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‘The Challenging Nature of Cartel Criminalisation: A Case Study of the UK’

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Aims and Layout of the Presentation



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✦ 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

- ✦ 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**

Part I: Introductory Comments



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- ✦ 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



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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



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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



Notification



Publication

✦ (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



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- ✦ 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

Part III: Evaluating the Merits and Demerits of the Reform



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(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)

Part III: Evaluating the Merits and Demerits of the Reform



(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**

Deception

(a) Where a cartel expressly states 'I have not cartelised'

(b) Where a cartel does not mention to the consumer the fact that he has cartelised

No Deception

(c) Where a cartel reveals the existence of the cartel prior to sale

Part III: Evaluating the Merits and Demerits of the Reform



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(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 cartelists 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)

Part III: Evaluating the Merits and Demerits of the Reform



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(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

- ✦ 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



P. Whelan, *The Criminalisation of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (Oxford University Press: Oxford, 2014)

** P. Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) *Modern Law Review*, forthcoming **

P. Whelan, 'Cartel Criminalization and the Challenge of Moral Wrongfulness' (2013) 33(3) *Oxford Journal of Legal Studies* 33(3)

P. Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71(3) *Cambridge Law Journal* 677

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