The Cartel Offence: Defining an Appropriate 'Moral Space'

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Abstract

There is increasing support in Europe for individual criminal penalties for cartel activity. The UK's initial experience of criminalisation has not been successful and reform has been suggested. It is argued that when designing a criminal cartel offence deterrence cannot be the only concern and the true wrongdoing in cartel behaviour must be at it centre. Cartel harm does not provide good basis for criminalisation and it is argued that its proper basis should be the individual cartelist's intention to subvert the competitive process. A reformed UK cartel offence, without the current dishonesty test, should reflect the central concern of subverting the competitive process clearly.

Keywords: cartels, crime, competition, harm, intent

Article

The use of the criminal law as a tool for the enforcement of competition law against cartels across Europe has become an increasingly important topic of debate; with support shown for domestic action across the EU, and even for action at the EU level.[1] The criminalisation debate has largely been focussed on the economic harm caused by cartel activity and the regulatory need to enhance the deterrence of an effective competition law regime.[2] That debate is well rehearsed, well established, and highly convincing; but, it only takes us part of the way towards successful cartel criminalisation. That debate may explain why regulators and legislatures have sought to criminalise the most serious, and least justifiable, form of competition violation, but it does little to elucidate or explain how to successfully criminalise. The design and definition of a cartel offence, and its associated enforcement practice, should follow a very different debate. It is that debate which has not been so well rehearsed in European competition policy circles.

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1 WPJ Wils, 'Is Criminalisation of EU Competition Law the Answer?' in KJ Cseres et al, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham, Edward Elgar, 2006), pp 60-109, and P Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4(1) *Competition Law Review* 7.

2 For the debate in the UK, see: J Joshua, 'A Sherman Act Bridgehead in Europe, or Ghost Ship in Mid Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct' [2002] 24 *European Competition Law Review* 231; J Joshua, 'The UK's New Cartel Offence and its Implications for EC Competition Law: A Tangled Web' (2003) 28 *European Law Review* 620; and, A MacCulloch, 'The Cartel Offence and the Criminalisation of UK Competition Law' [2003] *Journal of Business Law* 615.

The UK is one of the most recent converts to the criminalisation of cartels in Europe, but it has already found it expeditious to seek to reform its cartel offence after only two prosecutions.[3] In this article I look at the nature of the UK's offence to illustrate the problems faced when a jurisdiction attempts to translates a desire for increased competition law deterrence into the criminal law. Each jurisdiction has a unique context, but the UK experience should serve a salutary example for other European jurisdictions.[4]

One of the key issues surrounding the design of a criminal cartel offence, which distinguishes it from the majority of administratively enforced competition law, is that it occupies a very different 'space' than other competition enforcement. The criminal trial, with all the important cultural and legal trappings that go with it, is a very different environment to the SOs, Hearings, and Decisions that competition lawyers find much more familiar. The criminal trial is inherently a 'moral space' where guilt and innocence are established, and the guilty are punished because of their wrongdoing - it is the actions of the accused, their wrongdoing, which is judged. Therefore, for a criminal offence to be effective it must be clear what the wrongdoing is; that is, what is to be prohibited and punished?

The debate within competition law regarding criminalisation comes from the conviction that increased individual deterrence would increase the effectiveness of enforcement regimes in the struggle against cartels. This is essentially a 'forward looking' or utilitarian conception of the law.[5] Traditional criminal law tends not to have that focus. It is often 'backward looking' in that it seeks to justify what is criminal on the basis that the behaviour is wrong according to a societal view of justice.[6] Behaviour will be challenged if it deserves moral opprobrium and/or clearly causes societal harm. In this paper I wish to take a 'backward looking' approach to questions surrounding the design of the cartel offence and try to identify where I perceive its fundamental disconnect with the traditions of the criminal law to lie. It is also a good time to try and assess whether the UK coalition Government's suggestions for reform of the cartel offence are in any way suited to address those problems.

A. Societal Harm & Consumer Welfare

It is interesting that in the discussion surrounding cartel criminalisation there has been apparently little attempt to simply argue that cartels are wrong, and should be criminalised, as they are organisations that cause great harm to others in the economy. Such a position would sit well within the criminal law's 'moral' space. Where behaviour clearly causes significant harm to

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3 BIS, 'A Competition Regime for Growth: A Consultation on Options for Reform', March 2011. Regarding the problems with the original UK Offence, see, for example: A MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy', in BJ Rodger, *Ten Years of Competition Law Reform* (Dundee, DUP, 2010), pp 283-307; and, J Joshua, 'DOA: Can the UK Cartel Offence be Resuscitated?' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), pp 129-155. For a similar debate concerning the contemporaneous adoption of a cartel offence in Australia, see C Beaton-Wells, 'Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels*, pp 183-199.

4 For the experiences of Ireland and Germany see DM Low QC & CW Halladay, 'Competition Offences in Ireland: The Regime and its Results', pp 105-128, and F Wagner-von Papp, 'What if all the Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany', pp 157-182, in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011).

5 My own general account of the law in this area clearly takes this orthodox utilitarian stance, see, 'Cartels: deterrence, leniency and criminalisation' in BJ Rodger & A MacCulloch, *Competition Law and Policy in the EC and UK* (London, Routledge, 4th ed, 2009), pp 241-273.

6 See R Williams, 'Cartels in the Criminal Law Landscape' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), pp 289-312.

society it should be stopped, and those who have inflicted those harms on others should be punished.

In the cartel offence adopted in the UK there is no mention of harm itself; no element of the offence, as set out in the Enterprise Act, focuses on the harm that the cartelist standing in the dock has wrought on the marketplace or the costs to his customers and consumers. Why has this important moral element of the case against cartels been ignored by the offence?

Several commentators, including myself, welcomed this approach to the cartel offence when it was first introduced. Now it is a good time to reconsider the impact of that choice. At the time I argued that one of the main reasons for the shift away from the effects based, or harm based, approach to cartels was to separate the cartel offence from the approach adopted in Art 101 TFEU. The Enterprise Act was drafted in the difficult period leading up to the adoption of Regulation 1/2003 where the final relationship between EU and domestic competition law was still unclear.[7] Making the cartel offence look distinct from Art 101 TFEU was, at the time, a goal in and of itself. Post Regulation 1/20003 and *R v IB*[8] that linguistic separation is no longer as important. Notwithstanding this shift I would suggest there are still at least two clear reasons why the UK Offence, and also other cartel offences, would be wise to not rely directly on a cartel's harm for its underlying justification.

1. Proof of Harm

The first reason that it may be considered wise to exclude the harm caused by a cartel from the definition of the offence is driven by practical enforcement concerns.[9] If included the prosecution would have to prove the extent and nature of the harm to the jury in order to secure a conviction. This would clearly be a double edged sword. It would introduce the spectre of complex economic evidence into cartel offence trials, with rival expert witnesses giving contradictory evidence as to the nature of the market and the impact of the cartel activities.[10] Attempts to present complex economic evidence in jury trials have left a string of wounded prosecutors and embarrassed agencies in other types of white collar crime; there is no desire to introduce another case, and career, threatening trap into the cartel offence. This is probably the main reason that the cartel offence does not concentrate on the clear moral opprobrium that could be heaped on the damaging consequences of an act, but rather on the morality of the cartelist's individual behaviour within a cartel.

The antitrust orthodoxy accepts that cartels are unlikely to be acceptable or beneficial, and much scholarly ink has been spilled trying to quantify the harms that have stemmed from cartelisation in the recent past,[11] but in the context of a trial process, bringing an individual in front of a jury of his peers, there is little desire to try and reduce the morality of cartelists to a series of complex tables or even more complex equations.

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7 Regulation 1/2003/EC [2003] OJ L1/1.

8 *R v IB* [2009] EWCA Crim 2575.

9 See C Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation', in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), pp 359-379.

10 It is interesting to note that the level of evidence of harm needed in a criminal trial would be far greater than is required under Art 101 TFEU. DG Comp only has to evince the agreement has the 'object' of restricting competition to find an infringement and then the turnover in the effected market to calculate the fine - all within the civil burden of proof. In a criminal trial the prosecution would have to prove the nature of the agreement and actual harm caused by the cartel beyond reasonable doubt; a much tougher prospect.

11 Notable examples include, JM Connor & RH Lande, 'The Size of Cartel Overcharges: Implication for US and EU Fining Policies' (2006) 51(4) *Antitrust Bulletin* 983, and C Veljanovski, 'Cartel Fines in Europe – Law, Practice and Deterrence' (2007) 30 *World Competition* 65-86.

2. The Wrong Sort of Harm?

Another interesting way of approaching the centrality of a cartel's harm to a cartel offence is a normative one. By looking to the wider theoretical justifications for the use of the criminal law as a means of regulation we can define whether the harm that a cartel causes falls within the ambit of harm which demands criminalisation.

Such a normative examination has been undertaken by Wardhaugh, who, using the work of Mills[12] and Rawls,[13] seeks to understand the correct justification for the use of the criminal law.[14] It is set out that in Mill's utilitarian perspective freedom of action is key, but liberty can be restricted where acts may harm another. Not all harms to another's interest can, or should be avoided. The example of competition over a resource is used as an example: the winner of that competition will gain access to that resource, but the other competitors will be disappointed. As Mill's states:

> 'society admits no right, either legal or moral , in the disappointed competitors, to immunity from this kind of suffering; and it feels called on to interfere, only when means of success have been employed which is contrary to the general interest to permit – namely fraud or treachery, and force.'[15]

Here we see a clear indication that not all harms can be protected against by the criminal law, and also that some forms of 'offensive' conduct can elevate otherwise benign behaviour to be considered harmful. That still raises the detailed question of what types of behaviour are so harmful as to require control.

Wardhaugh's analysis of Rawls's anti-utilitarian stance gives an alternate justification. Rawls uses the 'veil of ignorance' a thought experiment to discover the restrictions which would be acceptable in a hypothetical pre-moral position where we are ignorant of our own circumstances and the economic and political circumstances of our society. This prevents one from 'bargaining' for individual advantage. The first principle Rawls defines through this experiment is that each person should have liberty and equal rights; the first desire is liberty, but as no one knows what position they will have in society they would also seek to ensure equality. The second principle is that social and economic liberties are to be arranged so that they are of the greatest benefit to the least advantaged. Inequality is not prevented with in this model, it is required that inequalities make all people better off; including those least advantaged. When one applies these principles to the organisation of market economy there is recognition that the law may be required to intervene to ensure that the principles are maintained. It sets out parameters through which the institutions of the market are to be developed. Wardhaugh then goes on to attempt to apply these principles to the marketplace. He suggests that the only obvious restriction to liberty that would be accepted in the 'original position', of ignorance, would be integrity of the person or property. Further restrictions would be less likely given the risk adverse nature of those in that position. By examining the harms that are associated with cartels it is argued that they are not the type of harm which a Rawlsian analysis would suggest should be restricted through the criminal law.

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[12] JS Mill, *On Liberty*, (London, Parker, 1859).

[13] J Rawls, *A Theory of Justice* (Cambridge MA, Harvard UP, Revised ed, 1999).

[14] B Wardhaugh's full paper has not yet been published. His ideas were presented as 'A Normative Approach to the Criminalization of Cartel Activity', SLSA Conference, 13 April 2011, University of Sussex, and I had the benefit of seeing a fuller draft. My attempt to very briefly summarise this complex area barely does justice to Wardhaugh's argument but it will appear in full in a forthcoming issue of *Legal Studies*.

[15] JS Mill, *On Liberty* (London, Parker, 1859) at Chapter 5.

By taking one example from Wardhaugh's analysis we can illustrate the type of analysis undertaken. The most obvious type of 'harm' caused by a cartel would be the overcharge to customers. It is suggested that those customers, following a voluntary transaction with the cartel member, have less money than they would were it not for the cartel; essentially the appropriation of the consumer surplus by the cartel. It is argued the protection of the ever shifting consumer surplus is too fleeting to be undertaken through the criminal law. As liberty is to be protected it is argued to be unlikely that those under the veil of ignorance, ignorant whether they be producers or consumers, would accept the extensive intervention in the marketplace; perhaps price controls to ensure a just price. It is suggested that those under the veil would prefer structural remedies to 'safeguard the voluntary nature of the transactions and ensure confidence in the institutions of distributive justice'.[16] The final analysis is that the harm stemming from cartels is the harm to the institution of the market; it damages confidence in the markets ability to act as the chosen mechanism for transfer and distribution.

3. The Rejection of Harm as a Basis for Criminalisation

From the above it can be seen that there are several reasons why we might avoid attempting to justify the employment of criminal sanctions against cartelists on the basis of harm alone. That is not to say that it is unimportant that cartels are harmful, but rather the key rationale that should be behind the particular offence lies elsewhere.

This is not to argue that the harm caused by cartels is not a matter of grave concern – the evidence clearly suggests it is a significant economic problem. What is being suggested is that the nature of the harm caused by cartels is ill suited to a response through the criminal law. The best way of addressing that harm is through other legal tools available under domestic and EU law. It is important that we already have highly effective agencies to deal with the problem of cartel harm through administrative enforcement and through tortious/delictual remedies aimed at compensation. The question of cartel harm is, for instance, arguably central to the development of the EU's fining policy.

The rejection of harm as the rationale for criminalisation also goes some way to resolving another important question regarding the relationship between administrative enforcement and the cartel offence. It could be argued that administrative enforcement in the UK and EU focuses on corporate accountability for the harms caused by cartels.[17] In this sense the utilitarian arguments of optimal deterrence are much more convincing when we examine the financial penalties imposed on the undertakings who are party to cartels by Competition Authorities or through the courts in actions for damages. If corporate harm is addressed in this way it means that the criminal offence can, and perhaps should, seek to address the role of another actor in the functioning of the cartel. This may go some way to explain why it is the individual, rather than the corporation, that is the subject of the UK's cartel offence. The cartel office, having a different structure and justification, seeks to complement, and enhance, other deterrent policies aimed at corporations.[18]

As we have rejected cartel harm as the rationale of the offence, we must put forward another rationale. This plays a vital role in setting out why the criminal law is the right enforcement tool,

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[16] B Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity', as yet unpublished, to appear in a forthcoming Legal Studies, Section 3.1.

[17] While that may be argued it must also be recognised that harm is not a necessary element of 'object' type cartel agreements under Art 101 TFEU.

[18] There are other, offence specific, reasons that the particular offence I advocate should only be aimed at individuals. I will address these below. At a more general level there is no reason in principal why a justification for individual criminalisation could not also apply equally to corporate criminalisation.

and justifying why a particular criminal offence, in the terms of its scope and definition, has been chosen. It should, however, be noted that even if we reject harm as the rationalisation for criminalisation it does not mean that size, duration or damage caused by a cartel has no role to play in a criminal trial. It is still likely to be an issue when a judge comes to address the severity of offending while sentencing.[19]

B. The Morality and Wrongdoing of Cartelist Behaviour

If we reject simple harm as the main rationale for criminal sanctions we should seek out what other justifications lie behind our desire to criminalise cartel activity.

One suggestion put forward by Whelan is a hybrid model between deterrence and retributive justifications.[20] He suggests that deterrence may the reason that we seek argue for the existence of a criminal offence, but other retributive justifications may also be important to justify: (i) why a particular individual is being held to account, and (ii) the severity of the punishment.[21] He correctly states:

> 'these principles – as employed in the criminalisation framework – do not shape the argument on the existence of criminal liability; rather, they are used to limit that liability and to develop rules concerning, inter alia, the subject and/or severity of criminal sanctions'.

As noted above the UK offence currently focuses on the actions of individuals within the cartel as opposed to the actions attributed to a corporate entity. The wider debate about the relationship between individual and corporate liability, including individual and corporate leniency, is relevant to the deterrence argument in that explains how the criminal law can play a complementary role in the overall enforcement strategy adopted within a competition regime.[22] In this paper I seek to move on from that debate, focussing on the underlying choice behind the decision to criminalise a particular actor. I concentrate on why criminal liability should be limited to a particular person, behaving in a particular way, and in a particular context; i.e. who should be the subject of the criminal offence. It is this debate which should clarify the design of the criminal offence itself, going beyond the discussion of the context in which it exists. The choice whether the criminal law should focus on an individual or a corporate undertaking should be driven by what we see as the truly criminal act, the person actually responsible for committing the offense as set out, and also, more practically, evidential questions.

The definition of individual cartel activity set out in the Enterprise Act 2002's cartel offence is drawn from the economic case against cartels; it sets out the behaviour that economics suggest will cause harm if adopted on a marketplace. There is little in the offence to suggest that the actions of an accused are 'wrong' in themselves. Does the offence demonstrate why those particular acts, in that particular circumstance, are inherently wrong? Why are they singled out for punishment, when other acts are not? What is the wrong that we are seeking to punish these persons for, and why are they being held personally responsible? When we take a 'backward looking' stance we should be clearly able to identify what it is within that action that indicates it

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[19] As it did in the Sentencing Remarks of Judge Rivlin in Marine Hose, *R v Whittle, Brammar & Allison*, Sentencing Remarks, Crown Court at Southwark, 11 June 2008.

[20] P Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4(1) *Competition Law Review* 7.

[21] Ibid, at p 19.

[22] For an analysis of those relationships see CR Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents', (2008) 49 *William & Mary Law Review* 1621.

is right that the criminal law should take a strong moral or retributive stance against that activity and hold the perpetrator to account.

There are also interesting arguments that legal rules, particularly criminal law of general application, should be presented in a way that that ensures that the general public can understand their scope and application; after all, the public are subject to those laws, as market players, or expected to play a role in enforcing those laws as potential jurors. As Stephan argues:

> 'A popular understanding of why cartels are harmful and should attract criminal penalties, lends legitimacy to the cartel offence and helps to ensure continued political backing for criminal persecutions; reducing lobbying for soft enforcement'.[23]

It is to encourage this 'legitimation' or 'comprehension' of the cartel offence that it should be designed to maximise clarity in the scope of the behaviour it seeks to challenge. Whelan highlights the importance of 'comprehensibility' in making sure that the behaviour caught is 'considered wrong by a sufficient proportion of the population'.[24] In a more general context Goodin sets out an 'Epistemic Case for Legal Moralism'.[25] Here the argument is that the law should be discernable to the public without constant recourse to lawyers and the courts. Generally applicable law should be accessible to the general public, and importantly accord with critical-normative morality, if we are to hope that in their day to day lives the public, aided by their own understanding of morality, are to seek to accord with those laws. The morality of cartels is a difficult question, as is highlighted in the discussion of harm above and that before the House of Lords in *Norris*,[26] but I argue that the definitional scope of the offence should be accessible in that it sets out the behaviour of a particular cartelist within a cartel which is out of tune with morality; it should not have to address the morality of the cartel as a whole. By restricting the ambition of the offence and by attempting to keep its scope in line with core questions of basic morality it is hoped that it would have a clearer relationship with the wider public; as opposed to only being understood by a competition law elite. As Goodin puts it:

> 'For law to serve its social function – for it to guide people's action, to point and to push them in direction legally desired – people have to have some good way of finding out what the law actually requires of them.'[27]

Another conception of why society chooses to criminalise some behaviour is posited by Lamond and does not rely directly on morality. He relies on the argument that criminal law is best suited to deal with 'wrongs that the community is *responsible* for punishing'.[28] This approach can be summarised as beginning with punishment – asking when behaviour is sufficiently blameworthy to deserve punishment. As not all blameworthy behaviour deserves punishment, the next question is whether wrongdoing is serious enough; the suggestion being where the blameworthy conduct 'manifests a *disrespect* for the interest or value that has been violated' and the wrongdoer 'deliberately violates' the value.[29] To put this in the context of the cartel offence, we have to consider what is the central value or interest that is violated through cartel behaviour and

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[23] A Stephan, "The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal', in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), pp 381-394, at 393.

[24] P Whelan, supra, n 20, at p 21.

[25] RE Goodin, 'An Epistemic Case for Legal Moralism' (2010) 30(4) *Oxford Journal of Legal Studies* 615-633.

[26] *Norris v Government of the United States of America and others* [2008] UKHL 16.

[27] RE Goodin, supra, n 25, at p 633.

[28] G Lamond, 'What is a Crime?' (2007) 27(4) *Oxford Journal of Legal Studies* 609-632, at p 621 (emphasis as in the original text).

[29] Ibid, pp 621 & 622 respectively (emphasis as in the original text).

disrespect for which deserves state punishment? This is different in that it does not rely on morality *per se*, but the heart of the offence should still be an important societal value that the state must protect through punishment.[30] Again this challenges us to set out the central wrongdoing in cartel activity.

The current UK cartel offence makes its clearest attempt to deal with the morality or wrongdoing of cartelist behaviour through the introduction of the 'dishonesty' requirement alongside the economic *actus reus* of the cartel. The introduction of dishonesty in the cartel offence proved to be its most controversial and challenging element; widely being blamed for the lack of successful prosecutions to date.[31] A fundamental problem with the dishonesty element of the extant Cartel Offence is that is depends on the fact that juries will consider the behaviour set out in the offence to be immoral, absent any clear guidance as to the matter,[32] before there can be a conviction. The discussion in *Norris* clearly indicated that historically this has not been the 'default' moral position in the UK.[33] What is less clear is whether the hardening of legal attitudes to cartels has been accompanied by a hardening moral attitude in the wider public.[34] Williams characterises this as the 'bootstraps' problem. The cartel offence seeks to pull itself up by its own bootstraps in that it seeks to harden moral opprobrium by criminalising cartels, but 'dishonesty cannot *inculcate* collective moral censure for the cartel offence because it *presupposes* and relies upon such collective moral censure already existing'.[35]

It appears that dishonesty may not remain a part of the cartel offence in the long term. One major suggestion for reform of the cartel offence in the BIS Consultation on the competition regime is to remove the dishonesty element.[36] If dishonesty is to go two questions are raised. First, to inculcate collective moral censure or a clear sense of wrongdoing does the offence need to go beyond the cartel's economic *actus reus*, or is that all that is required? Second, if it does need something more – what best reflects the wrong in cartel behaviour?

1. Is Competition a Moral Question?

Competition law has not generally been seen to have a moral element outside the unfortunate, in the sense that it tends to confuse rather than inform, public rhetoric about price fixing being 'theft'; however, as soon as competition law steps into the criminal arena it takes on a moral face. Just because questions of morality are difficult and unfamiliar it does not mean that competition lawyers can ignore them while still seeking to utilise the perceived advantages of criminal deterrence. If we are to use the criminal law we must abide by its conventions and justify our offence on its terms. As Williams points out a poorly designed cartel offence is not only

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30 Much of the rest of this paper is couched in the terms of morality, but if one rejects morality's role in the discussion of criminalisation I argue that in many situations Lamond's conception of 'wrongdoing' can fulfil a similar, if not identical, function.

31 For contrasting views in the UK's dishonesty debate see, A MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy', in BJ Rodger, *Ten Years of Competition Law Reform* (Dundee, DUP, 2010), pp 283-307, J Joshua, 'DOA: Can the UK Cartel Offence be Resuscitated?' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels* (Oxford, Hart, 2011), pp 129-155 and A Bailin, 'Doing Away with Dishonesty' [2011] *Competition Law Journal* 169-174.

32 On the reality of the *Ghosh* direction, as to dishonesty, in criminal trials, see Joshua, ibid.

33 *Norris v Govt of USA and othrs* [2008] UKHL 16, [2008] 1 AC 92.

34 Andreas Stephan's oft cited survey of UK public opinion gives a valuable snap-shot of public opinion in the UK, but more work would be valuable to indicate if there is a direction of travel. See A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5(1) *Competition Law Review* 123-145.

35 R Williams, supra, n 6, p 297 (emphasis as in the original text).

36 BIS, 'A Competition Regime for Growth: A Consultation on Options for Reform', March 2011. See also B Wardhaugh, 'Closing the Deterrence Gap: Individual Liability, the Cartel Offence, and the BIS Consultation' [2011] *Competition Law Journal* 175-194.

damaging to the competition regime, it is also damaging for the coherence and reputation of the criminal law.[37] Simply removing the dishonesty element also causes problems for the civil cartel regime. As the BIS Consultation points out, in a small number of situations activity that would fall under the scope of the cartel offence is permitted as being beneficial.[38] There must be a means, other than prosecutorial discretion, to distinguish truly criminal conduct from that which is not even a civil wrong. The definition of the criminal offence must not be over-inclusive; in that all behaviour captured must be truly worthy of moral opprobrium.

2. Identifying the Moral Wrongdoing

If one accepts that it is useful to narrowly delineate the extent of the cartel offence, to ensure it is not over-inclusive and only catches the worst forms of wrongdoing, one must accept that part of the *actus reus* of the offence will be drawn from economic theory. In this way elements of the UK's cartel offence are unproblematic. It is uncontroversial that criminal liability should only attach to those involved in 'hard-core' horizontal cartel arrangements. While the drafting of the Enterprise Act is not without its problems in this area I will not discuss it further here.[39] But this economic influence can do little more than set out the context in which the moral judgment of the offence is played out. It does not explain which behaviour, or wrongdoing, within that context deserves a criminal sanction. To illustrate this issue an example may be appropriate. One may accept that criminal liability can attach to those who either 'make or implement' a cartel arrangement.[40] If we focus on those who may implement a cartel arrangement it may be desirable to differentiate, in liability terms, between two individuals: (1) a cartel 'enforcer' who has the role of ensuring that all cartel participants are properly holding to the agreement through a mix of threats and encouragement, and (2) a retail store manager who receives routine pricing instructions from his boss and ensures that goods are sold at the firm's (cartel) price. Both of these individuals can be said to be implementing the cartel arrangement but it would be harsh in the extreme to conclude that a retail store manager following normal pricing instructions is acting criminally.[41] It is important that the offence, on its face, sets out the particular behaviour which deserves the weight of a criminal sanction.

There has been no strongly expressed desire that the cartel offence should be a strict liability offence. It is accepted that must be some mental element, the *mens rea*. The mental element, however, does not appear to offer a complete answer. It cannot alone narrow the current cartel offence to only those actions which truly deserve opprobrium. To do that one needs to set out clearly what part of the activity a person undertakes within a cartel which creates criminal liability. In order to do this it is vital we identify the criminal 'heart' of the offence by identifying a particular element of 'delinquent' cartel behaviour which would usefully characterise the

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[37] R Williams, supra, n 6, pp 296-298.

[38] BIS Consultation, supra, n 36, paras 6.27-6.30. The examples given are credit card interchange fees and joint selling of sports rights.

[39] See my comments in A MacCulloch, 'The Cartel Offence and the Criminalisation of UK Competition Law' [2003] *Journal of Business Law* 615. The Australian offence also has considerable issues with regards to limitation in this area. See the discussion in A MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy', in BJ Rodger, *Ten Years of Competition Law Reform* (Dundee, DUP, 2010), pp 283-307.

[40] This is the formulation is s 188 of the Enterprise Act 2002.

[41] This is one of the problems with simply removing dishonesty from the UK cartel offence. The dishonesty element effectively separates these two scenarios; giving the retail store manager an obvious defence.

offence.[42] Only once we have properly defined the *actus reus* is it possible to decide the appropriate mental element which goes to complete the offence.[43]

A review of the existing literature indicates a number of useful suggestions as to what might be the core of cartel behaviour which deserves challenge. Suggestions include 'secrecy',[44] 'defiant willingness',[45] 'disobedience',[46] 'cheating',[47] 'subversion of competition',[48] or 'exploitation'.[49] Which of these is most useful to replace dishonesty and act as an effective moral indicator to catch the right cartelists and send the correct signal to the wider public why this behaviour is worthy of punishment? That discussion must consider each option's appropriateness for two distinct demands. It is not sufficient to design the offence only thinking of the challenge the prosecutor faces. Simply making the offence 'easier' to prove, and therefore secure convictions, is not, in itself, enough to satisfy the other important audience. It is vital that the offence signals to wider society that an offender has not committed a mere technical breach, but that there has been a serious affront to wider societal values. An offence that correctly identifies the delinquency of cartel behaviour may be a more difficult offence to prosecute, and prosecutors will have to be very careful in identifying cases which are best suited to prosecution, but it will mean that successful prosecutions will accord with societal perceptions of 'justice', and it is much more likely that strong punishments, including imprisonment, will be seen as appropriate and justified. That in turn will increase the effectiveness of the offence, not simply through deterrence and punishment, but through people's desire to comply with the law.

Before going on make a suggestion as to what I consider the best solution might be it is important to address one of the BIS options which has found favour with the OFT, and which, at first glance, may appear to be the 'least worst' solution in the BIS Consultation. That option is the removal of dishonesty from the UK cartel offence and changing the definition of the offence to exclude agreements made openly.[50] The OFT's response to the Consultation makes several points similar to those I have made above, perhaps the most telling being that: 'it should be possible to frame the offence in other ways, that do not rely on dishonesty as an element of the definition of the offence'.[51] The OFT seem to, correctly, identify that simply removing the inconvenience of proving dishonesty is not the answer to the problems facing the cartel offence, but they have not alighted, to my mind, on a good solution. By simply excluding 'open' agreements from the cartel offence they may have removed a class of agreements which are very unlikely to be worthy of prosecution from its ambit,[52] but they have failed to give any guidance as to which agreements do deserve punishment. This does not address the central concern that I

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42 On the 'delinquency' of cartel behaviour, see C Harding & J Joshua, *Regulating Cartels in Europe* (Oxford, OUP, 2nd ed, 2010).

43 The correct mental element for my conception of the offence will be discussed further below.

44 BIS Consultation, supra, n 36, paras 6.40-6.48.

45 Harding, supra, n 9.

46 S Green, *Lying, Cheating and Stealing: A Moral Theory of White Collar Crime* (Oxford, OUP, 2006).

47 Ibid, and C Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 675.

48 C Beaton-Wells & B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge, CUP, 2011).

49 Williams, supra, n 6

50 This would effectively extend the current provision in s 188(6) of the Enterprise Act 2002 relating to bid-rigging.

51 OFT, 'A Competition Regime for Growth: a consultation on options for reform - The OFT's response to the Government's consultation', June 2011, OFT 1335, para 5.8.

52 This exclusion would still leave such agreements potentially subject to administrative enforcement and civil actions.

have sought to identify above; the offence still appears to be potentially over-inclusive and makes little attempt, on its face, to identify the particular conduct which is seen as being reprehensible. I would therefore argue that the OFT's position leaves the offence over-inclusive and reliant on prosecutorial discretion for necessary limitation of its scope.[53]

3. A Potential Solution – Protecting the Process?

As noted above, a number of writers have suggested what they believe lies at the centre of cartel activity. All of those suggestions highlight aspects of cartel behaviour and help us to better understand and visualise the cartel as a phenomenon. When we seek to use that understanding to inform our limitation of a cartel offence it is important to bear two, potentially contradictory, challenges in mind. The first challenge is to correctly identify the actual behaviour of the cartelist which is morally repugnant, and which should therefore be punished. The second challenge is to find an expression of that moral sense which works in practice. Whatever formulation is chosen must reflect the wrong, but it must also be a formulation which is suited to proof in a criminal trial. If the formulation of the offence has evidential clarity it is valuable in a number of ways: first, it is clear to the prosecutor what they have to prove in order to bring a successful prosecution, this allows them to focus their efforts during the investigation and at trial; and, second, it helps the jury if they have an understandable conception of what the issues are to help them decide whether the accused has committed the offence.

One of the options in the BIS Consultation does seek to limit the cartel offence to a particular form of behaviour, by suggesting the introduction of a 'secrecy' element.[54] This formulation has an advantage, compared to the 'openness' option discussed above, of setting out a clear limiting factor to set out which cartel behaviour is sufficiently reprehensible to be appropriate for criminal sanctions. The Consultation itself highlights a potential problem with introduction of 'secrecy' to the offence. The concern addressed is whether there should be a distinction between active and passive secrecy. The Consultation dismisses a restriction to active secrecy, as it may be difficult to prove, and as there is no policy reason to demarcate only active secrecy as being criminal. Passive secrecy does not escape without comment; concerns were raised that the addition of secrecy would not give clarity to business and may catch 'potentially benign' agreements which businesses had not seen a need to announce.[55] The latter of those points raises the question as to which secret cartels are 'benign'? But, it is the first point which lies closer to the heart of the matter. Is the presence of 'secrecy' the point whereby a cartelist crosses the moral threshold of criminality? I would suggest not. The problem is that secrecy is a symptom of increasing moral repugnance of cartel activity; it is not the cause. We are in very similar territory here to arguments that were made regarding dishonesty, and which were canvassed in *Norris*.[56] There the argument was that secrecy would act as proof of dishonesty. Secrecy results from the cartelists' awareness that they are committing a wrong; it is not the wrong itself. To effectively limit the cartel offence it would be preferable to identify the wrong itself, rather than writing into the offence a proxy such as secrecy.

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[53] It should also be noted that the Australian offence also relies heavily on prosecutorial discretion for limitation of its scope. See CDPP and ACCC, 'Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct', July 2009.

[54] Paras 6.40-6.48. The Consultation, at para 6.41, suggests a definition of secrecy as follows: 'an agreement may be proved to have been made secretly where the persons who make the agreement take measures to prevent the agreement or the intended arrangements becoming known to customers or public authorities'.

[55] At para 6.46.

[56] *Norris*, supra, n 26, at [59]-[61].

From the various suggestions in the literature I would suggest that two conceptions present themselves as the best potential candidates for highlighting the wrong in cartel behaviour and being useful to limit the application of the cartel offence; those are 'cheating'[57] and 'subversion of competition'.[58] I argue that these best fulfil the two challenges set out above. Both concepts are quite closely related and my preference for them stems from the same central understanding. Both represent the concern that cartel behaviour is wrong in that the act of making or implementing a cartel arrangement denies the marketplace of the legitimate expectation of a competitive process. The cartelist 'subverts' that process or 'cheats' the marketplace by stepping outside of the legitimate process that other market players, and the wider economy, legitimately expect. The wrong in the conduct is that the cartel members have chosen to break the rules of the game. There is an assumption in this that free competition within the marketplace is a legitimate expectation within the UK. I do not think that in the 21st Century that is an unreasonable position to hold; competition is very much the norm – and the public understand that competition is in the wider interest and the process should be protected from those who wish to make private gains. As competitive markets are the mechanism through which society's wealth is to be maximised it is legitimate that wider society, and not just those actively involved, can have an expectation of a truly competitive markets.[59]

While both conceptions share a common theme, in that they express the idea that the offending behaviour goes against the expectations of the market, there are subtle differences which might lead to a preference between the two. If one prefers the 'cheating' formula the offence would tend to have a narrower scope. The idea of 'cheating' the market is certainly a more active idea. It also tends to suggest that there were clear cut rules or some kind of more structured form to the process that has not been followed. The best example of where a 'cheating' case could be made out would be in a classic bid-rigging situation. If the prospective tenderers got together to decide who should submit the winning bid, and arranged some form of compensation or pooling arrangement, it would be a situation in which one could clearly characterise the behaviour as cheating. The expected norms of the tendering process had been broken by those involved. An interesting issue surrounding the scope of a cartel offence using a cheating limitation is to consider the position of cover bidding, as seen in the UK construction cartel.[60] If a tenderer wishes to ensure they do not win a tender and communicate with others to ensure they tender a sufficiently high 'cover' bid, would that be cheating? It is clear in such a case that it would be much more difficult to make out a case of active cheating rather than some other more passive form of not 'playing by the rules'. If we were to proceed on the basis of a 'cheating' type formulation of an offence we must accept that the offence would only capture the most obvious and egregious types of actively deceitful cartels. The lesser forms of cartel behaviour would still, of course, fall within the ambit of the civil antitrust prohibitions.

There is also difficulty with adopting the 'cheating' formulation when we try to deal with more traditional cartels. If one pictures a traditional price fixing cartel, meeting in hotel rooms under the cover of a regular trade association event, you can see how 'cheating' might be difficult to prove. It begs the question who is being cheated and where are 'the rules' set out? A case can be made that markets are expected to be competitive in nature and therefore any attempt to avoid competition is cheating on that norm. However, if you need to stretch the meaning of 'cheating' that far I can see no reason why it would not be better to clearly set out the limitation in a more natural use of words. I would suggest that if we wish to catch the traditional cartel clearly within

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[57] S Green, supra, n 46, and C Beaton-Wells, supra, n 47.

[58] C Beaton-Wells & B Fisse, supra, n 48.

[59] On the 'universality' of competition see, C Harding & J Joshua, supra, n 42, Chapter 2.3.

[60] See OFT Press Release 114/09, 'Construction firms fined for illegal bid-rigging', 22 September 2009.

the scope of the offence the better limiting formulation would be a requirement that the arrangement 'subvert competition', 'subvert a competitive market', or 'subvert the competitive process'.[61] Of those I prefer the latter, as it the process itself I argue that the offence should protect from the behaviour of the cartelist. I also foresee a danger that the reference to simply 'competition' or the 'competitive market' in the other formulations could potentially lead to ideas of harm and economic evidence being brought into issue. As we noted above there are good reasons to limit such potential where we can. The advantage of this approach is that the offence is limited to situations in which the prosecution can show that the accused was involved in a horizontal arrangement, limited to particular forms, but also that they did so with the intention to undermine the competitive process that we legitimately expect in a competitive market.[62] It should be noted here that the offence would be ambivalent to why the cartelist sought to subvert the process; there should be no defence that they claim good intentions - perhaps avoiding 'ruinous competition' or saving jobs. The limitation in this formulation is designed to ensure that only those who can be proved to be 'making or implementing' a cartel with a particular objective in mind can be found guilty of the offence. There can be no bright line of criminality in cases such as this, as there are numerous process and forms that cartels can take, but we can seek to ensure that the offence is designed to catch only those who have entered into an arrangement in a manner which shows that have taken a clear choice to step outside the expected norms of the competitive marketplace. The offence would be reserved for those for whom we could show had exhibited a disregard for the competitive process, and the value that society ascribes to that process, through their actions.

C. The Mental Element of the Offence

The current UK cartel offence is largely dependent on the 'dishonesty' element for its *mens rea*, but it also has another mental aspect; in sections 188(2) and (3), the offence is limited to horizontal arrangements as far as they operate, 'as the parties to the agreement intend'. If dishonesty is removed from the offence can this limited form of intention be the whole of the mental element of a reformed cartel offence?

Looking at the cartel offences in other jurisdictions it is clear that the mental element of those offences appears secondary to the physical. The Sherman Act offences in the US rely on a mix of intention and conspiracy for its mental element.[63] The Australian offence, which rejected the adoption of a dishonesty test, relies on the Criminal Code for an intention element as to the making of a contract or arrangement, and then 'knowledge or belief' that the arrangement contains a 'cartel provision' as defined in the legislation. I have previously argued that it is important that the UK cartel offence maintains a clear mental element to reduce the risk that it accretes the judicial perception that it is not 'real' crime and, as a result, be treated like a technical breach of a regulatory provision.[64] On the basis that dishonesty is no longer part of the office it is clear that some form of mental element must be attached to the new limitation that takes its

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[61] The examination of a number of thesauruses indicates to me that 'subvert' appears to be one of the better choices of words. 'Vitiate' seems to be to go far, indicating the complete removal of all competition, whereas 'impair' or 'damage' indicate a much lesser form of impact.

[62] I shall return to the matter of intention below.

[63] Several of the early cases draw on the wording of the Sherman Act and focus on conspiracy, see F Alese, *Federal Antitrust and EC Competition Law Analysis* (Aldershot, Ashgate, 2008), pp 78 et seq. The importance of specific intent is discussed in O Odudu, 'The Role of Specific Intent in Section 1 of the Sherman Act' (2002) 25(4) *World Competition* 463-491.

[64] See the discussion in A MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy', in BJ Rodger, *Ten Years of Competition Law Reform* (Dundee, DUP, 2010), pp 283-307.

place. On that basis I suggest that most simple answer is to move the 'intention' requirement in the UK cartel offence to cover not only the horizontal hard-core nature of the arrangement set out in subsection (2) and (3), but also to cover the arrangement to subvert the competitive process in subsection (1).

Making intent more central to the definition of the offence in section 188(1) would ensure that the offence was seen to focus on the cartelist's 'wrong' in seeking to subvert the competitive process by involving themselves in a hard-core cartel arrangement. It would also ensure that those who were unaware of the cartel arrangement but played a role in its implementation would be able to escape criminal liability as they would not have the requisite intent.[65] There may be concerns that proving intent may be difficult for prosecutors, but it clear from other jurisdictions that courts, and juries, are willing to infer intent from cartel conduct.[66] It is relatively simple to infer anti-competitive intent from behaviour which could have no other reasonable justification. This focus on intent should also assist the prosecutor in making decisions as to which cases best suit criminal prosecution – the best cases will be clear cut cartels where the actions of those involved indicate their clear intent to subvert the competitive process. If there is little evidence of actions that demonstrate that intent the case will be one that is best left to administrative enforcement against the undertaking.

Increasing the focus on the intention to subvert the competitive process also has another important impact on my conception of the offence. As I have conceived the wrongdoing or moral centre of cartel behaviour, being based on subversion of competition, there is no reason to stipulate that the suggested offence should be limited to individuals; there is no reason in principal that a legal person could not have the requisite intention to subvert the competitive process. However, I do not suggest that the UK cartel offence should be extended in this way. I argue that as intention would, in effect, become more central to the offence there are clear practical reasons to limit the scope of the offence to individuals. The first is the difficulty, albeit a not insurmountable one, in attributing intent to a corporate body to the requisite standard.[67] There is relatively little to be gained in a deterrence sense from surmounting that, not inconsiderable, hurdle to extend criminal liability to corporations as we already have an effective mechanism to impose large financial sanctions through administrative enforcement. While there is little deterrence benefit there may be an argument that some retributive purpose could be served by bringing the corporate 'wrongdoer' before the criminal law. In short I am not convinced that the retributive benefit of such prosecutions, when compared to administrative proceedings, is clear. The case in favour of the deterrent and retributive value of criminal proceedings against individuals is, to my mind, much clearer. In deterrence terms there are clear arguments, most clearly set out in Leslie's work,[68] that the availability of separate sanctions against, and leniency programmes for, individuals heightens the effectiveness of the tools used in corporate enforcement and the regime as a whole.[69] In a retributive sense I also suggest that the wrongdoing which goes to the heart of the cartel offence, as I conceive it, is committed but individuals within the cartel organisations. The organisation itself, as a whole, is challenged through the administrative proceedings. The offence seeks to challenge the actions within that organisation, either through making or implementing the agreement, which subvert the

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[65] As in the example of the retail manager implementing normal price instructions discussed above.

[66] See Odudu, supra, n 63, at pp 479-484.

[67] See, for instance, E Ferran, 'Corporate Attribution and the Directing Mind' (2011) 127 *Law Quarterly Review* 239-259

[68] See, CR Leslie 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49(5) *William & Mary Law Review* 1621-1699.

[69] This is the main reason that a criminal offence was initially seen to be important, as discussed above.

competitive process. Those actions are taken by individuals. It is individuals that attend secret cartel meetings and disguise their activities. That individual wrongdoing deserves some form of retributive sanction. Separate individual sanctions also addresses two problems recognised in relying on administrative proceedings against corporations. The first situation is where, because there can be a lengthy passage of time between cartel activity and the imposition of administrative sanctions,[70] those individuals who were truly responsible for the instigation and operation of the cartel are no longer associated with the company when the final sanctions are imposed. With individual criminal liability they would still retain potential liability notwithstanding that they had left the company. The other situation in which there is a retributive case for individual liability is where there is a 'rogue director'. Here the individual inside the company who is responsible for the cartel activity was acting alone; potentially in direct contravention of clear instructions from his corporate superiors. While it is right that the corporation bears responsibility for the vicarious harms caused by the actions of the 'rogue director' through administrative proceedings, there is also a clear case that the individual is the author of the wrongdoing and should stand liable to punishment on their own account. On that basis I argue that the current limitation of criminal liability to individuals should be retained in the UK cartel offence.

D. Conclusions

In this paper I have tried to set out a way forward for the UK's cartel offence which refocuses the offence on what I perceive to be the core 'wrong' within a cartelist's behaviour. When seeking to sanction individuals for their role in cartels it does not appear to be useful to base the justifications for action directly on the harm that stems from cartels. It is inappropriate because harm is difficult to prove in the context of a criminal trial and the individuals responsible for the cartel, as an organisation, are often well insulated from the actual harm it caused. When attempting to deal with diffuse harms caused by complex organisations we require more complex regulatory tools than the criminal law. To that end we should rely on the existing administrative enforcement regimes. The rationale for criminalising certain forms of cartel behaviour lies outside simple harm. As Mill set out, in the 19th Century, harm itself may not require a criminal sanction but 'offensive' conduct may elevate a matter into the criminal sphere.

The current process of reform in the UK appears to indicate that the days of the dishonesty element, in the Enterprise Act 2002 cartel offence, are numbered. If dishonesty is removed from the offence something needs to replace it to limit the scope of the offence to individual behaviour that properly deserves criminal punishment. The method of limiting the offence is key to both ensuring that it has the correct scope and also that prosecutors and juries are clear as to the evidence necessary to support a case against an individual. I argue that the best way of limiting the offence is to focus on individual behaviour which steps outside the expected norms of a competitive marketplace. The wrong that the offence challenges is behaviour, by an individual, that intentionally subverts the competitive process that we demand within the marketplace. The offensive conduct that is challenged is a violation of the competitive process that we, as a contemporary industrial society, hold to be important. Where an individual steps outside of society's norms, and their behaviour may lead to harm, we can feel justified in using the sanctions of the criminal law to seek to punish that behaviour. By ensuring that only those who can be shown to have intended to subvert the competitive process fall within the offence we can exclude those who unknowingly play a role in a cartel and focus moral opprobrium, and sanctions, on the most deserving.

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[70] Over 20 years in some cases.

A potential redrafting of s 188 of the Enterprise Act 2002 might be as follows:

> An individual is guilty of an offence if he agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements which, if operating as the parties intend, subvert the competitive process and are of the following kind relating to at least two undertakings (A and B).

The 'intention' element that currently appears in section 188(2) & (3) would now appear in the redrafted section 188(1).

If the offence was redrafted in this way it would create a considerably higher evidential hurdle for prosecutors, compared to the reform suggested by the BIS Consultation, but a clearly delineated offence would have positive benefits. It would help the investigation teams focus their efforts only on the most serious cases where there is real evidence of individual 'delinquency' with the cartel organisation and more clearly set out to a jury, during the trial process, why the individual's behaviour was considered to be deserving of punishment.

I hope that a reformulation of the UK cartel offence in this way sets out why individual cartel behaviour is a question of morality or wrongdoing, and why it is contrary to standards of behaviour that we expect from business people in contemporary markets; UK business now operates in a very different context from that discussed in *Jones v North*.[71] This cartel offence indicates that it is the deliberate attempt to avoid the perils of the competitive process that elevates such conduct to criminality.

The UK's experience of criminalisation accords with the experiences of other European jurisdictions,[72] in that the 'push' towards the adoptions of criminal penalties on the basis of a desire for increased deterrence appears to be moving in advance of the public's understanding of cartels as being inherently criminal in nature. For criminalisation to be effective this issue cannot continue to be ignored.

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[71] (1875) LR 19 Eq 426.

[72] See the literature cited in note 4.