‘HOW (NOT) TO DESIGN A CRIMINAL CARTEL OFFENCE: LEARNING FROM THE UK EXPERIENCE’

‘The Fight against Hard Core Cartels in Europe: Trends, Challenges and Best International Practices’
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Dr Peter Whelan
Associate Professor in Law
School of Law
University of Leeds
@drpeterwhelan
Aims and Layout of the Presentation

✧ **Aims:**

To examine critically the *recent reform* of the **UK Cartel Offence**

To detail some **lessons** that can be **learned** from the reform

✧ **Layout:**

Part I: Introductory Comments

Part II: The Recent Reform of the UK Cartel Offence

Part III: Evaluating the Merits and Demerits of the Reform

Part IV: Final Comments
Part I: Introductory Comments

- Traditionally, penalties for breaches of UK competition law have been non-criminal in nature (and focus on companies rather than individuals)
  - Reflected in Competition Act 1998

- The Cartel Offence (CO) came into force in June 2003 & changed this:
  
  S 188 of the Enterprise Act 2002 (originally) provided that an individual is guilty of an offence if he dishonestly agrees with another to make or implement (or cause to be made or implemented) a cartel arrangement between horizontal competitors

  Cartel arrangement = price-fixing; market sharing; output restrictions; bid-rigging

- Dishonesty was included, inter alia, to avoid ‘over-criminalisation’ (ie to link criminal cartel activity to immoral behaviour)

- The existence of ‘dishonesty’ is determined according to the Ghosh test:
  Objective and subjective elements

- The maximum custodial sentence is (still) 5 years
The central idea behind the CO was **deterrence**

Patricia Hewitt MP (then Sec of State for DTI) in House of Commons:

‘We regard forming cartels as very serious offences, and the threat of imprisonment is important to deterring them’

Finds some support in the literature:

Criminal sanctions are ‘the most meaningful deterrent to antitrust violations’ (Liman)

They ‘send a message to other business executives about the risks and penalties for this kind of behaviour’ (Bauer)

**Main points in the argument:**

- A fine of ~**150% of annual turnover** is needed to deter an undertaking
- Such a fine **cannot be imposed** for practical reasons (e.g. liquidation of the company)
- Turn to **individual** sanctions
- However these sanctions must be **more than mere monetary sanctions** – otherwise indemnification will occur (i.e. company will pay the fine)
- **Custodial** sanctions are **non-indemnifiable**
In order to have deterrence need sufficient enforcement
Hammond/Penrose Report: probably about 6 prosecutions per year
Realistically: perhaps at least one high profile case a year?
How many successful prosecutions since 2003?

- There has only been 3 prosecutions since 2003!
- Only 2 of these were successful and the defendants pleaded guilty
- The other was a disaster!
One of the reasons put forward by OFT (now CMA) for low level of enforcement was the definitional element of dishonesty:
- It proved too difficult to overcome in practice
- OFT advocated its removal from the offence
In 2011 a reform process was initiated that provided scope for the reform of the offence
Part II: The Recent Reform of the UK Cartel Offence

Process:

✦ UK Government published a Consultation Document in March 2011
  ✦ One chapter considered reform of Cartel Offence
  ✦ 4 options put forward; all involved removal of dishonesty
  ✦ Favoured Option 4: removal of dishonesty and ‘carve out’ of agreements made openly

✦ Government Response published in March 2012:
  ✦ Option 4 adopted

✦ The Enterprise and Regulatory Reform Bill (ERRB) received its first reading in the House of Commons on 23 May 2012

✦ The Bill was given Royal Assent on 25 April 2013
  ✦ Option 4 contained within it; but also additional (controversial) reforms of the Cartel Offence (which were not debated/part of consultation)

✦ Provisions on the Cartel Offence came into effect on 1 April 2014
Part II: The Recent Reform of the UK Cartel Offence

Outcome:

- (1) ‘Dishonesty’ was removed from Cartel Offence
- (2) There was a carve out of agreements ‘made openly’:
  - Customers given relevant information prior to sale;
  - Bid-rigging: person requesting bids informed at time of bid; or
  - Relevant information published at time of making the agreement
- (3) **Additional defences**:
  - Did not intend nature of agreement to be concealed from customers
  - Did not intend nature of agreement to be concealed from CMA
  - Took reasonable steps to disclose nature of agreement to lawyers in order to get advice prior to its making or implementation
Part III: Evaluating the Merits and Demerits of the Reform

In order to evaluate the reform one must consider:

(i) The removal of dishonesty from the offence [good]
(ii) The carve out of agreements due to publication or notification [good]
(iii) The additional defences provided [first two ok; final one is very bad idea]

These are insights that can be relevant to other jurisdictions (and not just advice to the UK legislature)

Particularly (ii) above

Paper of mine will be published on this in (2015) Modern Law Review, forthcoming
(i) It Was a Good Idea to Remove Dishonesty

- There is a ‘chicken and egg’ problem

  - One wishes to have convictions to **harden attitudes** to cartel activity
  - Aim: for business people to internalise norms and self-enforce
  - But requirement of ‘dishonesty’ **presupposes** those hardened attitudes
  - Why? Due to existence of *Ghosh* test:
    - D’s actions were dishonest according to the standards of ordinary people [objective element]
  - There is **no evidence** that hardened attitudes already exist:
    - CCP survey: only 60% found cartels to be dishonest
    - CCP survey: only 10% thought imprisonment was warranted

- The existence of ‘dishonesty’ element short circuits the effective operation of CO
(i) It Was a Good Idea to Remove Dishonesty (contin.)

- It allows for **dubious defences** to come into play
  - D may claim he was not ‘dishonest’ as all he was doing was protecting jobs at the company, protecting shareholder’s interests…
  - Empirical evidence on cartelists suggest tendency to rationalise behaviour as benevolent
  - Werden & Simon: evidence that unions get the majority of monopoly profits
  - Unlikely that D will have obtained direct gain

- These ‘defences’ **are irrelevant when Article 101 TFEU** is enforced (so should also be irrelevant under CO if following the same objective):
  - If cartel falls within Article 101(1) TFEU it is prohibited unless it fulfils the criteria of Article 101(3) TFEU
  - No other defence
  - Admittedly, EC can only impose fines on undertaking where the cartel activity is intentional or negligent: Article 23(1) of Regulation 1/2003
(ii) The Use of Notification/Publication Carve Outs is Helpful

Two reasons:

• (a) It provides good way to deal with legitimate cartel activity
  • Some cartels are legitimate (eg they provide benefits to consumers)
  • Issue: should not apply criminal law to these types of cartels
  • Using defence like Art 101(3) is not ideal:
    • Inconsistency; institutional competence; economic evidence may be confusing…

• (b) It links criminal cartel activity to ‘immoral behaviour’ (without the need for ‘dishonesty’ element)
  • Important to avoid ‘overcriminalisation’:
    • Traditionally there is a link between criminal law and morality
    • Unfairly labelling offenders as criminals undermines the law’s moral authority
    • Changes people’s attitudes towards the meaning of criminality
    • The criminal law may lose its legitimacy
(ii) The Use of Notification/Publication Carve Outs is Helpful

- (a) It provides good way to deal with **legitimate cartel activity**
  - It operationalises an **Article 101(3) TFEU** –type defence without the need for economic evidence to be presented to a jury/decision-maker
  - If cartelists **genuinely believe** (following self-assessment) that their arrangements would fulfil requirements of Art 101(3), **all they need to do** to get exception is to notify or publish

**Counterargument:**
- Cartelists will routinely publish agreement to ‘**short circuit**’ the criminal regime
  - Therefore the Cartel Offence will not be effective
- But **not realistic**:
  - Cartelists will want to keep agreement secret to avoid admin sanctions/bad reputation
  - If cartelists publish agreement to ‘short circuit’ the criminal regime, there will be an **increase in deterrence** re the administrative regime (the veil of secrecy is pierced)
(ii) The Use of Notification/Publication Carve Outs is Helpful

• (b) It links criminal cartel activity to ‘immoral behaviour’ without the need for ‘dishonesty’ element

• Idea: that by providing such carve outs cartel activity lines up (approximately) with deceptive behaviour

• **Deception** occurs where a person
  
  (a) Communicates a message
  (b) With intent to cause a person to believe something that is not true
  (c) That person is led to believe the untruth

• Three cartel scenarios are relevant for deception

  (a) Where a cartelist **expressly states** ‘I have not cartelised’
  (b) Where a cartelist does not mention to the consumer the fact that he has cartelised
  (c) Where a cartelist **reveals the existence** of the cartel prior to sale
(ii) The Use of Notification/Publication Carve Outs is Helpful

• (b) It links criminal cartel activity to ‘immoral behaviour’ without the need for ‘dishonesty’ element (contin.)

• First scenario: cartelist lies to customer; intends to keep cartel secret (avoid fines; bad reputation); rare examples; exception: official statements about absence of collusion in procurement process (Germany)

• Second scenario:
  • Message communicated = ‘our goods are for sale’
  • Not untrue; but not problematic; can lead to belief of untruth
  • Mechanism: consumers make the assumption that the goods are at a competitive price (and cartelists know/assume this)

Lever and Pike: ‘... in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the assumption that they are dealing with undertakings that are lawfully engaged in normal competition with each other; and the cartelists will know that this is so and will, in effect, act in a dishonest ... manner, if the existence of the cartel is kept secret.’
(ii) The Use of Notification/Publication Carve Outs is Helpful

- (b) It links criminal cartel activity to ‘immoral behaviour’ without the need for ‘dishonesty’ element (contin.)
- In order to ensure (criminal) cartel activity is confined to deceptive conduct (scenarios 1 and 2) we need to carve out agreements made openly
- Reason: the third situation clearly does not involve deception:

  1. **No strong case** that cartelist by telling truth intends to mislead customer

  2. **Unlikely** that customer will be misled as the (painful) truth has been presented

- **Bottom line**: carve outs help to link criminalised cartel activity to deception (and therefore helps to avoid overcriminalisation without need for express adoption of moral language)
(ii) One of the Defences Provided is a Very Bad Idea

- Two defences based on lack of intention to conceal:
  Can link these defences to ‘deception’
  Lack of intention to conceal, perhaps lack of deception
  May be difficult to prove, so perhaps not so relevant

- Defence Based on Obtaining Advice from Lawyers:
  ‘It is a defence for an individual charged with an offence under section 188(1) [of the Enterprise Act] 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’
  - No obligation to take the advice
  - Could easily be used to short circuit the offence
    All that is required is that cartelists tell their lawyers about their plans prior to entering into a cartel!
  - Lawyers do not have to disclose (otherwise criminal) cartel to authorities
Part IV: Final Comments

- The Cartel Offence was introduced to deter cartel activity
- It was **not successful** and **change was necessary**
- The reform has led to an **improved offence**:
  - ‘Dishonesty’ requirement was a burden and unnecessary
  - Can achieve the aims of the ‘dishonesty’ requirement with the ‘carve out’ of agreements made openly
    - ‘Carve outs’ = very useful way of dealing with ‘legitimate’ cartels and avoiding economic evidence at trial
    - ‘Carve outs’ = very useful way of ensuring cartel offence captures immoral conduct
    - Good idea for **other jurisdictions too**
- However: one of the **new defences** is very problematic and should **not have been included**: getting advice from lawyers
  - Should be abolished
  - Other jurisdictions should **not follow** this approach


Email: p.whelan@leeds.ac.uk