidentiality, but the information that needs to be published is not detailed or likely to be commercially sensitive.⁷³ These are effective protections for beneficial arrangements. Rather than carving out behaviour which found not to be harmful, or some other form of complex examination of the arrangement or the parties, it uses a simple proxy: do all of parties in a transaction know of the existence of the arrangement before committing to any obligations? To borrow from Louis Brandeis – ‘sunlight is said to be the best of disinfectants’.⁷⁴ It is reasonable to say

⁶⁸ *ibid*, 7.26.

⁶⁹ *ibid*, 7.12-7.25.

⁷⁰ In the academic community at least, the responses to the BIS consultation were very mixed, CMA, ‘Consultation outcome - A competition regime for growth: options for reform’ 16 March 2011 <<https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform>> accessed 11 August 2020.

⁷¹ On the reform process and s47 ERRA 2013, see Peter Whelan, ‘Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence’ (2015) 78(3) *The Modern Law Review* 493–521.

⁷² Section 188A(1)(b) provides an analogous defence in relation to big-rigging.

⁷³ See Whelan (n 71), 507.

⁷⁴ Louis Brandeis, *Other People’s Money and How the Bankers Use It* (1914 Frederick A Stokes), Chapter 5.

that if the parties bring an arrangement to the attention of the public, and in particular to any customer before the supply of the relevant product, they should escape criminal law sanctions. That is not to say they are acting entirely lawfully – just that the criminal law is no longer the most appropriate remedy. It is also reasonable to assume that the publicity accorded to the arrangement through these mechanisms will alert customers and the competition authorities to a potentially problematic arrangement. Customers might want to reconsider their purchase, and the CMA may wish to examine the arrangement more closely. If public, and official, scrutiny is not a concern for the parties to the arrangement, there are more appropriate regulatory tools than the criminal law available; for example, the Chapter I prohibition. As discussed below, the criminal law should be reserved for the most egregious, and morally reprehensible, of violations; the parties are not likely to invite scrutiny of such arrangements. It is the simplicity of this ‘carve out’ which commends it. If the parties to a horizontal agreement are confident in its legitimacy, they have a means to protect themselves from any risk of criminal prosecution. In return they open up their arrangement to potential scrutiny. Whelan commends this approach as being a useful ‘rough cut’ between ‘cartel activity caught by the (reformed) UK Cartel Offence and morally wrongful behaviour’ as seen in the usual deception of a clandestine cartel.⁷⁵

The defences introduced in s.188B are more problematic: those in s.188B(1) and (2) introduce some concerns, but in practice are unlikely to be significant; however, the new defence in s.188B(3) has been described as an ‘absurdity’.⁷⁶ The defences in s.188B(1) and (2) are complements to the ‘openness’ and ‘publication’ carve outs found in s.188A. They cover ‘gap’ situations where the relevant information has not been provided, but the parties to the arrangement can show there was no intention to conceal them. Under (1), they must show they ‘did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into [supply] agreements’. Under (2), they must show they ‘did not intend that the nature of the arrangements would be concealed from the CMA’. The rationale behind these defences is that they cover the ‘gap’ between the arrangement being made and the s.188A defence being completed. The most obvious example is under (2): to make out the defence you must first make an arrangement, and then subsequently publish its existence in the required form.⁷⁷ There must be a ‘gap’ between those two steps in which the offence of ‘making’ the arrangement has occurred, but the defence of publication has not been made out. The s.188B(2) defence covers that gap, as long as the parties can prove that they did not ‘intend’ to ‘conceal’ the arrangement from the CMA. The timing of the discovery of the arrangement will be important – the longer the ‘gap’ the more difficult it will be for the parties to show that concealment was not their intention. The same is true under (1) where the gap will be slightly different: here it would be between the agreement being made and a supply agreement being entered into. The parties would have to prove they had no intention, during that time, to conceal the nature of the arrangement. While the gap in (2) could be due to a simple delay in formal publication, the failure to alert customers in (1) must always be an error or oversight of some form. That failure will be difficult for those at the heart of the arrangement to explain, but in a larger commercial undertaking it may well be possible that full information about the nature of the arrangement is only available to a few people in the wider organisation. The carve out will potentially be useful for individuals who are at a distance from the cartel arrangement. If we think back to the sales teams in Pre-Cast Concrete cartel, it was apparent that the sales team in some firms were kept in the dark as to the cartel, s.188B(1) may give them a defence. At the time high-level management made the arrangement, those sales people will be able to show that they did not intend to conceal that arrangement from customers with whom they transacted. My interpretation of (1) will need to be tested, but it appears that it may cover that situation. One might hope that the CMA would not seek

⁷⁵ Whelan (n 71), 511.

⁷⁶ Andreas Stephan, ‘The UK cartel offence: a purposive interpretation?’ (2014) 12 Criminal Law Review 879-892, 883.

⁷⁷ For the correct form see the CMA, ‘Cartel Offence Prosecution Guidance’, CMA9, March 2014.

to prosecute an ‘innocent’ implementer of a cartel arrangement, but this would, on the face of the Act, give such an individual the comfort of a defence.

The most problematic defence introduced by s.47 ERRA 2013, is now to be found in s.188B(3) of the 2002 Act. It is such a bizarre provision it is worth setting out in full:

‘(3) It is a defence for an individual charged with an offence under section 188(1) to show that, before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.’

A complete defence to the UK Cartel Offence has been created for any individual who merely takes ‘reasonable steps’ to disclose the nature of the cartel arrangement to ‘professional legal advisers’ for the ‘purposes of obtaining advice’. Quite frankly this beggars belief. It might be possible, at a very generous reading, to understand why Parliamentary drafters would want to protect an assiduous businessperson who: develops a novel, and highly beneficial, new business arrangement; consults his solicitors for legal advice; receives advice that the arrangement would benefit from the provisions of Art 101(3) TFEU, or ss. 9 or 11 of the Competition Act 1998; and, then, seeks protection from the apparent application of the Cartel Offence. But a legitimate defence in that situation exists – publication under s.188A(1)(c). My reaction to the defence was to refer to it as ‘Get Out of Jail Free’ card;⁷⁸ Stephan, as noted above, described it as ‘manifest absurdity’;⁷⁹ and, Whelan, in a more measured way, as ‘particularly troubling’.⁸⁰ One significant problem would be enough to condemn the defence, but there are several very obvious issues. If an individual obtains advice that the behaviour is clearly a criminal offence and they should not embark on that course of action, but chooses to go ahead regardless - it is still a good defence. If you disclose the nature of the arrangement to a legal advisor seeking advice, but don’t wait for, or pay attention to, their response – it is still a good defence. If you post a letter to a foreign lawyer disclosing the agreement, but fail to provide a return address – is that enough? Any of these failings would be enough for the defence, as it is drafted, to be considered seriously flawed. But its most fundamental failing is that it is simply not required. Legal advice is irrelevant to the question of individual culpability for cartel activity. The ‘publication’ carve out in s.188A is an effective, and simple, means to give those who believe they are behaving legitimately the requisite protection, no matter why they believe their arrangement should not be considered unlawful. There is no need for further protection. Section 188B(3) should be removed from the statute book as soon as possible. Stephan makes an interesting argument that it may be possible to construe the defence in such a way as to mitigate its most significant failings,⁸¹ but such an interpretation would stretch the limits of potential statutory interpretation. It would better if the s.188B(3) defence is repealed.

The 2013 reforms are a classic ‘curate’s egg’ – partly good, partly bad. The removal of the troublesome dishonesty element was inevitable; it will not be missed by prosecutors, its potential will be missed by the defence bar.⁸² The removal of dishonesty, which had the function of differentiating legitimate and

⁷⁸ Angus MacCulloch, ‘Get Out of Jail Free: s 188B(3) of the Enterprise Act 2002’ (Who’s Competing Blog, 15 November 2015) <https://whoscompeting.wordpress.com/2013/11/15/get-out-of-jail-free-s-188b3-of-the-enterprise-act-2002/> accessed 12 August 2020.

⁷⁹ Stephan (n 76).

⁸⁰ Whelan (n 71), 517.

⁸¹ Stephan (n 76).

⁸² See, for instance, the many law firms who supported its retention in their responses to the CMA Consultation, (n 70).

illegitimate conduct, necessitated the introduction of a new ‘carve out’ mechanism into the offence.⁸³ The carve outs in s.188A are a simple and elegant way of achieving that purpose, without adding significant added complexity to the provision. If you are open about your activity, with either your customers, or the CMA via publication, you cannot commit an offence. Openness may of course leave your undertaking open to investigation under the antitrust prohibitions, or private actions for damages, but that will not be an issue when its behaviour is legitimate. Thus partly good. The new defence in s.188B(3) is, on the other hand, the bad. If there was a legitimate concern that led to its late introduction in the Act, its wording has surely gone beyond that purpose. It is only a shame that Parliament gave it such minimal scrutiny. It should now be repealed.

4. A Developing Consensus in the Academic Debate

The introduction of the Cartel Offence in 2004 generated a great deal of commentary.⁸⁴ Most of that discussion focused on the additional deterrence that the new Cartel Offence would introduce, and how it would complement the existing antitrust fines imposed on undertakings. There was also considerable interest in the extent to which individual penalties could transform the incentives for leniency within cartels.⁸⁵ That debate was largely instrumental in nature and only looked at the Cartel Offence as a tool of competition law. It gave little heed to the fact that new offence was not simply another piece of administrative competition law; it was a part of the criminal law. The debate transformed once it was clear that the offence was not generating the prosecutions and convictions that were envisaged when the offence was introduced.⁸⁶ Even before the setback of the collapse of the BA Four case, and the soul searching which then followed, much of the academic debate focused on the dishonesty element of the Cartel Offence and its appropriateness.⁸⁷ After the failure in the BA prosecution the tide turned for dishonesty; even though the collapse of the trial was because of a discovery failure, the main line of defence led by the accused clearly related to the honesty, or otherwise, of the cartel participants’ behaviour. The debate then widened out to consider how the UK Cartel Offence might be reshaped to make it workable, not only in terms of a what should be required for the prosecution to make out their case, but also in the terms that the offence properly captured the culpability of those individuals involved in a cartel. It is to that principled debate that I now turn.

The problems faced by the CMA in securing convictions in jury trials indicate the importance of capturing the culpability of individuals within a cartel. Much of the blame for those prosecution failures has been placed on the requirement to prove dishonesty, but, even without dishonesty, it will be necessary for the prosecution to make out a clear case to a jury why a cartel participant deserves to face the moral stigma of a criminal conviction, and the possibility of the law’s most stringent sanction – a term of imprisonment. If a prosecutor cannot convince the jury of this, there will always be the real risk of acquittals. Williams explains this as the ‘bootstraps’ problem – the Cartel Offence sought to harden the moral opprobrium of cartels, by declaring them as criminal; but the original offence presupposed that ‘ordinary’ citizens on juries would consider cartels as dishonest and therefore morally wrong.⁸⁸

⁸³ It is with no little irony that after the ERRA 2013 reforms the UKSC redefined the dishonesty test in *Ivey v Genting Casinos* [2017] UKSC 67. As this reform essentially removed the ‘subjective’ element of the *Ghosh* test it would not have made a significant difference in cartel offence cases.

⁸⁴ See, for example, Joshua, MacCulloch, and, Lever & J Pike (n 1).

⁸⁵ See, Christopher R Leslie, ‘Cartels, Agency Costs, and Finding Virtue in Faithless Agents’ (2008) 49 *Wm & Mary LRev* 1621.

⁸⁶ Six to ten prosecutions per year were envisaged in the Hammond/Penrose Report (n 14).

⁸⁷ See, for example, C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), and MacCulloch (n 65).

⁸⁸ R Williams, ‘Cartels in the Criminal Law Landscape’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Hart, 2011), pp 289-312.

One of the reasons put forward as the primary rationale for the introduction of the dishonesty element in the original offence was to avoid the necessity of introducing complex economic evidence in jury trials.⁸⁹ But the desire to avoid economic analysis did not sit well with the instrumental approach to deterrence which lay behind the introduction of the Cartel Offence. If the economic harm caused by a cartel is not the rationale that lies behind the moral opprobrium, what is the criminal heart of cartel activity? It is also worth stressing at this point that the economic harm of cartels is in most cases the responsibility of undertakings operating on markets; the Cartel Offence does not apply to those undertakings. The offence applies to individuals within undertakings. They are to a greater or lesser extent isolated from the impact of the economic activity of the firm.⁹⁰ In the Galvanised Steel Tank trial the acquitted defendants' case was built upon the argument that they did not benefit personally from the cartel.⁹¹ If we are to effectively explain why the individual deserves condemnation we must focus our attention on the individual's actions as an active cartel participant.

When one turns to look at the morality of cartel behaviour in the criminal law context there are a number of interesting arguments. A useful starting point is the work of Green in relation, more widely, to white-collar crimes.⁹² He has developed a three-part test for situations in which the criminal law has traditionally determined that behaviour deserves the intervention of the state. Those three tests are: 1) culpability, 2) social harmfulness, and 3) moral wrongfulness. That framework can be used to place the criminality of cartel behaviour inside the framework of the criminal law; as opposed to merely looking for justification from a competition law perspective. We can look at each of these elements in turn.

4.1. *The Culpability of Cartel Participants*

Before an individual feels the full force of the criminal law, it should be proved that they are personally culpable. This is perhaps the least controversial element in relation to the UK Cartel Offence. Section 188(2) of the 2002 Act contains the requirement that to fall within the offence the arrangement must be a 'hard core' cartel arrangement 'if operating as the parties to the agreement intend'. That intention element goes to the culpability of the individual. Intent is a common feature of such offences. The individual must have intended to commit the actus reus of the offence.

4.2. *The Social Harmfulness of Cartel Behaviour*

The social harmfulness of white-collar crime can be more difficult to explain, when one compares it to more commonly understood street crimes.⁹³ In a cartel the criminal behaviour is highly disguised, exists alongside legitimate behaviour, and has very diffuse effects. We have discussed the economic harm of cartels above, and that it is not the sole reason for cartel criminalisation. The criminal law will normally look at harm as part of its justification. Criminal law, however, does not see all harms as being equal. Many events could be perceived as causing harm, but only the most serious will be seen as appropriate for the attention of the criminal law. One of the key distinctions is that between private harms – which are left to be resolved through private remedies, such as contract and tort – and public harms – that 'properly concerns the community as a whole, rather than just the individual citizens within such community'.⁹⁴ It is therefore important that if competition law wants to call on the innate criminality of a cartel, we should make a clear argument that cartels cause harm that goes beyond the

⁸⁹ MacCulloch (n 84).

⁹⁰ On the problems with harm see, Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32(3) *Legal Studies* 369-395.

⁹¹ See KWM (n 47) and NRF (n 49).

⁹² Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP, 2006).

⁹³ Green (n 92), 35 & 36.

⁹⁴ *ibid*, 34.

private interests of financial interests of individuals, and goes to a broader form of public harm to the wider community. The ‘public’ nature of the cartel harm requires us to examine the inherent wrongfulness of cartels.

4.3. The Moral Wrongfulness of Cartels

The attempt to establish the inherent wrongfulness of cartels is at the heart of the contemporary understanding of cartel criminalisation. If competition lawyers cannot articulate why cartels are intrinsically wrong, they should not claim the support of the criminal law.⁹⁵ The academic literature in the UK has shown a surprising confluence of views in regard to this fundamental question. This is in stark contrast to the divergence of opinion in demonstrated in wider responses to BIS Consultation on the ERRA reforms. If you canvas the academic literature you see that many authors have seized upon a common set of ideas that seek to capture the heart of cartel criminality. While we all have sought out our own perfect term, there is perhaps value in the wisdom of the crowd. If we look at the language proposed we can arguably see that there is shared understanding of the problem that we seek to address.

The most interesting attempts to characterise the wrong of cartels have included Harding & Joshua’s arguments around ‘delinquency’⁹⁶ – where the cartelist through the subterfuge they employ to avoid detection shows that they are acting outside the ‘norms’ of acceptable business behaviour. In his sole authored work, Harding continues to develop that idea by suggesting ‘defiant willingness’ to describe cartel behaviour.⁹⁷ Williams uses the concept of ‘exploitation’ to describe the advantage that the cartelist seeks to gain through their activity.⁹⁸ The most popular analogy to be used, and the one which I now find by far the most convincing is that of ‘cheating’. It has been proposed by Beaton-Wells,⁹⁹ Wardhaugh,¹⁰⁰ and Whelan.¹⁰¹ I admit to being late to join this group, but now have the zeal of a convert.¹⁰² I have rehearsed the arguments in favour of cheating being the most appropriate model elsewhere, but I shall attempt to summarise them briefly here.¹⁰³

Green’s white-collar crime model is, again, a useful structure based on the common law understating of the criminal cheat. It encompasses a situation where, ‘X must (1) violate a fair and fairly enforced rule, (2) with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship’.¹⁰⁴ It is the nature of the relationship which is key to the conception of the cartel as a cheat. Much of the common law case law stems from gambling and games of chance, for a recent example we can look to *Ivey v Genting Casinos*, where the UKSC examines the cheating in casino

⁹⁵ For a more wide-ranging examination of wrongs in competition see, Nicolas Cornell, ‘Competition Wrongs’ (2020) 129 Yale Law Journal 2031.

⁹⁶ Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, Oxford University Press 2010), chap 3.

⁹⁷ Christopher Harding, ‘The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels* (Hart Publishing 2011).

⁹⁸ Rebecca Williams, ‘Cartels in the Criminal Law Landscape’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels* (Hart Publishing 2011).

⁹⁹ Caron Beaton-Wells, ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal’ (2007) 31 Melbourne University Law Review 675.

¹⁰⁰ Bruce Wardhaugh, *Cartels, Markets and Crime* (CUP 2014), Chap 1.

¹⁰¹ Peter Whelan, *The Criminalization of European Cartel Enforcement* (OUP 2014), Chap 4.

¹⁰² See Cerian Griffiths & Angus MacCulloch, ‘Dishonesty and Cheating in Fraud and the Criminality of Cartel Behaviour’ (CLaSF Workshop, Granada, September 2018).

¹⁰³ Angus MacCulloch, ‘The ‘Public’ Wrong of Cartels and the Article 101 TFEU ‘Object Box’ (2020) 65(3) Antitrust Bulletin 361-375.

¹⁰⁴ Green (n 92), 57.

Baccarat.¹⁰⁵ In the context of a cartel the ‘game’ can be seen as the rules of the market itself – there is an expectation that all the market participants accept those ‘rules’ to facilitate trade and ensure there is a level playing for their mutual benefit. The cheat is where the cartel participants steps outside the ‘norms’ of the market in order to gain an unfair advantage over their peers. It is important to stress that the wrong is not gaining an advantage, that is the expectation in a market, but it is that the cartel participant steps outside the normal expectations of the marketplace to seek that advantage.

As was noted above, not all wrongs or harms are best dealt with through the criminal law - crime should focus on ‘public’ wrongs. In what way can we then characterise the wrongful cheating of cartel participants as a public wrong? Again we can turn to the fundamental importance we place on the market as a public institution. This was explained by Wardhaugh who sets out that the market has taken a central role in the economic system upon which we all rely.¹⁰⁶ The market creates a ‘fair environment for exchange’¹⁰⁷ which society uses to ensure the proper allocation of resources. By stepping beyond the expectations of the market the cartel participants not only harms other market participants, but also the wider public interest in the functioning of the market as a public institution.

4.4. *The Value of Consensus*

This specific conception of the ‘public’ wrongfulness of cartels is my own, but one can see that there is now a more widely accepted agreement that there are certain expectations of the market, and that those who participate in cartel activity act against the market as an institution, rather than simply in a manner that harms their individual customers. The value in having a more widely accepted description of the wrongfulness of cartels is twofold. First, those who seek to justify the use of criminal law sanctions against cartel participants can explain why those, most stringent, sanctions are an appropriate response to that behaviour. Until now that rationale has not been set out very clearly. Second, the lessons learned from having a clear idea of why a criminal sanction is appropriate gives investigators, and ultimately prosecutors, a narrative to explain to a jury why the behaviour of the cartel participants falls below expected standards of behaviour, and how it damages us all. Without a common conception of the criminal cartel problem it was difficult for investigators to understand exactly what evidence needs to be gathered to build a good criminal case, as opposed to that evidence that they were used to gathering for a civil antitrust investigation. That evidence will go to the fact that those individuals knew that they were stepping outside the norms of the market and they did so to gain an advantage; not necessarily to line their own pockets, for this is not a question of greed, but to protect their commercial interests from the rigours of the market. It is the market that protects us all, but those individuals sought to deny us that protection in order to advantage themselves.

5. The Future of Criminal Investigations and the Cartel Offence in the UK

At the time of writing there are few reasons to be optimistic about the operation of the UK Cartel Offence. There have been very few prosecutions, and while there have been convictions, they have only come from guilty pleas. Where cases have gone to trial, those charged have been acquitted.¹⁰⁸ If I were a member of the defence bar I might advise my clients to take their chances at trial – the CMA do not have a good record as a prosecutor.

While that record cannot be denied there are still reasons for some guarded optimism. That is not to say that we can expect a sudden upsurge in cases, or a reversal of the current position. However, we have some indication that there are building blocks in place, which may allow the UK authorities, and

¹⁰⁵ *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67.

¹⁰⁶ Wardhaugh (n 100), 25-26.

¹⁰⁷ *ibid*, 45.

¹⁰⁸ See, *Galvanised Steel Tanks* (n 44).

wider competition law community, to develop an environment in which future criminal prosecutions might be more likely to be successful. There are a number of interrelated strands which we must continue to develop to build that more positive environment.

5.1. *The New Cartel Offence*

With the clear exception of the defence of seeking legal advice, the changes to the Cartel Offence introduced by ERRA 2013 are largely to be welcomed. The removal of the dishonesty element of the original offence was an inevitability given the problems that it caused in the first cases to go to trial. There are questions which can legitimately be raised about the OFT and CMA's case selection and preparedness for being a prosecutor, and there were always going to be issues as it developed its expertise in a very different legal environment; but, that phase is now over.

There will be a significant lag period where 'legacy' cases, discovered after the introduction of the new offence but including behaviour that preceded it, are discovered. It will only be when cartels that began after 1 April 2014 begin to come through the system that we can observe how the new offence will cope. These cases will now be coming to the attention of the CMA.

The new offence may be easier to prove, in that the evidence will only need to show that there was an intention to make or implement an arrangement of a certain type, but as we have seen defendants are willing to make strenuous defences based on arguments that what they did was not 'wrong' or motivated by personal greed. The focus on the ordinary nature of the defendants and their motives in *Galvanised Steel Tanks* prosecution is an example of this defence strategy, but it has been apparent in both live cases in the UK.¹⁰⁹ The presence of the dishonesty element in those cases made such a line of defence of obvious value, but there is no reason to suggest that such an approach will not be retained under the new offence. If the defence can present the accused as an everyman who is just doing their best to look at their business and save jobs it will still be a powerful message to the jury.

For a successful prosecution to be brought the CMA must focus on the right sort of cases for prosecution. That choice goes beyond technical questions about whether there is evidence about the nature of the arrangement. A good case for prosecution is also one that not only surpasses the technical evidence threshold, but is also one that shows clearly why it is a good case for criminal prosecution. The criminal law has a different focus to that of the antitrust prohibitions. A cartel may present with very strong evidence of a Chapter I infringement, but that does not necessarily mean that it will also present with evidence of a strong criminal case. The nature of criminal enforcement is that it will be reserved for the most serious cases; that is its very purpose. In practical terms a criminal case must also come before an antitrust infringement process. That challenge means that the CMA must be aware of the potential for a criminal investigation at the very early stages of any Chapter I investigation. It should also be alert to the flags, discussed below, that indicate that a cartel case has the elements which might make it a good case for criminal investigation, and ultimately of prosecution. It is in this regard where there are more reasons for optimism. There is evidence that the CMA increasingly understands the importance of individual culpability and a wider narrative of wrongfulness.

5.2. *Individual Culpability*

One of the most obvious distinctions between criminal investigations under the Cartel Offence and traditional antitrust investigations is their focus on individual behaviour. Recent CMA practice has shown that it has taken steps to make that its focus in more cases.

We have already examined the Cartel Offence cases. In *Galvanised Steel Tank* and *Pre-Cast Concrete Drainage* the CMA,¹¹⁰ at an early stage in the process, identified the potential for a criminal case and

¹⁰⁹ See the discussion in § 3.1.

¹¹⁰ See § 3.1.

used their criminal investigatory powers to focus on the individual actions within the cartel. In those cases that was through the making of covert recordings of the cartel activity. Those recordings were no doubt invaluable, not only in proving the nature of the arrangement, but also proving the role played by certain individuals. But that was not the only evidence of individual behaviour which was focused on in criminal investigations such as *Pre-Cast Concrete Drainage*. There was also evidence addressing the leadership of meetings and who shaped discussions.¹¹¹ As I have identified, there were other elements of individual culpability which singled Mr Copper out for the bringing of a criminal charge: 1) he signed competition compliance documents while being involved in cartel activity, and 2) he reprimanded staff who unknowingly made sales outside the parameters set by the cartel arrangement. This type of evidence is not required for a Chapter I prohibition case. It does not matter who did what within an undertaking, only what the undertaking did as a whole. While there has always been the potential for a 'smoking gun' email to emerge during any infringement investigation, there now appears to be a more concerted effort to gather the right sort of evidence to support a criminal case. The experience in these cases will also have helped investigators to understand what evidence is most effective before a jury.

The growing importance of individual culpability in relation to competition law is also seen in another interesting area: Competition Disqualification Orders and Undertakings. There is no need to go into the detail of those Orders and Undertakings here, as it is covered in detail above by Peter Whelan in Chapter 11. As that Chapter indicates, Director Disqualification also acts as a form of individual deterrence within the UK competition regime, working as a complement to fines on undertakings, and the ultimate sanction of imprisonment. One of the key features which must be addressed by the CMA in considering making an application for a CDO is that 'the director's conduct contributed to the breach of competition law'.¹¹² This shows that across the full panoply of competition law enforcement in the UK the individual conduct of a Director may be of importance in any investigation, not just in classic cartel cases. This renewed focus on individual behaviour in wider competition investigations will build expertise and experience which will feed into potential Cartel Offence cases in the future, and will ensure that in early Chapter I investigations potential evidence of individual responsibility will be gathered.

The renewed focus on individuals has not, yet, led to Cartel Offence prosecutions, but there have been increasing numbers of Competition Disqualification Undertakings alongside Chapter I infringement cases. Whelan has noted a surge of cases in the last four years.¹¹³ Many of those cases were in relation to small scale price fixing arrangements, and it is clear that the use of CDOs or CDUs act as an effective complement to potential Cartel Offence cases. They are not only a complement in terms of deterrence, they also ensure that investigators will, well before decisions about the ultimate form of a case are finally taken, attempt to gather good evidence of individual culpability that could be of value in either a CDO or a criminal case.

I have stressed the importance of investigation and evidence gathering in this section. There is however also a note of caution to be struck. One unusual feature of Chapter I cases like *Galvanised Steel Tank*, *Balmoral Tanks*,¹¹⁴ and *Pre-Cast Concrete Drainage* is that we see evidence gathered using criminal investigation powers, usually covert recordings of cartel meetings, used in antitrust infringement decisions. That has proved to be very useful in those cases, and the use of the enhanced investigatory powers in those cases was justified. If we do not see new criminal prosecutions being

¹¹¹ *Pre-Cast Concrete Drainage* (n 58), 4.79.

¹¹² Competition and Markets Authority, 'Guidance on Competition Disqualification Orders', CMA 102, 6 February 2019, 2.10.

¹¹³ Cross Reference ...

¹¹⁴ *Balmoral Tanks Ltd & Anor v Competition And Markets Authority* [2019] EWCA Civ 162.

brought before the courts in the future, the continued availability of those criminal powers of investigation may be brought into question.

5.3. The Narrative of Wrongfulness

The enhanced focus on individual culpability during investigations and evidence gathering is only part of the change required to develop effective pathways toward successful prosecutions. The prosecution must be able to present that evidence in a way that convinces a jury that a conviction and term of imprisonment is deserved (and not simply legally warranted).

It is here that the developing understanding of the criminal nature of cartel activity is of assistance. Having a shared understanding of the nature of cartel criminality gives the wider competition law community an opportunity to develop a clearer narrative of what it is about an individual's behaviour in a cartel that means they deserve punishment. The conception of 'cheating' the market is potentially therefore very helpful. If investigators and prosecutors have that conception in mind when building their cases, and ultimately prosecutors can present their evidence to a jury using that narrative to explain the criminal wrong that lies at the heart of cartel activity, they are more likely to carry the jury with them. A single narrative used over time in a number of cases, and highlighted in competition advocacy by the CMA, may also help to develop a better understanding of the cartel problem in the business community and more widely in the public consciousness.

It is hopefully not mere coincidence that the recent CMA 'Cheating or Competing' campaign¹¹⁵ is an example of how this message can be built up, through adverts, videos and posters, and carried through into investigations and prosecutions. As Howard Cartlidge, the CMA's Senior Director of Cartels, said in the press release, 'The CMA is cracking down on businesses that collude to rip off customers by fixing prices, sharing out markets amongst themselves or rigging bids. Our message to them is that we know cheating when we see it, even if you don't.'¹¹⁶ The campaign uses covert recordings captured in previous criminal investigations, such as *Pre-Cast Concrete Drainage*, and *Residential Estate Agency Services*.¹¹⁷ Effective advocacy of this nature is to be encouraged. It should raise awareness of the cartel problem in the business community, but it must also be carried through by the CMA into its enforcement efforts. If the CMA consider cartel activity as a species of cheating they will have the intellectual support of many in the academic community. That narrative of wrongfulness must also be used to help CMA investigators shape the evidence they gather, and then have CMA prosecutors use that evidence to build up cases which can convince a jury that cartel participants are criminal cheats. If they can do that effectively it will help to reduce the impact of the common lines of defence that cartel activity is not for personal greed, or is to save jobs. That is less relevant is the narrative of harm focuses on cheating the wider public.

6. Conclusions

The UK Cartel Offence has, in many ways, not been a great success. It was a bold change in enforcement practice for the UK regime, and it appears the UK competition authorities were underprepared for the enforcement challenges it would bring. The wider competition law community had also failed to appreciate how much the adoption of criminal powers, and contested trials, would necessitate a re-examination of many of the fundamental questions which underlie competition law. Those early failures have, through the changes brought in by ERRA 2013 and the wider debate surrounding the wrongfulness of individual cartel activity, been addressed to a great extent. The problem now is not the lack of a clear pathway to rebuild the UK Cartel Offence, it is whether there is

¹¹⁵ CMA, 'Cheating or Competing?' <<https://cheatingorcompeting.campaign.gov.uk/>> accessed 18 September 2020

¹¹⁶ CMA, 'New CMA campaign urges firms to compete, not cheat', 26 February 2020

¹¹⁷ CMA Decision, *Residential Estate Agency Services*, Case 50543, 17 December 2019.

the institutional appetite, particularly within the CMA, to re-invest in criminal enforcement. There is still significant reputational risk in further failure, and one hopes that there are those within the CMA who are willing to try again. The CMA's focus on cartels as 'cheating' and their willingness to use other individual sanctions, such as CDUs, gives some hope that there is still stomach for the fight.