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## LEGISLATION AND REPORTS

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### **SECTION 47 OF THE ENTERPRISE AND REGULATORY REFORM ACT 2013: A FLAWED REFORM OF THE UK CARTEL OFFENCE**

Dr Peter Whelan\*

On 1 April 2014, section 47 of the Enterprise and Regulatory Reform Act 2013 ('ERRA') entered into force, ensuring significant changes to the criminal UK Cartel Offence. That particular criminal offence, contained in section 188 of the Enterprise Act 2002, was enacted in order to secure the deterrence of cartel activity affecting the UK. Following almost ten years of its enforcement, the Cartel Offence had failed to live up to its expectations. Consequently, following a public consultation it was reformed in substance. As a result of section 47 ERRA, the (controversial) definitional element of 'dishonesty' has been removed from the offence, a number of 'carve outs' from the offence have been created, and three additional defences now exist. This article examines in detail the specific reforms of the Cartel Offence and argues that, although considerable improvement has been made, the UK authorities currently have at their disposal a criminal offence that is fundamentally flawed and unworkable in practice. Further reform is therefore advised.

Keywords: cartels; criminal enforcement; defences; dishonesty; Enterprise and Regulatory Reform Act 2013; UK Cartel Offence

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### **INTRODUCTION**

The concept of 'cartel activity' refers to the making or implementing of an anticompetitive agreement, concerted practice or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or divide markets by allocating customers, suppliers, territories or

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\* PhD (Cantab). Associate Professor in Law and Deputy Director, Centre for Criminal Justice Studies, School of Law, University of Leeds; email: [p.whelan@leeds.ac.uk](mailto:p.whelan@leeds.ac.uk).

lines of commerce.<sup>1</sup> Cartel activity is generally perceived to be harmful to society in that it reduces competition in the marketplace to the detriment of consumers.<sup>2</sup> The potential effects of cartel activity include an increase in prices for consumers, a reduction in output, quality and innovation, and the existence of ‘deadweight loss’ (ie, a situation where consumers who would have purchased goods at the competitive price are unable to purchase those goods at the cartelised price). EU law prohibits cartel activity which has an effect on trade between the EU Member States: Article 101(1) of the Treaty on the Functioning of the European Union (‘TFEU’). While, as a result of Article 101(3) TFEU, an exception to the prohibition in Article 101(1) TFEU is legally possible (provided strict criteria are fulfilled),<sup>3</sup> it is very unlikely to be provided in practice for cartel activity.<sup>4</sup> In fact, the European Commission, in enforcing the cartel prohibition, regularly imposes large (administrative) fines on companies. Importantly, it cannot impose criminal sanctions (such as custodial sentences) on individuals.<sup>5</sup> That said, EU law does not prohibit the EU Member States themselves from enforcing the cartel prohibition in Article 101(1) TFEU (or indeed any cartel prohibition in their own national laws) through individual criminal sanctions, including imprisonment.<sup>6</sup> In fact, some Member States do enforce (EU and national) competition law through personal criminal sanctions.<sup>7</sup>

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<sup>1</sup> Organisation for Economic Cooperation and Development (‘OECD’), ‘Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels’, 25 March 1998, C(98)35/final, [2(a)].

<sup>2</sup> S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (London: Sweet & Maxwell, 2010), 163.

<sup>3</sup> See Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595.

<sup>4</sup> See, eg: European Commission, *Xth Report on Competition Policy*, Brussels, 1980, [115]; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Research and Development Agreements [2010] OJ L335/36, Article 5(1); and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialisation Agreements [2010] OJ L335/43, Article 4(1).

<sup>5</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (hereafter ‘Regulation 1/2003’), Article 23(5).

<sup>6</sup> See, eg: Regulation 1/2003, Articles 5 and 12(3); P. Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford: Oxford University Press, 2014), 144-145; and W. Wils, *Is Criminalization of EU Competition Law the Answer?*, in K. Cseres, M.P. Schinkel, and F. Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham: Edward Elgar Publishing, 2006), 90-92.

<sup>7</sup> See, eg, M. O’Kane, *The Law of Criminal Cartels: Practice and Procedure* (Oxford: Oxford University Press, 2009), 325-327.

In the UK a (statutory) criminal offence centred on the concept of cartel activity has been in existence for a number of years: the UK Cartel Offence. In 2001, following a public consultation on the issue,<sup>8</sup> the UK Government decided to introduce a criminal Cartel Offence into law in order to create a ‘real deterrent’ concerning cartel activity.<sup>9</sup> The Enterprise Act (‘EA’) was passed in 2002, with the relevant section containing the UK Cartel Offence coming into effect on 20 June 2003.<sup>10</sup> Accordingly, under section 188 EA (as originally drafted), it is a criminal offence for an individual to dishonestly make or implement or cause to be made or implemented a cartel agreement between horizontal competitors. A cartel agreement in this context is confined to agreements relating to price-fixing, market or customer sharing, output restrictions and bid-rigging. The Cartel Offence is a stand-alone offence which does not require proof of a violation of Article 101(1) TFEU.<sup>11</sup> Although the Cartel Offence has been on the UK legislative books for more than ten years, to date there has only been two successful criminal prosecutions of this offence (both of which were obtained via guilty pleas on behalf of the defendants).<sup>12</sup> The only other prosecution of this offence ended in an embarrassing failure when, due to issues concerning disclosure of evidence, the Office of Fair Trading (‘OFT’) had to offer no evidence at trial.<sup>13</sup> The OFT’s efforts to enforce the UK Cartel Offence have been subjected to considerable criticism,<sup>14</sup> with many in agreement that ‘enforcement has

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<sup>8</sup> Department of Trade and Industry, *A World Class Competition Regime*, Cm 5233, July 2001.

<sup>9</sup> Department of Trade and Industry, *‘Productivity and Enterprise – A World Class Competition Regime’ Government’s Response to Consultation*, December 2001, 20-24.

<sup>10</sup> s 188 EA. On the UK Cartel Offence, see generally: M. Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Cheltenham: Edward Elgar, 2012), Chapter 4; and A. MacCulloch, ‘The Cartel Offence: Is Honesty the Best Policy?’, in B. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee: Dundee University Press, 2010).

<sup>11</sup> M. Furse and S. Nash, ‘Partners in Crime: The Cartel Offence in the UK’ (2004) 15(5) *ICCLR* 138, 141.

<sup>12</sup> See: *R v Whittle and others* [2008] EWCA Crim 2560 (involving three convicted defendants); and *R v Snee*, Southwark Crown Court, 17 June 2014 (involving one convicted defendant).

<sup>13</sup> *R v Burns and others*, Unreported Judgment, Southwark Crown Court, 10 May 2010. See generally: OFT, ‘OFT Withdraws Criminal Proceedings against Current and Former BA Executives’, OFT Press Release, 47/10, 10 May 2010, <http://www.of.gov.uk/news-and-updates/press/2010/47-10#.Uf57LCBwbIU>; and N. Purnell, C. Bellamy, N. Kar, D. Piccinin and P. Sahathevan, P., ‘Criminal Cartel Enforcement – More Turbulence Ahead? The Implications of the BA/Virgin Case’ (2010) 9(3) *Competition Law Journal* 313.

<sup>14</sup> See, eg: M. Furse, ‘The New Cartel Offence: “Great for a Headline But Not Much Else?”’ (2011) 32(5) *European Competition Law* 223; and J. Joshua, ‘Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?’ [August 2010] *Antitrust Source* 1.

some way to go before criminal sanctions against individuals will appear to be an active deterrent'.<sup>15</sup>

Given this context, it was no real surprise when the UK Government recently conceded that enforcement of the Cartel Offence had been ineffective and that legislative change was required in order to reform the Cartel Offence so that it would become fit for purpose.<sup>16</sup> Two of the major changes decided upon by the UK Government were the removal of the 'dishonesty' element from the offence and the additional narrowing of the offence by defining it 'so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before they are implemented, so that customers and others are aware of them'.<sup>17</sup> On 23 May 2012, the Enterprise and Regulatory Reform Bill - the Bill that contained inter alia the Government's reforms on the Cartel Offence - had its first reading in the House of Commons. By 25 April 2013, when this Bill received the Royal Assent and became an Act of Parliament, it contained a number of additional (controversial) reforms to the Cartel Offence, such as the creation of three specific defences to this offence: section 47 of the Enterprise and Regulatory Reform Act 2013 ('ERRA'), which came into force on 1 April 2014. These additional reforms received no treatment in the public consultation and their consideration in the Parliamentary debates was scant at best. Moreover, it is arguable that, while some of the reforms should be welcomed by those who wish to see effective enforcement of cartel law in the UK, one of the new defences in particular has the potential to undermine completely the effectiveness of the UK criminal cartel regime and should never have been enacted.

This article intends to engage with this particular debate. More specifically, it aims to analyse critically the recent reform of the UK Cartel Offence and, in doing so, evaluate whether the legislative changes in section 47 ERRA are supportable and/or whether future, additional reform is warranted. The article is divided into three substantive sections and a conclusion. The first section examines the originally drafted UK Cartel Offence and its inherent defect, allowing one to highlight the mischief that the recent reform aimed to rectify. The inherent defect identified is the inclusion within the originally drafted Cartel Offence of the definitional element of 'dishonesty'. The next section considers the public consultation on the UK Cartel

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<sup>15</sup> E. Morgan, 'Criminal Cartel Sanctions under the UK Enterprise Act: An Assessment' (2010) 17(1) *International Journal of the Economics of Business* 67, 81.

<sup>16</sup> See Department for Business, Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011 (hereafter 'the Consultation Document'), Chapter 6.

<sup>17</sup> See Department for Business, Innovation and Skills, *Growth Competition and the Competition Regime: Government Response to Consultation*, March 2012 (hereafter 'Final Report'), 66.

Offence, the various proposals considered in the context of that consultation, and the legislative outcome of the consultation (viz., section 47 ERRRA). The final section analyses, critically and in detail, the reforms contained within section 47 ERRRA. Taken together these three substantive sections allow the author to present his conclusions that: (a) although some improvements have been made, the UK authorities currently have at their disposal a criminal cartel offence that is fundamentally flawed and unworkable in practice; and (b) further reform of section 188 EA is therefore advised.

### **THE ORIGINAL UK CARTEL OFFENCE AND ITS INHERENT DEFECT: THE DEFINITIONAL ELEMENT OF ‘DISHONESTY’**

Prior to the reforms of section 47 ERRRA, section 188(1) EA provided that an individual would be guilty of an offence if she ‘dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented’ a cartel arrangement between at least two horizontal competitors. Essentially, the cartel arrangement in question must be one which, if operating as the parties intend, would involve: fixing the prices of a product or service supplied to a third party; limiting or preventing the supply of a product/service or the production of a product; the dividing of markets or customers; or bid-rigging.<sup>18</sup> A person found guilty of this offence is liable, on summary conviction, to a maximum term of six months imprisonment and/or a fine not exceeding the statutory maximum<sup>19</sup> and, on conviction on indictment, to a maximum term of five years imprisonment and/or an unlimited fine.<sup>20</sup>

The primary rationale behind the creation of the UK Cartel Offence, with its focus on the above-noted cartel arrangements, was the deterrence of cartel activity.<sup>21</sup> As noted by Hughes LJ, there

is no doubt whatever that [the Cartel Offence] was created because it was thought to provide a stronger deterrent to [anticompetitive practices] to threaten executives with imprisonment than was achieved by threatening undertakings with civil financial penalties, heavy as the latter may often be.<sup>22</sup>

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<sup>18</sup> See Enterprise Act 2002, s 188(2).

<sup>19</sup> *ibid* s 190(1)(b).

<sup>20</sup> *ibid* s 190(1)(a).

<sup>21</sup> A. MacCulloch, ‘Honesty, Morality and the Cartel Offence’ (2007) 28(6) ECLR 355, 355.

<sup>22</sup> R v IB [2009] EWCA Crim 2575 at [22].

Sole reliance upon (administrative) fines on companies in order to deter cartel activity was seen as being ineffective, in particular because the optimally-deterrent firm-focused fine would be disproportionate and would produce unacceptable social costs (eg, the liquidation of the infringing company).<sup>23</sup> In addition, criminal sanctions aimed at individuals responsible for cartel activity were viewed as advantageous in achieving deterrence as they would ‘send out a strong message to the perpetrators, their colleagues in business, the general public, and the courts’.<sup>24</sup> In coming to these conclusions, the Government was persuaded by the experience of the Antitrust Division of the US Department of Justice (‘DoJ’) in its efforts to enforce the federal US prohibition on cartel activity in section 1 of the Sherman Act 1890 through the imposition of criminal (custodial) sanctions upon convicted individuals.<sup>25</sup> Importantly, the Government’s (deterrence-based) support for the existence of criminal cartel sanctions can still be rationalised on the basis of economic deterrence theory and the most recent empirical evidence concerning the operation of cartels (eg, their effects, duration, and chances of avoiding detection and prosecution).<sup>26</sup> This fact arguably provides a relatively solid explanation as to why the Government (and the relevant prosecutorial agencies) remained committed to the UK Cartel Offence even in the face of considerable criticism regarding its enforcement in practice (and obvious resistance to cartel criminalisation in other EU Member States).<sup>27</sup>

Although the primary rationale for the existence of the Cartel Offence is undeniably deterrence, the criminal justificatory theory of retribution also played a part in its creation. In particular, cartel activity was not prohibited in a per se manner: only dishonest cartel activity was criminalised. A two-part test to be used to determine ‘dishonesty’ was set out in *R v Ghosh*.<sup>28</sup> Although *Ghosh* concerned the Theft Acts,<sup>29</sup> the test for ‘dishonesty’ contained

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<sup>23</sup> See Department of Trade and Industry, *A World Class Competition Regime*, Cm 5233, July 2001, [7.13]-[7.16].

<sup>24</sup> HC Deb vol 383 col 47 10 April 2002 (Patricia Hewitt MP).

<sup>25</sup> See, eg, OFT, *The Proposed Criminalisation of Cartels in the UK — A Report Prepared for the Office of Fair Trading* by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM, OFT 365, November 2001, [1.3].

<sup>26</sup> See, eg: G. Werden, ‘Sanctioning Cartel Activity: Let the Punishment Fit the Crime’ (2009) 5(1) *European Competition Journal* 19; and Whelan, n 6 above, Chapter 3.

<sup>27</sup> See, eg, BIS, ‘Final Report’, [7.1] and [7.44].

<sup>28</sup> *R v Ghosh* [1982] 2 All ER 689, 696.

<sup>29</sup> On the link between cartel activity and theft, see P. Whelan, ‘Cartel Criminalization and the Challenge of Moral Wrongfulness’ (2013) 33(3) *OJLS* 535.

therein has in fact been deemed to be of general application in the criminal law of England and Wales.<sup>30</sup> Unsurprisingly then, the case of *R. v George and others* expressly established that the Ghosh test applied to the definitional element of ‘dishonesty’ contained in the original Cartel Offence.<sup>31</sup> Accordingly, both subjective and objective analyses are required: the conduct must be (a) dishonest according to the ordinary standards of reasonable and honest people and (b) known by the defendant to be dishonest according to those standards.

Whilst it is argued below that the ‘dishonesty’ element is an inherent defect in the (original) Cartel Offence, one can nonetheless identify various explanations for the employment of the concept of ‘dishonesty’ in that offence. First, the use of ‘dishonesty’ signals that the offence is a ‘serious’ one.<sup>32</sup> Second, the courts might be more likely to impose custodial sentences if the underlying criminal offence that had been committed was one involving the ‘dishonesty’ of the convicted individuals.<sup>33</sup> Third, the use of ‘dishonesty’ reflects the desire of the legislature to underline the moral wrongfulness of the cartelists’ behaviour: ‘dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct’.<sup>34</sup> By criminalising dishonest cartel activity, the legislature is sending out the message that some types of cartel activity are in fact dishonest (otherwise criminalisation would be pointless), and therefore ‘wrong’ in a moral sense. Communicating this message not only helps the legislature to avoid claims of ‘overcriminalisation’, but also aids the legislature (and the antitrust authorities) to create and/or to reinforce a moral norm concerning cartel activity.<sup>35</sup> In creating and/or reinforcing such a moral norm, the authorities are creating potential for the internalisation of that norm and thus for its self-enforcement. If successful, such internalisation can reduce the costs inherent in enforcing the criminal cartel offence. Fourth, it was argued that the definitional element of ‘dishonesty’ would ‘reduce the likelihood that conviction would depend on judgments taken on detailed economic evidence’.<sup>36</sup> The concern here was that juries would not be able to understand fully such economic evidence. An offence that does not require

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<sup>30</sup> *R v Lockwood* [1986] Crim LR 244.

<sup>31</sup> *R. v George and others* [2010] EWCA Crim 1148.

<sup>32</sup> OFT, n 25 above, [2.5].

<sup>33</sup> *ibid* [1.11].

<sup>34</sup> P Costello, ‘Criminal Penalties for Serious Cartel Behaviour’, Press Release from the Treasurer of Australia, 2 February 2005.

<sup>35</sup> See P. Whelan, ‘Improving Cartel Enforcement in the UK: The Case in Favour of BIS’s “Option 4”’ (2012) 8(3) *European Competition Journal* 589.

<sup>36</sup> BIS, Consultation Document, [6.9].

consideration of economic effects (ie, an offence based on ‘dishonesty’ rather than an economic impact in a market) would therefore be preferable. Finally, and in possible contradiction to the point made directly above, ‘dishonesty’ was also employed as a means of ensuring compatibility with Article 101(3) TFEU and/or section 9 of the Competition Act 1998 without having to define the Cartel Offence in a manner that expressly links the offence to those provisions.<sup>37</sup> It is submitted that there is indeed scope for the Ghosh test to carve out from the UK Cartel Offence cartel activity that would benefit from an exception under UK or EU law: the defendant could indeed argue that the conduct would not have been unlawful under UK or EU competition rules and that, ipso facto, she would not have fulfilled the first part of the Ghosh test (as reasonable and honest people may well come to the conclusion that there is nothing dishonest in cartel activity that is legitimate according to the cartel law rules in operation within the UK).<sup>38</sup> The concept of ‘dishonesty’, then, can be understood as a definitional construct that can be employed to ensure that the criminal cartel offence does not criminalise ‘legitimate’ or ‘acceptable’ cartel activity<sup>39</sup> (eg, the type of (very rare) cartel activity that may be capable of generating net efficiencies for consumers<sup>40</sup>).

Irrespective of the alleged merits of the UK approach, it was anticipated that the use of ‘dishonesty’ in the definition of the (original) Cartel Offence would represent a ‘significant challenge’ for prosecutors.<sup>41</sup> In fact, there are sound theoretical and legal reasons why the employment of the definitional element of ‘dishonesty’ in the original Cartel Offence would be problematic.<sup>42</sup> Stephan succinctly summarises one of the main problems:

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<sup>37</sup> See: MacCulloch, n 21 above, 356; and OFT, n 25 above, [2.5].

<sup>38</sup> Cf C. Dobbin and C. Peretz, ‘The Cartel Offence’, in T. Ward and K. Smith (eds), *Competition Litigation in the UK* (London: Sweet & Maxwell, 2005), 182.

<sup>39</sup> See Whelan, n 6 above, Chapter 8.

<sup>40</sup> For examples of this type of cartel activity, see: Case COMP/36.748, Reims II, Commission Decision, 15 September 1999, [1999] OJ L275/17; and Case COMP/29.373, Visa International – Multilateral Interchange Fee, Commission Decision, 24 July 2002, [2002] OJ L 318/17.

<sup>41</sup> S. Blake, ‘Criminal and Civil Cartel Enforcement: Issues and Challenges for Advisors and Authorities – Perspective of the Authority’ (2008) 7(1) *Competition Law Journal* 9, 12.

<sup>42</sup> See generally: B. Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 *Australian Business Law Review* 235; C. Harding and J. Joshua, ‘Breaking Up the Hard Core: The Prospects for the Proposed Cartel Offence’ [2002] *Crim LR* 933; J. Joshua, ‘D.O.A: Can the UK Cartel Offence be Resuscitated?’, in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Oxford: Hart Publishing, 2011); and P. Whelan, ‘Legal Certainty and Cartel Criminalisation within the EU Member States’ (2012) 71(3) *CLJ* 677.

[i]t was thought that incorporating the moral element of ‘dishonesty’ into the [UK Cartel Offence] would harden public attitudes. However, this has not happened in the absence of regular convictions and may be problematic because dishonesty necessitates a contemporary moral judgement on the part of the jury and therefore relies on attitudes being sufficiently hardened in the first place.<sup>43</sup>

In other words, the use of the definitional construct of ‘dishonesty’ engenders a problem of the ‘chicken and egg’ variety: one wishes to have criminal prosecutions to harden attitudes to cartel activity; but by arguing that cartel activity is dishonest (according to the standards of honest people), one in effect presupposes the existence of such hardened attitudes. According to the available (limited) empirical evidence, it seems that hardened attitudes to cartel activity do not currently exist in the United Kingdom.<sup>44</sup>

An additional issue with the originally-drafted UK offence concerns its adherence to the principle of legality.<sup>45</sup> As a result of Article 7 of the European Convention on Human Rights (‘ECHR’), a criminal offence must be clearly defined in law; it must be possible to predetermine, if necessary with legal advice, what conduct is criminal and what conduct is not solely by reference to the law: Article 7 ECHR ‘implies qualitative requirements, notably those of accessibility and foreseeability’.<sup>46</sup> It is arguable that the (original) Cartel Offence does not meet this standard.<sup>47</sup> The argument runs as follows. The Cartel Offence is conceptually distinct from the cartel prohibitions in Article 101 TFEU and in Chapter 1 of the Competition Act 1998. One can violate section 188 EA without violating Article 101 TFEU, as the former provision (unlike the latter) does not require an effect on trade between Member States and does not

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<sup>43</sup> A. Stephan, ‘Lame Duck or Black Mamba: Can the UK Cartel Offence Enhance Deterrence?’, ESRC Centre for Competition Policy Working Paper 08-19, November 2008, [www.ccp.uea.ac.uk/publications/workingpapers/CCP08-19.pdf](http://www.ccp.uea.ac.uk/publications/workingpapers/CCP08-19.pdf), 32.

<sup>44</sup> See A. Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ (2008) 5(1) *Competition Law Review* 123. For similar (albeit Australian-focused) literature, see, eg, C. Beaton-Wells, F. Haines, C. Parker and C. Platania-Phung, ‘Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement’, Melbourne Law School, December 2010 (where it was found that less than a majority of those surveyed believed that cartel conduct should be criminalised, with less than a quarter believing imprisonment to be an appropriate sanction).

<sup>45</sup> For an extended analysis of this issue, see Whelan, n 42 above.

<sup>46</sup> *SW and CR v United Kingdom* (1996) 21 EHRR 363, 399.

<sup>47</sup> See, eg, S. Parkinson, ‘The Cartel Offence under the Enterprise Act 2002’ (2004) 25(6) *Company Lawyer* 187.

provide an exemption for agreements which meet the requirements of Article 101(3) TFEU. One can violate section 188 EA without committing an administrative offence under Chapter 1 of the Competition Act 1998, as the latter also provides an exemption for agreements meeting certain strict criteria. Therefore when (in those admittedly rare cases) the cartel agreement fulfils the relevant exemption criteria, for example, it will not violate national or EU competition law. But, if by entering into the cartel agreement, the cartelist is deemed to be ‘dishonest’ by a jury then she will have committed a criminal offence (under the pre-ERRA offence). The legal certainty problem here is that the criminal offence (as originally drafted) does not have an *actus reus* which clearly points to criminality (in that the underlying conduct does not necessarily relate to a violation of national or EU competition law, for example) and that the only gauge for criminality would therefore be the jury’s perception of the honest/dishonest nature of the underlying conduct, itself an inherently vague and uncertain concept.<sup>48</sup> In short, as juries are the ones who decide what is or is not a dishonest practice, and as the potential cartelist does not have national or EU competition law to guide her, seeking legal advice on the criminality of her actions may not be as fruitful as she would have wished; hence the Article 7 ECHR-related problem.

More problematically, it may be possible for defendants to advance dubious defences in the context of the analysis of ‘dishonesty’;<sup>49</sup> the accused cartelists may allege, for example, that they were acting to protect employment or that they were acting in the best interests of some other category of person, such as shareholders.<sup>50</sup> Indeed, for Black, ‘few people, perhaps, will see anything dishonest in the practice where the purpose is to preserve jobs, and a vigorous entrepreneur may see nothing dishonest in it in any circumstances’.<sup>51</sup> It has also been argued that defendants ‘might rely on mistake of law as a way of denying that their conduct was dishonest’<sup>52</sup> and that the element of ‘dishonesty’ may in practice result in a requirement to waive professional privilege in order to demonstrate such a mistake, thus involving an

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<sup>48</sup> See P. Whelan, ‘Protecting Human Rights in the Context of European Antitrust Criminalisation’, in I. Lianos and I. Kokkoris (eds), *The Reform of EC Competition Law: Towards an Optimal Enforcement System* (Amsterdam: Kluwer International, 2010).

<sup>49</sup> See: Harding and Joshua, n 42 above, 938; and MacCulloch, n 21 above, 362.

<sup>50</sup> Parkinson, n 47 above, 189. See also Fisse, n 42 above, 262.

<sup>51</sup> O. Black, *Conceptual Foundations of Antitrust* (Cambridge: Cambridge University Press, 2010), 128.

<sup>52</sup> A. Gray, ‘Criminal Sanctions for Cartel Behaviour’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 364, 377.

unacceptable incursion into the rights of the defendant.<sup>53</sup> Added to this is the very real possibility that there may be huge variations in what different people think amounts to dishonest behaviour.<sup>54</sup> For Joshua, if the aim of including the element of ‘dishonesty’ within a cartel offence is to confine liability to the most serious cartels, then the criterion is ‘entirely misconceived’.<sup>55</sup> Beaton-Wells and Fisse are particularly sceptical of the appropriateness of using the concept of ‘dishonesty’ in the context of cartel criminalisation, arguing that it

serves no useful purpose as an element of a cartel offence, is uncertain in meaning, creates avenues for unmeritorious denials of liability and, in terms of deterrence and public education, is false and misleading as a label or signal.<sup>56</sup>

These problems and criticisms were deemed to be so acute that the Australian authorities eventually decided to abandon the use of ‘dishonesty’ in their (draft)<sup>57</sup> criminal antitrust legislation.<sup>58</sup>

In addition, one should also note the inherent contradiction between two of the above-identified rationales for employing the definitional element of ‘dishonesty’ in the Cartel Offence: (i) avoiding the presentation of complex economic evidence in front of a jury; and (ii) operationalising the exceptions in Article 101(3) TFEU and section 9 of the Competition Act 1998. Hammond and Penrose argue, for example, that the employment of the definitional element of ‘dishonesty’ would ‘go a long way to preclude a defence argument that the activity being prosecuted ... might have economic benefits or is an activity which might have attracted

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<sup>53</sup> See, eg. M. Pickford, ‘The Introduction of a New Economic Crime’ (2002) 1(1) *Competition Law Journal* 35, 38.

<sup>54</sup> See, eg. S. Connor, ‘Sexes Differ Over Dishonesty Says New Study’, *The Guardian*, 7 September 2009, discussing the ‘Honesty Lab’ research conducted by Finch and Fafinski.

<sup>55</sup> Joshua, n 42 above, 142. On this, see also: B. Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 *Australian Business Law Review* 235, 241-244; and B. Fisse, ‘The Australian Cartel Criminalisation Proposals: An Overview and Critique’ (2007) 4(1) *Competition Law Review* 51, 52-53.

<sup>56</sup> C. Beaton-Wells and B. Fisse, ‘The Australian Criminal Cartel Regime: A Model for New Zealand?’, *Legal Studies Research Paper No. 413*, Melbourne Law School, 2 August 2008, 1.

<sup>57</sup> The definitional element of ‘dishonesty’ only appeared in draft criminal antitrust legislation in Australia; see *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Exposure Draft Bill, January 2008)* (Australia), ss 44ZZRF and 44ZZRG.

<sup>58</sup> On this, see *Senate Standing Committee on Economics, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, Canberra, Australia, February 2009, [3.14]-[3.18].

exemption domestically or under [EU] law'.<sup>59</sup> But, if 'dishonesty' is to operationalise the exceptions in Article 101(1) TFEU and section 9 of the Competition Act 1998, it will be necessary for the defendant to argue that ordinary people would not find that activity to be dishonest because it is not unlawful under EU/national competition law and in order to substantiate that argument the defendant will be required to put forward economic evidence which demonstrates the applicability of an exception under Article 101(3) TFEU (or the national equivalent). In short, the use of 'dishonesty' does not preclude the presentation of complex economic evidence and may in fact encourage it if the defendant is serious about avoiding prison. This point has been acknowledged by a judge who was required to deliver a preliminary ruling in a UK Cartel Offence prosecution.<sup>60</sup>

The reality, then, is that the employment of the definitional element of 'dishonesty' merely provides another way for economic evidence to be used to carve 'acceptable' cartel activity out of the criminal cartel offence. This is problematic for those who wish to see effective cartel enforcement in the UK: there is a strong argument that a central feature of an effective criminal cartel law is the absence of a requirement to analyse and to prove any economic effects in a market to find an infringement. There are three reasons for this. First, despite the robustness of the economic theory underlying the definition of a market,<sup>61</sup> it can be notoriously difficult to establish the boundaries of a market in practice,<sup>62</sup> and this is particularly the case when one must do so to a criminal standard of proof. Second, forcing criminal courts to undertake complex economic analyses 'runs counter to our notions of the relative institutional competence of criminal courts as compared with a specialized administrative agency'.<sup>63</sup> This issue can become particularly problematic when a jury (rather than a panel of

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<sup>59</sup> OFT, n 25 above, [2.5].

<sup>60</sup> See A. Nikpay, 'UK Cartel Enforcement – Past, Present, Future', the Law Society Anti-Trust Section, London, 11 December 2012, 22, who notes that the judge in question 'was persuaded that expert economic evidence was potentially relevant to the issue of dishonesty'. In fairness to Hammond and Penrose, they do not say that 'dishonesty' would completely preclude the presentation of economic evidence.

<sup>61</sup> See, eg, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5.

<sup>62</sup> See, eg, A. Jones and B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 4th ed, 2011), 63.

<sup>63</sup> P. Warner and M. Trebilcock (1992-1993), 'Rethinking Price-Fixing Law' (1992-1993) 38(3) *McGill Law Journal* 680, 690. On the problems encountered in Canada when prosecutors had to prove an 'undue' lessening of competition in order to impose criminal cartel sanctions, see: L. Jacobs, 'Criminal Enforcement of Antitrust Laws – Problems with the US Model', in B. Hawk (ed.), *International Antitrust Law & Policy*: Fordham

criminal judges) is required to rule on (the defendant's belief as to) the fulfilment of economic criteria in order to determine whether a criminal cartel offence has been made out on the facts as presented.<sup>64</sup> Furthermore, it may inject a degree of inconsistency into the law, as it 'leaves open the possibility of inconsistent findings between criminal and civil proceedings arising as a result of differences in economic judgement between a lay jury and a specialist "civil" tribunal'.<sup>65</sup> Third, by requiring economic assessments to be made in order to determine if a criminal cartel offence has been committed a criminalised jurisdiction would be creating a very fine – and some may argue inappropriate – distinction between criminal conduct and non-criminal conduct.<sup>66</sup> Given the above, it seems that there is a solid argument that the employment of the definitional element of 'dishonesty' in the original Cartel Offence represented a significant inherent defect of that particular criminal offence.

### **THE BIS CONSULTATION, ITS PROPOSALS AND THE RESULTING LEGISLATIVE REFORM**

The section directly above argued that the central difficulty with the original UK Cartel Offence is its inclusion of the definitional element of 'dishonesty'. For a number of influential commentators, the inclusion within the UK Cartel Offence of the definitional element of 'dishonestly' agreeing with another to engage in cartel activity indeed proved to be too difficult for the OFT to overcome in practice, resulting in a relatively poor enforcement record.<sup>67</sup> The UK Government was receptive to these criticisms of the original offence. In fact, in March 2011, as part of a wider initiative aimed at reforming various elements of UK competition law, it set in motion a reform process concerning the UK Cartel Offence that would have its centre

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Corporate Law 2006 (New York: Juris Publishing, 2007), 29; and S. Scott, 'Criminal Enforcement of Antitrust Laws: The US Model – A Canadian Perspective', in Hawk, B. (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 2006* (New York: Juris Publishing, 2007), 70-71.

<sup>64</sup> J. Joshua, 'A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct' (2002) 23(5) ECLR 231, 242. Cf P. Massey, 'Criminalising Competition Law Offences – A Review of Irish Experience' (2012) 3(2) *New Journal of European Criminal Law* 153, 159.

<sup>65</sup> Pickford, n 53 above, 43.

<sup>66</sup> *ibid* 37.

<sup>67</sup> See: S. Branch, 'Enforcement Investigations – Now and Under the New Regime', Law Society Evening Session, Competition Section, 2 July 2013, 15; and Nikpay, n 60 above, 19–23. See also A. Riley, 'Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement', in B. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee: Dundee University Press, 2010), 277.

the removal of the definitional element of ‘dishonesty’. Indeed, in its 2011 Consultation Document (which considered many different aspects of the UK competition regime and not just its criminal enforcement strand), BIS acknowledged that the ‘dishonesty’ element in the UK Cartel Offence was overly problematic and put forward four options for future reform, each one of which involved, inter alia, the removal of that particular definitional element.<sup>68</sup> It was feared that the mere removal of the ‘dishonesty’ element would result in an offence that would be too broadly drawn; in particular, there was anxiety that the removal of that element ‘could mean that the offence would be more likely to capture some forms of agreement that are capable of exemption under the antitrust prohibitions on the basis of their countervailing beneficial effects’.<sup>69</sup> Thus none of the options for reform presented involved the mere removal of ‘dishonesty’; rather each attempted to deal with the issue of overreach that removing ‘dishonesty’ from the offence would arguably engender.

The first option for reform put forward in the Consultation Document involved the removal of the ‘dishonesty’ element and the introduction of prosecutorial guidance which would spell out the types of agreements that are most likely to warrant criminal investigation and prosecution (‘Option 1’). The second option articulated by BIS involved the removal of the ‘dishonesty’ element and defining the offence in a manner that carves out a set of ‘white-listed’ agreements, defined by type, as opposed to by virtue of their economic effects (‘Option 2’). The third proposal involved replacing the ‘dishonesty’ element with a definitional element constructed around the concept of ‘secrecy’ (‘Option 3’). A potential definition for secrecy in this context was provided in paragraph 6.41 of the Consultation Document: ‘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’. The final option (‘Option 4’) noted by BIS involved the removal of ‘dishonesty’ and the modification of the offence so that arrangements made openly do not fall within its scope. BIS noted in the Consultation Document that, subject to its consideration of the anticipated responses, it favoured the adoption of Option 4.<sup>70</sup>

It would be no exaggeration to state that the responses to the Consultation Document displayed significant opposition to the options for reform articulated therein. Interestingly, BIS noted in its Final Report that, while ‘[b]usinesses, members of the criminal law bar and law

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<sup>68</sup> See BIS, ‘Consultation Document’, Chapter 6.

<sup>69</sup> *ibid* [6.28]. See also the comments of Katja Hall in HC Deb vol 546 col 7 19 June 2012.

<sup>70</sup> BIS, ‘Consultation Document’, 61.

firms with competition law practices ... mostly did not support the proposed change', others (such as the OFT, other prosecutors, overseas competition authorities, and a number of academics and some members of the competition bar) 'generally favoured reform'.<sup>71</sup> The available public responses, however, arguably relate a far bleaker story. On this author's count, of the 115 publicly available responses to the Consultation Document (which, as already noted, contained quite a number of different proposals for the reform of the UK competition regime which were unrelated to criminal cartel enforcement), 49 commented on the reform of the UK Cartel Offence.<sup>72</sup> Of these 49 respondents, only three actually expressed support for Option 4: the OFT; the ESRC Centre for Competition Policy; and the current author.

Of particular interest, given the central position of the debate on 'dishonesty', is the fact that 33 respondents believed that the case for the removal of 'dishonesty' had not been adequately established. The primary reason for such a position was the fact that the Cartel Offence had not yet been tried in front of a jury: the alleged problematic nature of the definitional element of 'dishonesty' has not yet come to light in a case that was contested in the courts. This 'wait and see' attitude is summed up concisely in the following submission:

[g]iven that no case has yet properly tested the role of the dishonesty element within the criminal cartel offence (and the current consultation admits as such in para. 6.15), we consider that there is no clear justification for its removal. ... Further, we do not consider that any useful precedents on this issue can be derived from the criminal cartel cases that have been brought to date: the Marine Hoses case resulted from plea bargain arrangements entered into by UK citizens detained in custody in the US which required the relevant individuals to plead guilty to the OFT indictment – the dishonesty ingredient was not in that case required to be proved; the British Airways case, the difficulty of proving dishonesty was not a contributory factor to the OFT's decision not to offer any evidence in that case.<sup>73</sup>

Additional reasons put forward for keeping the 'dishonesty' element included the argument that the Ghosh test (for 'dishonesty') works well in other legal contexts,<sup>74</sup> the fact that the small

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<sup>71</sup> BIS, 'Final Report', [7.4].

<sup>72</sup> The relevant responses can be found at <https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform>.

<sup>73</sup> Berwin Leighton Paisner LLP, 'A Competition Regime for Growth: A Consultation on Options for Reform: Response Form', June 2011, 10.

<sup>74</sup> See, eg, Herbert Smith LLP, 'Herbert Smith Submission: A Competition Regime for Growth: A Consultation on Options for Reform', June 2011, 15. Cf American Bar Associate, 'Joint Comments of the American Bar

number of Cartel Offence prosecutions could be due to factors other than the existence of the definitional element of ‘dishonesty’ (such as the under-resourcing of the OFT in relation to its criminal cartel enforcement role<sup>75</sup> or the lack of cartels in existence that violate section 188 EA<sup>76</sup>), the need to ensure that a strong link existed between the commission of the Cartel Offence and moral culpability or impropriety,<sup>77</sup> and the need to ensure a distinction between the administrative cartel offence (under Article 101 TFEU and/or Chapter 1 of the Competition Act 1998) and the criminal Cartel Offence.<sup>78</sup>

Option 1 received very little support: only Dr Bruce Wardhaugh favoured it, with the Confederation of British Industry and the International Chamber of Commerce UK arguing that if reform were to occur (which in their opinions it should not) then Option 1 was to be preferred to the other options. Wardhaugh argues that the advantage of this option is that ‘it clearly specifies that certain agreements are never permissible, and are always illegal’ and that relying upon prosecutorial guidelines ‘provides legal certainty, which has important considerations when viewed from the perspective of the rule of law’.<sup>79</sup> This argument is difficult to support however, in particular because Article 7 ECHR is likely to be violated if individuals cannot predetermine from the wording of the offence (including its interpretation by the courts) whether their contemplated (cartel) conduct would be criminal in nature if it were to be engaged in:<sup>80</sup> in short, the use of Option 1 does little to resolve the legal certainty problem noted above. Likewise, Option 2 was not favourably received; only one response

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Association Section of Antitrust Law and Section of International Law on “A Competition Regime for Growth: A Consultation on Options for Reform” of the United Kingdom’s Department of Business Innovation & Skills’, May 2011, 2.

<sup>75</sup> See, eg, Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law, ‘A Competition Regime for Growth: A Consultation on Options for Reform: Comments of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law’, June 2011, 24.

<sup>76</sup> See, eg, Norton Rose LLP, ‘A Competition Regime for Growth: A Consultation on Options for Reform: Response to the Department for Business, Innovation & Skills Submitted by Norton Rose LLP’, 10 June 2011, 14.

<sup>77</sup> See, eg, Corker Binning, ‘BIS Consultation Paper March 2011 “A Competition Regime for Growth”, The Criminal Cartel Offence, Submission of Corker Binning’, June 2011, 2.

<sup>78</sup> See, eg, Orrick, Herrington & Sutcliffe (Europe) LLP, ‘Response to BIS Consultation Paper A Competition Regime for Growth: A Consultation on Options for Reform’, 13 June 2011, 3.

<sup>79</sup> B. Wardhaugh, ‘Closing the Deterrence Gap: Individual Liability, the Cartel Offence and the BIS Consultation’ (2011) 10(3) Competition Law Journal 175, 193. See also S. Summers, ‘What Should the Dishonesty Element of the UK Cartel Offence Be Replaced With?’ (2012) 11(1) Competition Law Journal 53.

<sup>80</sup> See: *SW and CR v United Kingdom* (1996) 21 EHRR 363, 399; and BIS, ‘Final Report’, 70.

advocated it, namely that co-authored by Professor Christopher Harding and Julian Joshua. As noted by BIS, it was generally (and, it is submitted, correctly) felt that Option 2 would ‘result in an offence that was narrower than it need be, that it could give rise to interpretational difficulties, and it would risk not adequately differentiating that offence from the civil antitrust prohibitions’.<sup>81</sup> Moreover, it was felt that pursuing such an option would also be inconsistent with the recent trend for EU competition law to move away from ‘white lists’ of acceptable agreements (eg, in the context of block exemption regulations implementing Article 101(3) TFEU).<sup>82</sup> Option 3 was supported by only five respondents (two of whom did so as the least undesirable alternative to the removal of ‘dishonesty’). An important advantage noted was the fact that the requirement to prove secrecy in this context could be used to express the inherent moral wrongfulness of the criminal activity in a manner that is easier to understand than is the case when ‘dishonesty’ is relied upon.<sup>83</sup> That said, it was convincingly argued that Option 3 suffers from a significant drawback, in that it increases the (already significant) burden facing prosecutors: hard core cartels ‘being highly unlawful, tend to be conducted extremely covertly, but [cartelists] may not always take steps to conceal behaviour that can readily be characterised as “active”, and even where such steps are taken their very covertness may mean that evidence of them is hard to uncover’.<sup>84</sup> Finally, as noted above, Option 4 only had a handful of supporters. Notable objections to Option 4 were that it would potentially capture legitimate horizontal agreements (such as specialisation or joint venture agreements) if they were not made openly and that it would create tensions with (legitimate) commercial confidentiality.<sup>85</sup> Some expressed concerns about how the carve out of agreements made openly would operate in practice (eg, how ‘openly’ would be defined).<sup>86</sup> By contrast, those who supported Option 4 did so on the basis, *inter alia*, that it would ‘help to ensure a ready means of distinguishing the

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<sup>81</sup> BIS, ‘Final Report’, [7.13].

<sup>82</sup> See, eg, Eversheds LLP, ‘A Competition Regime for Growth: A Consultation on Options for Reform: Response by Eversheds LLP’, 13 June 2011, 13.

<sup>83</sup> See, eg, Arnold & Porter, ‘A Competition Regime for Growth: A Consultation on Options for Reform: Response by Arnold & Porter (UK) LLP’, June 2011, 14.

<sup>84</sup> BIS, ‘Final Report’, [7.19].

<sup>85</sup> See, eg: Edwards Angell Palmer & Dodge, ‘Consultation on Options for Reform of the Competition Regime’, 8 June 2011, 9 and; Confederation of British Industry, ‘Options for Reform of the Competition Regime – CBI Response to BIS Consultation’, 13 June 2011, 13.

<sup>86</sup> See, eg, J. Pickering, ‘A Competition Regime for Growth: Options for Reform’, 10 June 2011, 4.

cartel offence from Article 101 [TFEU], such that criminal cases could be pursued whether or not there were parallel EU civil proceedings'.<sup>87</sup>

After considering the responses, in March 2012, BIS decided to advocate a revised version of Option 4. In particular it decided to

remove the 'dishonesty' element from the offence and define the offence so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before they are implemented, so that customers and others are aware of them.<sup>88</sup>

BIS acknowledged that it would be necessary to specify the format for publication at a later date, adding that the London Gazette (or a similar publication) could be used for this purpose, particularly given that it would be 'an objectively measurable' method to determine if the publication 'carve out' applied to a given agreement.<sup>89</sup> For it, the 'carve out' would not only achieve the objectives of the consultation, but it would do so in a manner that would not overly burden business actors. More specifically, in response to the above-criticisms, BIS noted that: (i) while businesses certainly need to protect commercial confidentiality when it is legitimate to do so, cartel arrangements are unlawful and therefore 'information as to their existence is not legitimately susceptible to protection on the grounds of commercial confidentiality';<sup>90</sup> and (ii) in those rare cases where cartel arrangements would fall within the scope of the Cartel Offence but would benefit from an exemption from any administrative prohibition due to their net beneficial effect for consumers, it is 'not unreasonable to require the disclosure of those provisions so as to bring them outside the scope of the offence (other elements of the arrangements could remain confidential)'.<sup>91</sup>

BIS's publication of its Final Report was swiftly followed by legislative action.<sup>92</sup> The Enterprise and Regulatory Reform Bill, a bill which contained inter alia BIS's proposal concerning the reform of the Cartel Offence, had its first reading in the House of Commons on 23 May 2012. This Bill eventually received Royal Assent on 25 April 2013 and became the Enterprise and Regulatory Reform Act 2013 ('ERRA'). By that stage, against the backdrop of

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<sup>87</sup> BIS, 'Final Report', [7.22].

<sup>88</sup> *ibid* 66.

<sup>89</sup> *ibid* 72.

<sup>90</sup> *ibid* [7.27].

<sup>91</sup> *ibid* [7.28].

<sup>92</sup> See generally <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>.

a relatively moderate amount of debate on the issues in both Houses of Parliament, the provisions concerning the Cartel Offence had undergone considerable change. The ‘dishonesty’ element was indeed to be removed (section 47(2) ERRA), but two additional (notification-type) ‘carve outs’ were added to the publication ‘carve out’ advocated by BIS in its Final Report. Consequently, under section 47(5) ERRA (which creates section 188A EA), the following are deemed to be circumstances in which the Cartel Offence is not committed:

- (a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,
- (b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or
- (c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

The ‘relevant information’ at issue means the names of the undertakings involved, a description of the nature of the arrangement which would explain why they might be arrangements subject to the Cartel Offence, the products or services in question, and other information as may be specified in an order made by the Secretary of State.<sup>93</sup> A novel development, and one which received practically no analysis in the Parliamentary debates, was the inclusion within ERRA of section 47(6), a section which provides three new defences to the commission of the Cartel Offence (by creating section 188B EA). These defences are articulated as follows:

- (1) In a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, it is a defence for an individual charged with an offence under section 188(1) [EA] to show that at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.
- (2) It is a defence for an individual charged with an offence under section 188(1) [EA] to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA [Competition and Markets Authority].
- (3) It is a defence for an individual charged with an offence under section 188(1) [EA] to show that, before the making of the agreement, he or she took reasonable steps to ensure that the

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<sup>93</sup> Enterprise and Regulatory Reform Act 2013, s 47(5).

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.

The ERRA, in section 47(7), also provided that the CMA must prepare and publish guidance on ‘the principles to be applied’ in coming to a decision whether to prosecute an individual for commission of the Cartel Offence. Following a short consultation on this issue initiated in September 2013,<sup>94</sup> the CMA duly published such guidance.<sup>95</sup>

Section 47 ERRA came into force fully on 1 April 2014, following the making of an order to that effect by the Secretary of State.<sup>96</sup> On that date an additional order of the Secretary of State also came into effect which provided that, for the purpose of the publication ‘carve out’ provided in section 47(5) ERRA, ‘relevant information about the arrangements is published if it is advertised once in either the London Gazette, the Edinburgh Gazette or the Belfast Gazette’.<sup>97</sup> At the time of writing, the CMA has yet to charge anyone under the new provisions relating to the UK Cartel Offence implemented by virtue of section 47 ERRA.<sup>98</sup>

## **CRITICALLY ANALYSING THE REFORMS IN SECTION 47 ERRA**

### **Removal of ‘Dishonesty’ and the Potential for ‘Overcriminalisation’**

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<sup>94</sup> See: CMA, Cartel Offence Prosecution Guidance – Consultation Document, CMA9con, September 2013; and CMA, Cartel Offence Prosecution Guidance – Summary of Responses to the Consultation, CMA9resp, March 2014.

<sup>95</sup> CMA, Cartel Offence Prosecution Guidance, CMA9, March 2014.

<sup>96</sup> The Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014, SI 2014/416, s 2(a).

<sup>97</sup> The Enterprise Act 2002 (Publishing of Relevant Information under Section 188A) Order 2014, SI 2014/535, s 2.

<sup>98</sup> It should be noted at this point that the original Cartel Offence will remain the appropriate offence for a criminal prosecution in the UK when the (dishonest) cartel activity was allegedly committed between 20 June 2003 and 1 April 2014. Interestingly, according to the CMA’s website, there are two ongoing criminal investigations based on an alleged violation of the original (ie, pre-ERRA) Cartel Offence; see: <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>; and <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.

It was noted above that a serious inherent defect of the original Cartel Offence was its requirement to prove ‘dishonesty’ on behalf of the individual cartel member in order to secure successful prosecutions. It is submitted therefore that section 47 ERRA’s abolition of the ‘dishonesty’ element from the Cartel Offence should be welcomed: it removes the inherent defect and the difficulties it can engender. Admittedly such a position is in conflict with the ‘wait and see’ position adopted by the vast majority of the (relevant) respondents to BIS’s Consultation Document; however, as is evident from the analyses above, this position is supportable on the basis of theoretical, legal and empirical arguments. None of this is to say, however, that by merely removing ‘dishonesty’ one thereby resolves the problems with the Cartel Offence. In fact, the removal of ‘dishonesty’ brings with it a serious additional problem that needs to be overcome: the potential engendering of the phenomenon of ‘overcriminalisation’,<sup>99</sup> where the Cartel Offence no longer aligns itself expressly with culpable or morally wrongful conduct.

While there are of course morally-neutral/-ambiguous offences,<sup>100</sup> it does not necessarily follow that morality is no longer a concern for those who advocate criminalising a given behaviour, including cartel activity.<sup>101</sup> Of continuing importance is the question whether the criminal law should extend beyond its traditional conception of criminality and concern itself with conduct which does not attract the unequivocal moral opprobrium of the community. For some, applying the criminal law to morally-neutral/-ambiguous conduct is not only unjust but is also counterproductive, in that by unfairly labelling offenders as criminals, the moral authority of the law is undermined, resulting as a consequence in a weakening of the deterrent value of criminal sanctions.<sup>102</sup> For the Law Commission, for example, ‘criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal

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<sup>99</sup> See R. Patel, ‘The Removal of Dishonesty from the Cartel Offence and the Publication Defense: A Panacea?’ [2012] 5 CPI Antitrust Chronicle 11.

<sup>100</sup> See, eg, S. Green, ‘Moral Ambiguity in White Collar Criminal Law’ (2004) 18(2) Notre Dame Journal of Law, Ethics and Public Policy 501.

<sup>101</sup> See C. Parker and V.L. Nielsen, ‘How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Non-Compliance with the Trade Practices Act’ (2008) 32(2) Melbourne University Law Review 554, 601.

<sup>102</sup> S. Green, ‘Why It’s a Crime to Tear a Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences’ (1997) 46(4) Emory Law Journal 1535, 1536.

conviction because they have engaged in seriously reprehensible conduct'.<sup>103</sup> Ashworth argues a similar point when he posits that the 'central function' of the criminal law involves the '(a) the declaration of forms of wrongdoing that are (b) serious enough to justify (c) the public censure inherent in conviction and (d) punishment'.<sup>104</sup> Some even contend that applying the criminal sanction to morally-neutral conduct in fact 'decriminalises' the criminal law, and taken to its extreme either results in nullification or, more subtly, a changing of people's attitudes towards the meaning of criminality.<sup>105</sup> For them, the criminal law should be concerned solely with conduct which unequivocally attracts the moral opprobrium of society; it should in other words concentrate on 'traditional' crimes and not morally-neutral conduct.<sup>106</sup> They argue that, in the absence of such a restraint, the criminal law may begin to lose its legitimacy.<sup>107</sup>

Admittedly such arguments do not entertain the possibility that by criminalising cartel activity one may influence others as to how they perceive the nature of that behaviour;<sup>108</sup> they ignore the educative function of the criminal law. More specifically, they do not allow for the criminal law actually to create, and not just reflect, a moral opprobrium for what is, at least according to those who legislate, undesirable behaviour, albeit behaviour failing somewhat short of 'immoral' according to a significant percentage of the population. It is difficult to deny that there is some reciprocal relationship between the content of the criminal law and society's perception of the morality of the conduct it regulates.<sup>109</sup> According to Coffee, the line between *malum in se* and *malum prohibitum* has been crossed many times and has largely been discredited — particularly in the field of white-collar crime — and in fact the public learns a

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<sup>103</sup> Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper*, Consultation Paper No. 195, London, 2010, [1.28].

<sup>104</sup> A. Ashworth, 'Conceptions of Overcriminalization' (2008) 5(2) *Ohio State Journal of Criminal Law* 407, 408-409.

<sup>105</sup> H. Packer, *The Limits of the Criminal Sanction* (Oxford: Oxford University Press, 1968), 359.

<sup>106</sup> G. Richardson, A. Ogus and P. Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Oxford: Clarendon Press, 1982), 14-15.

<sup>107</sup> See, eg: F. Allen, 'The Morality of Means: Three Problems in Criminal Sanctions' (1981) 42(4) *University of Pittsburgh Law Review* 737, 738; D. Galligan, *Law in Modern Society* (Oxford: Oxford University Press, 2007), 228; and P. Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76(2) *Boston University Law Review* 202.

<sup>108</sup> See M. Stucke, 'Morality and Antitrust' [2006] 3 *Columbia Business Law Review* 443, 537.

<sup>109</sup> J. Coffee, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71(2) *Boston University Law Review* 193, 200. See also Ball and Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation' (1964) 17(2) *Stanford Law Review* 197, 217.

significant deal of its morality from what is punished by the criminal law.<sup>110</sup> That said, although not all criminal offences involve intrinsic moral wrongs, the more negative that conduct is in terms of its moral qualities, the likelier it will be appreciated as undesirable conduct requiring criminal sanctions,<sup>111</sup> and the easier it would be to employ the educative function of the criminal law, particularly if attitudes have been hardened by an already-existing civil enforcement regime. Even further, a number of important advantages can be achieved if a cartel offence relates to conduct which is morally questionable, advantages which may be lost if morality is overlooked, such as a reduction in enforcement costs due to an internalisation of the moral norm.<sup>112</sup> Indeed, '[s]ocial norms opposing cartels have the potential ... to complement sanctions and encourage desistance'.<sup>113</sup> A disconnect between morally wrongful behaviour and the content of a cartel offence may therefore increase the probability of a negative outcome, such as nullification or a change of attitudes towards the nature and fairness of the criminal law. In fact, some believe that the success of a project of cartel criminalisation 'depends on the emergence of a genuine sense of "hard core" delinquency, without which effective regulation by means of criminal law is unlikely to be achieved'.<sup>114</sup> In order to avoid undesirable outcomes with the creation of a cartel offence (which does not contain an explicit moral concept at its heart, such as 'dishonesty'), one should therefore attempt to ensure that such an offence inherently captures some form of culpable or morally wrongful behaviour.

### **Rationalising the 'Carve Outs': the Concept of Deception**

It is submitted that one of the major advantages of the notification and publication 'carve outs' in section 47(5) ERRA is their ability to provide a sort of 'rough cut' between cartel activity caught by the (reformed) UK Cartel Offence and morally wrongful behaviour. The point to be

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<sup>110</sup> *ibid.* See also R. Williams, 'Cartels in the Criminal Law Landscape', in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Oxford: Hart Publishing, 2011), 295-298.

<sup>111</sup> See, eg, Packer, n 105 above, 262.

<sup>112</sup> For a more detailed overview of the advantages of a finding of immorality in the context of antitrust criminal sanctions, see Stucke, n 108 above, 505-524.

<sup>113</sup> A. Stephan, 'Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures' (2010) 37(2) *Journal of Law and Society* 345, 355.

<sup>114</sup> C. Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14(2) *Critical Criminology* 181, 183.

understood is that both the notification and publication ‘carve outs’ can be interpreted as a (relatively successful) attempt to align cartel conduct caught by the Cartel Offence with a violation of the moral norm against deception. The reasons for this are: (i) that, with certain exceptions, cartel activity usually involves deception; and (ii) that the ‘carve outs’ represent the obvious exceptions (i.e., those cartel situations where deception is clearly not present).<sup>115</sup> By (re)designing the Cartel Offence in this way, the legislature has reduced the potential for that offence to contribute to ‘overcriminalisation’ in the UK and to the problems that such a phenomenon can engender. In order to appreciate how this is the case, one first needs to understand how cartel activity can (and sometimes cannot) align itself with the moral norm against deception.

Deception occurs where (i) a message is communicated, with (ii) an intent to cause a person to believe something that is untrue and (iii) a person is thereby caused to believe something that is not true.<sup>116</sup> There are two scenarios involving the interaction of a cartel with her customer which arguably involve deception: (i) where the cartel expressly states to her customer that she has not colluded; and (ii) where the cartel does not expressly state that cartelisation has (or has not) occurred but nonetheless fails to disclose its occurrence to its customer. A third scenario can be added concerning cartel activity: where the cartel expressly discloses the existence of the cartel prior to implementing it, so that customers are actually or constructively aware of the cartel. It is argued below that (a) the third scenario does not involve deception and (b) to ensure that the criminal cartel offence only captures deceptive cartel activity, it would be necessary to ‘carve out’ the third scenario from the criminal cartel offence.

The first scenario identified directly above involves the communicated message (‘I have not engaged in cartel activity’), which is a verifiable assertion that is literally false.<sup>117</sup> The actual message intended to be communicated, then, is a lie. The process by which this communicated message leads to a false belief on the behalf of a third party (ie, that cartel activity has not occurred) involves the reliance by the third party upon one of the ‘core conventions of dialogue’: the convention that ‘positive assertions of fact are true in the ordinary

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<sup>115</sup> Cf A. Jones and R. Williams, ‘The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?’ (2014) 2(1) *Journal of Antitrust Enforcement* 100, 116-117.

<sup>116</sup> See J. Adler, ‘Lying, Deceiving or Falsely Implicating’ (1997) 94(9) *Journal of Philosophy* 435, 437.

<sup>117</sup> To use the words of S. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford: Oxford University Press, 2006), 77.

sense of the words used'.<sup>118</sup> Furthermore it is not difficult to argue that, absent a genuine mistake on the part of the cartel, her ultimate objective in communicating is to mislead the customer. There are certainly incentives for the cartel to so mislead. Customers are less likely to display 'bad feelings' about the price rise (and are therefore less likely to seek alternative suppliers) if they attribute the price rise to cost increases rather than to collusion; and due to their ignorance of the cartel's existence, customers will not report the cartel to the authorities. One must not forget here that cartel activity is unlawful after all and, if detected, will result in the imposition of significant fines. It should thus be no surprise that, according to the Commission at least, 'the undertakings involved in the gravest antitrust infringements usually employ efforts and sometimes sophisticated means to conceal their illegal conduct'.<sup>119</sup> The General Court agrees with this assessment.<sup>120</sup> With express statements, then, the criteria concerning deception can be fulfilled relatively easily. But while the first scenario may indeed involve deception, it is unlikely to occur in practice: cases where cartels provide statements such as 'no need to worry, our prices have not been determined by collusion' will be rare.<sup>121</sup> A possible exception may be where official statements concerning the absence of collusion when preparing tenders are provided to secure government procurement contracts.<sup>122</sup>

The second scenario is more common in the real world however. The message communicated by a cartel when active in a market is that her (cartelised) goods/services are available for sale. This message is a literal truth: the goods are indeed for sale. This is not a problem though, as literally true statements are capable of being deceptive.<sup>123</sup> What is required is that the message communicated leads to a false belief. The false belief is that cartel activity has not occurred; it is created due to an assumption made by third parties as a result of the communication of the original message. The assumption is that the cartel is lawfully engaged

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<sup>118</sup> L. Alexander and E. Sherwin, 'Deception in Morality and Law' (2003) 22(5) *Law and Philosophy* 393, 403-404.

<sup>119</sup> European Commission, Commission Staff Working Paper Accompanying the White Paper – Damages Actions for Breach of the EC Antitrust Rules, SEC (2008) 404, Brussels, 2 April 2008, [88] (emphasis added).

<sup>120</sup> See Case T-53/03 *British Plasterboard v Commission* [2008] ECR II-1333 at [63].

<sup>121</sup> P. Whelan, 'Resisting the Long Arm of Criminal Antitrust Laws: *Norris v US*' (2009) 72(2) *MLR* 272, 280.

<sup>122</sup> This occurs in Germany, where bids responding to public calls for tender, or to calls for tender addressed to at least two entities, 'contain either an express or at least an implied representation that the bids are not rigged': F. Wagner-von Papp, 'What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany', in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Oxford: Hart Publishing, 2011), 165.

<sup>123</sup> See Adler, n 116 above.

in normal competition with her competitors. By placing her (cartelised) good on the market and by keeping the cartel secret, the cartelist implies that she has not actually cartelised:

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 that is so and will, in effect, act in a dishonest ... manner, if the existence of the cartel is kept secret.<sup>124</sup>

This argument was accepted by the High Court when it ruled that cartel activity per se, that is without aggravating features such as express lies, could be a dishonest practice in law.<sup>125</sup> While the argument was rejected on appeal,<sup>126</sup> it was rejected due to legal precedent and not because the moral concept of ‘dishonesty’, or indeed deception, was incapable of accommodating cartel activity.<sup>127</sup>

As noted above, there is one more potential interaction between a cartelist and her customer that is relevant to the assessment of deception, an interaction that rationalises the existence of the notification and publication ‘carve outs’: where the cartelist expressly states to her customer that she has colluded. When this interaction occurs, there will be no deception; the cartelist is merely telling the truth. Indeed, the admission effectively ensures that the customer is made aware of the cartel: presumably, the customer would not be led to believe by such an admission that in fact no cartel exists. If there is an admission of the existence of a cartel prior to a sale (either through public publication (of which customers could be deemed to have constructive notice) or direct communication with potential customers), then, there is no violation of the moral norm against deception. While this assertion may represent a statement of the obvious, it nonetheless provides a solid reason for the existence of the ‘carve outs’: the desire to align the Cartel Offence with the moral norm against deception. In short, if one is swayed by the arguments concerning potential ‘overcriminalisation’, then one can take comfort in the fact that ‘carve outs’ help to undermine their potency.

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<sup>124</sup> J. Lever and J. Pike, ‘Cartel Agreements, Criminal Conspiracy and the Statutory “Cartel Offence”’: Parts I & II’ (2005) 26(2) ECLR 90, 95.

<sup>125</sup> See *Norris v Government of the United States of America and others* [2007] EWHC 71 (Admin) at [66]-[67].

<sup>126</sup> See *Norris v Government of the United States of America and others* [2008] UKHL 16.

<sup>127</sup> For a more detailed analysis of the link between cartel activity and immoral conduct, see Whelan, n 29 above.

## **Rationalising the ‘Carve Outs’: the Concept of ‘Legitimate’ Cartel Activity**

An additional, and equally important, advantage of the ‘carve outs’ is the fact that they allow for a satisfactory resolution of the difficult issue of avoiding the criminalisation of ‘legitimate’ cartel activity (ie, the (rare) type of cartel activity that is exempt from (administrative/civil) prohibition and punishment). First, one should understand that a criminal cartel offence that prohibits price-fixing, output restrictions, market sharing and bid-rigging while allowing for a ‘carve out’ of notified/published agreements would not require a decision-maker to assess the economic effects of an agreement to find that the offence has been committed. In short, the ‘carve outs’ avoid the presentation of complex economic evidence in a trial, and therefore the problems that such presentation entails. However, and importantly, the ‘carve outs’ can also indirectly provide immunity from criminal sanctions for those who conclude agreements that would benefit from an exception under Article 101(3) TFEU or section 9 of the Competition Act 1998. If cartelists genuinely believe that their cartel agreement would benefit from a (civil/administrative) exception (as it would fulfil the relevant legal criteria), all they have to do to avoid criminal sanctions is to publish publicly the agreement prior to its implementation or to notify the customers prior to their entry into the relevant contracts. Accordingly, no economic evidence needs to be presented to a jury for an Article 101(3)-type exception to be operationalised. What is necessary is that before coming to any agreement the cartelists analyse the agreement contemplated and make their decision (based on legal advice if necessary) whether an exemption would be available under the administrative offences. If so, and they wish to conclude and to implement the agreement, they should publish the agreement (prior to implementation) or give customers information about the agreement (prior to contracting) to avoid criminal sanctions. If they are correct in their economic analyses, then the undertakings for whom they work will also avoid administrative sanctions, such as fines. If the rules of UK/EU competition law would not deem the cartel to be ‘acceptable’ cartel activity, the cartelists can then decide: (i) to conclude and publish the agreement (in the process subjecting the cartel to possible civil competition law enforcement, but avoiding criminal liability for themselves); (ii) to conclude and then implement the agreement without publishing it or informing customers directly (subjecting themselves to possible criminal liability); or (iii) to abandon their attempts to reach agreement altogether so that criminal and/or administrative sanctions will not result.

Critics might say that cartelists will ‘short circuit’ the UK criminal antitrust regime by routinely making public all of their cartel agreements, thereby nullifying the deterrent effect of

the criminal cartel sanctions. This is unlikely as presumably the cartelists wish to see the cartel actually work in practice (and not receive fines and/or the negative publicity that would presumably follow). If so, they would be reluctant to bring the cartel to the attention of those who enforce the administrative cartel prohibitions. However, if (in the very unlikely case that) cartelists do decide to make their (clearly unlawful) agreement public merely to avoid criminal sanctions, the following positive effect would register: the veil of secrecy surrounding the cartel would be pierced, thereby increasing the rate of detection of unlawful cartels for the purposes of the enforcement of Article 101 TFEU or Chapter 1 of the Competition Act 1998 (and with it the deterrent effect of the administrative offence). This increase in the rate of detection (if it were to occur) would undermine the need for criminal sanctions to deter cartel activity in the first place (as the optimal fine would be reduced significantly).<sup>128</sup> Hence the ‘short circuiting’ if it were to occur (which, again, is unlikely anyway) would not be overly problematic.

Three potential issues could be raised with the ‘carve outs’. The first concerns legitimate commercial confidentiality and its undermining by the requirement to notify customers or publicise the agreement. It is submitted that BIS’s response on this issue is satisfactory:<sup>129</sup> given the important public interest in suppressing hard core cartel activity, it is not unreasonable to expect business people to provide (very) limited details regarding certain agreements in those rare instances where cartel activity can be understood as being beneficial for consumers. The second issue is that the parties to a cartel may wish to publish an (innocuous) agreement between them in order to obscure collusive behaviour that is more problematic under the EU competition law rules. Indeed, there are a number of EU competition cases where legitimate cooperative behaviour was employed as a screen for more problematic, anticompetitive conduct. One recent example is the EPEX/Nord Pool cartel, where the parties, in the (legitimate) context of exploring a joint approach concerning the technical systems to be employed in cross-border trade, agreed not to compete with one another and allocated EU markets between them.<sup>130</sup> It is submitted here however that this issue is not something about which to be anxious. It all comes down to the scope of the ‘carve out’. If the ‘carve out’ is to apply at all it will only apply to the published/notified agreement itself; other agreements between the parties remain unaffected. Where one (legitimate) agreement is published/notified

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<sup>128</sup> On the link between sub-optimal cartel fines and the need for criminal cartel sanctions, see, eg, Whelan, n 6 above, Chapter 3

<sup>129</sup> See BIS, ‘Final Report, [7.28].

<sup>130</sup> Case AT.39952, Power Exchanges, Commission Decision, 5 March 2004, [2014] OJ C 334/06.

to obscure the existence of another (unlawful) agreement, the situation is clear: the (unlawful) cartel agreement that the (published/notified) agreement attempts to ‘shield’ remains exposed to criminal sanctions. The parties may argue, however, that the two agreements in that instance (the legitimate and the unlawful) in fact together form one ‘overall agreement’ between them and that this ‘overall agreement’ has been published/notified. In doing so, they will hope to rely upon the publication/notification of the legitimate aspect of the alleged ‘overall agreement’ to apply to the agreement as a whole. Importantly, this sort of tactical use of the ‘carve outs’ would be unsuccessful. The reason is that, for a ‘carve out’ to be applicable, the parties must provide (via publication or notification) a description of the nature of the arrangement which would explain why they might be arrangements subject to the Cartel Offence. By failing to disclose the existence of the unlawful aspect of the alleged ‘overall agreement’, the parties would be failing to provide this information. Consequently, a ‘carve out’ for the alleged ‘overall agreement’ would not be provided. In any case, the ability to apply administrative (EU or national) competition law sanctions would be untouched by any publication/notification, and so no negative impact upon the administrative competition law regime would result due to the existence of the ‘carve outs’. In the worst case scenario, then, the ‘carve outs’ would neither help nor hinder the competition authorities in dealing with the sorts of cartels where legitimate cooperative behaviour is employed as a screen for more problematic, anticompetitive conduct. The third issue is that the (publication) ‘carve out’ approach to operationalising an Article 101(3)-type exemption from the criminal cartel offence could be interpreted by some as a return to the past, where notification of agreements to competition authorities was a pre-requisite to the granting of an exemption, a practice that has rightly been criticised as a highly inefficient method of dealing with legitimate agreements between competitors.<sup>131</sup> It is submitted, however, that the ‘carve out’ of published agreements is not equivalent to a notification and authorisation regime as it does not require any action on behalf of the competition authorities: the mere fact that an agreement has been published in a suitable format automatically removes the cartelists from the sphere of criminal law. There is therefore no resultant administrative burden on the authority. This is very different to a state of affairs where a ruling by the competition authority on the validity of an agreement is actually required in order to provide clarification of the legal situation. What the ‘carve out’ really amounts to in practice is a form

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<sup>131</sup> For the articulation of this criticism during the passage of section 47 ERRA through Parliament, see, eg: HC Deb vol 548 cols 553 and 554 10 July 2012; HL Deb vol 741 col 507 18 December 2012; and HL Deb vol 743 col 1055 26 February 2013.

of criminal immunity that is granted prior to the implementation of a cartel agreement that leaves open the possibility of later civil/administrative action by the competition authority.<sup>132</sup> It is submitted in fact that such a ‘carve out’ engenders more advantages than disadvantages and should be an option favoured by those jurisdictions that are serious about dealing with hard-core cartel activity but do not wish to prohibit cartel activity that (according to the EU/national competition law rules) pursues a legitimate purpose or may produce net benefits for consumers.

### **An Imperfect and Unworkable Reform: the Defence of Legal Advice**

Unfortunately the reform of the Cartel Offence extends beyond the removal of ‘dishonesty’ and the provision of notification and publication ‘carve outs’, involving as it does the creation of three novel defences, one of which is particularly troubling for those who wish to see a robust criminal cartel regime exist within the UK. The two defences which are not problematic are those that, respectively, centre on proof (on the balance of probabilities) that the defendant did not intend the nature of the cartel arrangements to be concealed from (a) customers or (b) from the CMA. These defences are unlikely to have a large impact in practice, particularly given the fact that they require proof (albeit to lower standard) of a negative. Moreover, both normal commercial confidentiality considerations and the absence of a positive obligation to disclose horizontal agreements to the CMA make it difficult to determine whether an absence of an intention to conceal was present. This fact has led some to conclude that these defences have ‘been drafted more to define situations in which it should not be available, ie secret cartels, than to provide a generally useful defence for legitimate commercial arrangements’.<sup>133</sup> Two things can, however, be said in their favour. First, they can be used to ensure that criminal sanctions do not attach to those sorts of (cartel) agreements that are beneficial to consumers but for which their prior disclosure may be difficult in practice (assuming that such agreements actually exist). There does not appear to be a solid consensus on the extent to which such agreements may exist in practice, but one potential example has been aired: arrangements for the joint underwriting of certain insurance contracts.<sup>134</sup> Second, and more importantly, these

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<sup>132</sup> See, eg, Warner and Trebilcock, n 63 above, 719.

<sup>133</sup> See B. McGrath and J. Love, ‘A Further Twist in the “Dishonesty” Tale: UK Government Proposes New Defences to the Criminal Cartel Offence’, Lexology, 30 October 2012, 3.

<sup>134</sup> See, eg, the comments of Viscount Younger of Leckie in HL Deb vol 743 col 1057 26 February 2013.

two defences, like the notification and publication ‘carve outs’, can be rationalised as an attempt to link (criminalised) cartel activity to deception: an absence of an intention to conceal can be interpreted as an absence of an intention to mislead. For those concerned about overcriminalisation, these two defences may therefore provide some comfort.

The problematic defence is the one (now found in section 188B(3) EA) that requires an individual to show (on the balance of probabilities) that, before the making of the agreement, 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 implementation. The reason that it is problematic is that, on its face, this defence allows cartelists to escape criminal conviction merely by informing their lawyers of their intended cartel plans in order to get their advice regarding their legality. Taken literally, the defence does not impose a requirement to follow any legal advice provided, even when that advice clearly explains that the proposed conduct would otherwise fall within the scope of the UK Cartel Offence; all it seems to require is that reasonable steps are taken to obtain the advice. This interpretation is supported by the Explanatory Notes and the CMA’s Prosecution Guidance, both of which are silent regarding any need to take the advice provided.<sup>135</sup> According to the CMA, for this defence to be operative, there must ‘genuinely be an attempt to seek legal advice about the arrangement’.<sup>136</sup> If, then, there is no requirement actually to take any (reasonable) legal advice provided then a serious flaw has crept into the reform of the Cartel Offence: ‘there would appear to be nothing to prevent an executive from seeking such advice to cover [her] back, being advised that the conduct [she] proposes is unlawful, and then simply ignoring that advice’.<sup>137</sup> The Cartel Offence, then, may operate in future merely as a measure that ensures both the payment of a solicitor’s fee by a cartelist and the inconvenience of disclosing to that solicitor her future cartel plans in order to obtain legal advice. If so, this would be a rather strange feature of the UK competition regime, particularly given that, in the context of administrative competition law proceedings against undertakings, ‘legal advice provided to an undertaking cannot form the basis of a legitimate expectation on the part of an

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<sup>135</sup> See respectively: Enterprise and Regulatory Reform Act 2013 – Explanatory Notes, [361]; and CMA, n 95 above, [4.18]-[4.24].

<sup>136</sup> CMA, n 95 above, [4.24]. See also S. Branch, ‘Competition, the Revised Cartel Offence and the CMA – A New Landscape’, Business Crime – 2014 Conference, London, 23 September 2014, <https://www.gov.uk/government/speeches/sonya-branch-speaks-about-the-cartel-offence-and-the-cma>.

<sup>137</sup> M. O’Kane and J. Nakhwal, ‘Changes to the Cartel Offence by the Enterprise and Regulatory Reform Act 2013’, Practical Law Company, 1 May 2013, 9.

undertaking that its conduct does not infringe Article 101 TFEU nor will it give rise to the imposition of a fine’,<sup>138</sup> even where the advice is erroneous and relied upon in good faith by the undertaking. More importantly, the creation of a ‘seeking of legal advice’ defence is clearly an unacceptable development for those who wish to see a real deterrent effect from criminal cartel sanctions: prosecutions are unlikely to be forthcoming when a defence can so easily be made out. Indeed one commentator has gone so far as to note that this defence represents an ‘absurdity’ in English law,<sup>139</sup> while another contends that it represents in effect a ‘get out of jail free card’ for cartelists operating in the UK.<sup>140</sup>

One of the central reasons for disappointment is that the defence exists in a context where the informed lawyer of the cartelist is under no obligation to inform the authorities about the proposed cartel activity of her client: as legal professional privilege receives very strong protection in law,<sup>141</sup> the obligations to inform the authorities about a client’s future activity are very narrowly drawn indeed,<sup>142</sup> and at present do not expressly or impliedly encompass the reporting of cartel activity. One could, in theory, provide (through legislation) an express obligation on the informed lawyer to disclose to the authorities the proposed cartel conduct of the client. If such an obligation were created and respected by lawyers, this would go some way towards rehabilitating the reformed Cartel Offence: while criminal sanctions would not attach to the reported cartel activity, the reporting of that activity to the authorities helps to pierce the veil of secrecy surrounding cartels, improving the rate of detection of cartels (and engendering a more robust administrative enforcement regime), all of which would be to the benefit of deterrence, and ultimately to consumer welfare. This type of remedial measure, however, would arguably be a step too far, particularly given the importance that is accorded

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<sup>138</sup> See Case C-681/11 Bundeswettbewerbshörde, Bundeskartellanwalt v Schenker and others, Judgment of the Court of Justice, 18 June 2013 at [41].

<sup>139</sup> A. Stephan, ‘The UK’s Revised Cartel Offence: The Need for a Purposive Approach to the “Seeking Legal Advice” Defence’, ESRC Centre for Competition Policy, December 2013, 5.

<sup>140</sup> A. MacCulloch, ‘Get Out of Jail Free: S. 188B(3) of the Enterprise Act 2002’, 15 November 2013, <http://whoscompeting.wordpress.com/2013/11/15/get-out-of-jail-free-s-188b3-of-the-enterprise-act-2002/>.

<sup>141</sup> See, eg, R (Prudential Plc and another) v Special Commissioner of Income Tax and another [2013] UKSC 1 at [17]. Admittedly, it has been held by the Court of Justice that in (administrative) competition proceedings before the European Commission, undertakings do not enjoy legal professional privilege regarding the advice of in-house lawyers: Case C-550/07 P Akzo Nobel Chemicals Ltd v Commission [2010] ECR I-08301 at [44]. But this does not detract from the argument: legal professional privilege is indeed strongly protected under English law, including when in-house lawyers are employed.

<sup>142</sup> See generally J. Herring, *Legal Ethics* (Oxford: Oxford University Press, 2014), Chapter 5.

to the concept of legal professional privilege.<sup>143</sup> The limited circumstances in which a duty to disclose exists invariably involve activity that would be considered inherently immoral and/or criminal in nature by the vast majority of citizens (eg, the financing of terrorist operations). It is not unlikely that there would be a distinct absence of support for such a measure among the legal community, if not wider society. Of particular concern would be idea that lawyers should take on an indirect (civil/administrative) enforcement role regarding cartel activity. Indeed, in the context of money laundering and the current obligations imposed upon lawyers to report such activity,<sup>144</sup> concern has been voiced about lawyers' being used to 'police' the enforcement of a given law.<sup>145</sup> In addition, and on a practical note, one should understand that the legal advice defence may be fulfilled when the 'professional legal adviser' is a foreign (ie, non-UK) lawyer. While the ERRA is silent again on this issue, the CMA has noted the following: the term 'is intended to cover both external and in-house legal advisers qualified in the UK' and 'it could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification'.<sup>146</sup> If foreign lawyers can qualify as 'professional legal advisers' for the purposes of the defence, then it could prove difficult to ensure the workability of the duty to disclose in practice: informed cartelists may get legal advice abroad in order to avoid their lawyers' having to disclose any proposed cartel. For the above reasons, then, the creation of a duty to disclose proposed cartel activity should not be advocated.

An alternative method of dealing with the identified deficiency in the 'legal advice' defence is to read additional words into the defence, along the lines of '... and must have taken reasonable steps to comply with/act on that advice'.<sup>147</sup> The argument here would be that, if those lines are not read into the relevant provision (section 188B(3) EA), then that provision becomes irreconcilable with the rest of the statutory provision providing criminal cartel sanctions (ie, section 188 EA): section 188 EA is designed to deter cartel activity; but section 188B(3) EA (read literally) is an 'absurdity' as it ensures in effect that deterrence will not occur. It has been argued that judicial support for a reading into the defence of those lines could potentially be found in a number of English cases where a purposive approach to statutory

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<sup>143</sup> See, eg, *Three Rivers District Council v Bank of England (No. 6)* [2004] UKHL 48 at [3].

<sup>144</sup> See generally: *Proceeds of Crime Act 2002*; *Money Laundering Regulations 2007*, SI 2007/2157; and *Law Society, Anti-Money Laundering* (London, 2012).

<sup>145</sup> See, eg, *Herring*, n 142 above, 375.

<sup>146</sup> CMA, n 95 above, [4.24] (emphasis added).

<sup>147</sup> *Stephan*, n 139 above, 5.

interpretation is adopted.<sup>148</sup> Cases noted in this context include: *R. v Allen*,<sup>149</sup> *Re Sigsworth*,<sup>150</sup> *Keene v Muncaster*,<sup>151</sup> and *Stock v Frank Jones (Tipton) Ltd.*<sup>152</sup> It is submitted, however, that such an approach, while arguably possible, is overly optimistic as it depends upon a receptive judiciary that is prepared to read words into a statute when there is no expressed or implied intention on the part of Parliament to have the provision understood in that fashion. Nowhere in *Hansard*, or anywhere else for that matter, is there an expression on behalf of Parliament that the legal advice defence should operate in any other way than the literal interpretation of section 188B(3) EA would warrant. Furthermore, it is extremely difficult to argue successfully in court that words should be read into a statute:

[t]he power to add to, alter or ignore statutory words is an extremely limited one. Generally speaking, it can only be exercised when there has been a demonstrable mistake on the part of the drafter or where the consequence of applying the words in their ordinary, or discernible secondary, meaning would be utterly unreasonable. Even then the mistake may be thought to be beyond correction by the court.<sup>153</sup>

Given this context, to remedy the identified ‘flaw’ in the reformed Cartel Offence, it would be advisable for Parliament to abolish section 188B(3) EA. Importantly, the ‘legal advice’ defence’s assumed objective of providing a safe harbour for ‘legitimate’ cartel activity can be achieved satisfactorily through the notification and publication ‘carve outs’ and the other two defences, as argued above. In fact, the defence offers very little to the successful operation of a criminal cartel regime except its ability to undermine the capability of antitrust enforcers to obtain successful prosecutions in practice.

## CONCLUSIONS

On 1 April 2014, section 47 ERRa entered into force, ensuring significant changes to the criminal UK Cartel Offence. As a result of section 47 ERRa, the (controversial) definitional

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<sup>148</sup> *ibid* 3-5.

<sup>149</sup> (1872) LR 1 CCR 367.

<sup>150</sup> [1935] Ch 89.

<sup>151</sup> (1980) 6 TR 377.

<sup>152</sup> [1978] ICR 347.

<sup>153</sup> J. Bell and G. Engle, Cross – Statutory Interpretation (Oxford: Oxford University Press, 3rd ed, 2005), 99.

element of ‘dishonesty’ has been removed from the offence, a number of ‘carve outs’ from the offence have been created, and three additional defences now exist. It was argued above that, for various (theoretical, legal, and practical) reasons the removal of the ‘dishonesty’ element should be welcomed. However, mere removal of that particular element arguably fosters a criminal cartel offence which does not necessarily encompass morally reprehensible behaviour; in short, it would engender a potential ‘overcriminalisation’ issue. For this reason, the notification and publication ‘carve outs’ in section 47 ERRRA should also be welcomed: they represent a (largely successful) attempt to align the conduct captured by section 188 EA with conduct that violates one of the accepted norms in British society, namely the norm against deception. In addition, those particular ‘carve outs’ also provide an effective way of operationalising an exemption for ‘legitimate’ cartel activity, without the need for the presentation of complex economic evidence in a criminal trial (with a (non-specialised) jury), in the process ensuring that the Cartel Offence does not ‘chill’ any horizontal cooperation between competitors that is beneficial to consumers.

It is submitted that if the reform of the Cartel Offence were to have stopped there, it would have provided the UK authorities with a workable criminal cartel offence. Unfortunately, in an apparent effort to reassure those worried about legislative overreach, the British legislators also introduced a problematic defence that has the real potential to undermine the effective operation of the UK Cartel Offence: section 188B(3) EA. That defence, focused as it is on the seeking of legal advice, provides remarkably easy cover for those who wish to engage in cartel activity (contrary to the interests of consumers) without worrying about exposure to a later criminal prosecution. It is the contention of this author that the provision of this new defence was a mistake in principle. The UK Government would be well advised to remove this defence from the statute books if it wishes to have in place a robust and effective anti-cartel enforcement regime within its jurisdiction.