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‘Criminal Cartel Enforcement in the UK: Rectifying the Mistakes of the Past’

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Aim and Layout of the Presentation



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✦ Aim:

To explain and to examine critically the **recent reform** of the **UK Cartel Offence**

✦ Layout:

Part I: Introductory Comments

Part II: BIS's Consultation Document

Part III: My Response to the Consultation Document

Part IV: Other Responses to the Consultation Document

Part V: The Government's Response

Part VI: Legislative Change

Part VII: Final Comments

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

Reflects EU-level enforcement; reflected in the Competition Act 1998

- ✦ The **Cartel Offence** (CO) came into force on 20 June 2003 & **changed this**

S 188 of the Enterprise Act 2002 (originally) provided that an individual is guilty of an offence if he **dishonestly** agrees with another to make or implement (or cause to be made or implemented) a **cartel arrangement** between horizontal competitors

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

- ✦ The existence of ‘dishonesty’ is determined according to the **Ghosh test**: Objective and subjective elements
- ✦ The maximum custodial sentence is (still) **5 years**

- ✦ The central idea behind the CO was **deterrence**
- ✦ Patricia Hewitt MP (then Sec of State for DTI) in House of Commons:
'We regard forming cartels as very serious offences, and the threat of imprisonment is important to deterring them'

Finds some support in the literature:

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

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

Main points in the argument:

- A fine of **~150% of annual turnover** is needed to deter an undertaking
- Such a fine **cannot be imposed** for practical reasons (e.g. liquidation of the company)
- Turn to **individual** sanctions
- However these sanctions must be **more than mere monetary sanctions** – otherwise indemnification will occur (i.e. company will pay the fine)
- **Custodial** sanctions are **non-indemnifiable**

✦ While rationale for the CO was deterrence, s 188 **EA did not punish all cartel activity**: only **'dishonest'** cartel activity is criminalised

✦ Reasons:

(1) To use **moral leveraging**

Underline the moral wrongfulness of (certain) cartels

(2) To avoid **'over-criminalisation'**

By linking offence to immoral behaviour

(3) To ensure compatibility with **Article 101(3) TFEU**

Can argue not dishonest as believed exception existed

(4) To avoid presentation of **complex economic evidence** in front of a jury

Technically no equivalent of Article 101(3) TFEU in the offence

✦ **** Contradiction between aims (3) and (4)**

- ✦ In order to have deterrence **need sufficient enforcement**

- ✦ Margaret Bloom (2002):

We are uncovering around **one cartel a month**. ... Effective deterrence is very important. However, we will select carefully the cartels for criminal prosecutions, concentrating on the serious ones. We expect that there will be a **relatively small number of prosecutions** – but they will have a significant deterrent effect.

- ✦ Hammond/Penrose Report: probably about 6 prosecutions per year

- ✦ Realistically: perhaps at least one high profile case a year?

- ✦ How many successful prosecutions since 2003?

 - ✦ There has only been **2 prosecutions** since 2003!

 - ✦ Only **1 of these was successful** and the defendants pleaded guilty

 - ✦ The other was a disaster!



- ✦ March 2011 – BIS published its consultation document (CD)
 - Objective: to ensure UK becomes effective at **ensuring economic growth**
 - One aspect of this: enhancing the regime's **ability to deter** competition restrictions
- ✦ Focused on many different aspects of the UK competition regime
 - Merger regime; markets regime; concurrency etc.
- ✦ **Chapter 6** focused on **Cartel Offence**
- ✦ Government remained committed to CO
 - ✦ No consultation on abolition of CO
- ✦ Hard core cartels – typically secret and highly damaging to the economy
- ✦ CO should 'radically alter the incentives' facing potential cartelists
- ✦ Focus is still on economic deterrence (rather than retribution)
- ✦ Imprisonment is taken more seriously as a threat than civil sanctions



Chapter 6 focused on **Cartel Offence**

- BIS admitted deterrent effect was weaker than intended
 - Due to: low number of cases
 - This due to problems with definition: inclusion of dishonesty
 - It 'seems to make the offence harder to prosecute'
 - It artificially limits 'scope of cases'
- Proposals therefore focused on **definition** of the offence
- **4 options** for reform were put forward
- All involved **removal of dishonesty**
 - Lack of certainty for business
 - Weak argument that economic evidence is irrelevant
 - Implies personal gain – which may not exist
 - Dishonesty could be considered at sentencing

- 4 options for reform:
 1. Remove dishonesty and provide **guidance**
 2. Remove dishonesty and create **white list**
 3. Remove dishonesty and require **proof of secrecy**
 4. Remove dishonesty and **exclude** agreements **made openly**

Option 1:

- Removing dishonesty **increases scope of offence**: could now include agreements which would benefit from exemption under UK/EU competition law
- Guidelines would **make clear** that such beneficial agreements would **not be caught**
- Problem:
 - It is 'inappropriate' for CO to cover conduct that is unlawful but would not be prosecuted
 - *Legal* certainty arguments (Art 7 ECHR): need to be able to tell from wording of offence which conduct is criminal



Option 2:

- **Removing** certain agreements from the scope of the offence
- Agreements **defined by type** rather than actual **economic effects**
 - To avoid economic arguments
 - Example: joint ventures could be removed (like in Australia)
- Increases certainty for business
- Acknowledgment: success depends on ability to provide sufficiently clear definitions of the (benign) types of agreements

Option 3:

- Replaces 'dishonesty' with requirement to prove 'secrecy'
- Issue to be resolved: active secrecy vs passive secrecy
 - Possible definition of secrecy involves person 'taking measures' to prevent agreement becoming known to customers or public authorities



Option 4:

- The CO would **'carve out' agreements made openly**
 - 'the offence would not be committed where the customers would be told about the arrangements to fix prices [etc] at or before the time of purchase of the relevant product or service'
- Would avoid problems with proving (active) secrecy
- The carve out already exists for bid-rigging
- Policy rationale:
 - Informed consumers can contract elsewhere
 - This is questionable though: there may be no effective choice
- BIS favoured this option from the outset:
 - Reduces risk of complex economic evidence being introduced at a trial
 - Excludes from offence 'benign' agreements
- CCP and I both supported this option

Part III: My Response to the Consultation Document



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✦ I focused on Option 4 and **rationalised it**

✦ Three essential issues:

(1) Why 'dishonesty' should go

(2) Why one should indeed 'carve out' agreements made openly

(3) What advantages does this approach engender

✦ The essential steps in my argument were:

(a) Dishonesty should go for a number of reasons

(b) But removing dishonesty may engender 'over-criminalisation'

(c) And to avoid 'over-criminalisation' one can link cartel activity to immoral behaviour ('deception'), but to do so we should carve out agreements made openly

(d) There are significant (additional) advantages to such an approach

(a) Dishonesty should go for a number of reasons

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

(a) Dishonesty should go for a number of reasons (contin.)

- It allows for **dubious defences** to come into play
 - D may claim he was not 'dishonest' as all he was doing was protecting jobs at the company, protecting shareholder's interests...
 - Empirical evidence on cartelists suggest tendency to rationalise behaviour as benevolent
 - Werden & Simon: evidence that unions get the majority of monopoly profits
 - Unlikely that D will have obtained direct gain
- These 'defences' **are irrelevant when Article 101 TFEU** is enforced (so should also be irrelevant under CO if following the same objective):
 - If cartel falls within Article 101(1) TFEU it is prohibited unless it fulfils the criteria of Article 101(3) TFEU
 - No other defence
 - Admittedly, EC can only impose fines on undertaking where the cartel activity is intentional or negligent: Article 23(1) of Regulation 1/2003

Part III: My Response to the Consultation Document



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(a) Dishonesty should go for a number of reasons (contin.)

- ✦ There is arguably a problem with **legal certainty**

Article 7 ECHR: must be possible to predetermine, if necessary with legal advice, what conduct is criminal and what is not *solely by reference to the law*

- ✦ The argument is **not** that legal certainty is a problem due to **mere existence** of dishonesty requirement

- ✦ Argument is this:

- ✦ One can violate CO **without violating civil** competition provisions

Example: Art 101 TFEU: may have no effect on trade; Art 101(3) criteria fulfilled

- ✦ But if D enters a cartel agreement he will have committed a criminal offence if jury believes he is dishonest

- ✦ Problem:

CO does not contain an *actus reus* which clearly points to criminality

Only gauge of criminality is the jury's perception of dishonesty (vague)



(b) But removing dishonesty may engender ‘over-criminalisation’ (as express link with morality is removed)

- **Traditionally** there is a link between criminal law and morality:
 - Von Hirsch: one of the aims of criminal law is to communicate to D society’s condemnation of his (immoral) behaviour
- **Unfairly labelling** offenders as criminals undermines the law’s moral authority
- Changes **people’s attitudes** towards the meaning of criminality
- The criminal law may lose its **legitimacy**
- True that law has **educative function**
- But there are **limits** to this:
 - Overuse will reduce the moral stigma of the law
 - ‘Sticky’ norms
 - If a moral norm already exists – easier to enforce (internalisation of the norm; nullification is less likely)

Part III: My Response to the Consultation Document



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(c) And to avoid ‘over-criminalisation’ one can link cartel activity to immoral behaviour, but to do so we should carve out agreements made openly

- ✦ There are a number of potential norms which are relevant (stealing, rule breaking, promise breaking...)
- ✦ Focus here will be on deception
- ✦ **Deception** occurs where a person
 - (a) Communicates a message
 - (b) With intent to cause a person to believe something that is not true
 - (c) That person is led to believe the untruth
- ✦ Two cartel scenarios are relevant for **deception**
 - (a) Where a cartel member expressly states ‘I have not cartelised’
 - (b) Where a cartel member does not mention to the consumer the fact that he has cartelised

Part III: My Response to the Consultation Document



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- ✦ **First scenario:** deception is present (lie committed)
- ✦ **Arguably clear purpose (direct intention)** to mislead customer about non-existence of cartel
 - Would be good reasons to aim to mislead about existence of cartel:
 - To protect the cartel (from competition authorities)
 - To ensure consumers do not feel ripped off
 - Exception: cartelists have forgotten about the cartel
- Depends on core convention of dialogue
- **Not very common** in practice
 - Exceptions:
 - (1) The cartelists order all salespersons to explain that price is 'the most competitive price'
 - (2) Official statements provided during procurement process (exists in Germany)

Part III: My Response to the Consultation Document



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- ✦ **Second scenario:** deception can be present
- ✦ Message communicated = 'our goods are for sale'
- ✦ Not untrue; but not problematic; can lead to belief of untruth
- ✦ Mechanism: consumers make the assumption that the goods are at a competitive price

Message [goods are for sale] + Assumption [competitive price] => Untruth [no cartel exists]

- ✦ Two issues:
- ✦ (a) whether consumers **actually make** such an **assumption**;
- ✦ (b) whether **cartelists**, by placing goods on sale, **intend** to cause consumers to make this assumption
- ✦ **Both must be present for deception in Scenario 2**

Part III: My Response to the Consultation Document



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- ✦ *Quaere (a)*: whether consumers **actually make** such an **assumption**;
- ✦ Not new claim:
 - Lever and Pike (2005) believe the assumption is made; the High Court in *Norris* agreed:
 - ‘... in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the **assumption** that they are dealing with undertakings that are lawfully engaged in normal competition with each other; and **the cartelists will know that this is so** and will, in effect, act in a dishonest ... manner, if the existence of the cartel is kept secret.’ (Lever and Pike)
- ✦ No empirical data on this; need this
- ✦ Could also argue that consumers **do not always** make this assumption: sometimes they **complain** to the competition authorities
- ✦ But do they **regularly** make this assumption?
 - 60% surveyed believe cartelists are dishonest (assume cartelisation is not legitimate business practice?)
 - Benefit of doubt (presumption of innocence)

Part III: My Response to the Consultation Document



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- ✦ *Quaere (b)*: whether **cartelists**, by merely placing goods on sale, **intend** to cause consumers to make this assumption
- ✦ Need to understand intention can be made up of:
 - ✦ (i) **Direct intention** (aim/purpose)
 - Silence can have the purpose to mislead
 - Good reasons to keep quiet in hope consumers do not become aware of cartel:
 - High fines; bad for reputation...
 - ✦ (ii) **Indirect/oblique intention** (consequences are very likely and C is aware of this):
 - Requires the **assumption of consumers** to be very likely [see earlier slide]
 - Also requires **knowledge by cartelist** that consumers make the assumption:
 - Directly dealing with consumers
 - Consumer satisfaction surveys
 - No complaints to competition authorities

Part III: My Response to the Consultation Document



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- In order to ensure that (criminal) cartel activity is confined to scenarios 1 and 2 (ie to ensure link with ‘deception’) we need to carve out agreements made openly
- Reality: there is a third scenario:
 - Where the cartelist informs its customers about the cartel prior to or at point of sale
- This situation **does not involve deception**
 - (1) No strong case that cartelist by telling truth intends to mislead customer
 - (2) Unlikely that customer will be misled as the (painful) truth has been presented
- Therefore Scenario 3 needs to be removed from the definition of the offence
- This rationalises the carve out of agreements made openly



- (d) There are significant (additional) advantages to such an approach
- It avoids the problems associated with **proof of dishonesty**
 - Less scope for dubious defences based on benevolent motivations
 - Jury nullification less likely
 - Presentation of economic evidence no longer an issue
- By linking cartel activity to deception the issue of **over-criminalisation** is less problematic
- **Gain to cartelist** is not required (useful, given the nature of cartel activity)
- No need to prove **secrecy**
 - Option 3 could also be used to link cartel activity to immoral behaviour
 - But requiring proof of secrecy brings additional challenges

(d) There are significant (additional) advantages to such an approach (contin.)

✦ The CO is less likely to be a ‘**national competition law**’

- CO would pursue other objective than protecting competition
- Recital 9 and Art 3 of Reg 1: Reg’s requirements do not apply if national legislation pursues predominantly an objective different from protecting competition [if so, not a national competition law?]
- Court of Appeal would disagree (*R v. IB*), but other courts may not

✦ Advantage of **notification system** using the London Gazette

- It operationalises an **Article 101(3) TFEU** –type defence without the need for economic evidence to be presented to a jury
- If cartelists publish agreement to ‘short circuit’ the criminal regime, there will be an **increase in deterrence** re the administrative regime (the veil of secrecy is pierced)

(d) There are significant (additional) advantages to such an approach (contin.)

- ✦ Admittedly there are limitations
- ✦ **Relies upon argument that **consumers make certain assumptions**
- ✦ It also makes an **assumption** re the intention of cartelists to mislead
 - There is no requirement to prove it in each case
 - Could require this *mens rea* – but CO becomes more difficult to prove
- ✦ The approach is **limited** to the extent that cartelists do not intend to mislead consumers [empirical evidence is required]
- ✦ But this may not be overly problematic:
 - Cartelists either aim to mislead in order to protect the cartel (direct intention) **OR**
 - They are aware of the very high likelihood of misled consumers by their silence and they do not publicise the cartel (indirect/oblique intention)

Part IV: Other Responses to the Consultation Document



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- ✦ There were 115 (public) responses to BIS's CD
- ✦ 49 of these commented on CO
- ✦ The **vast majority rejected all of BIS's proposals**
- ✦ 33 contributors believed that the dishonesty element should not be removed
 - Most were businesses, members of criminal bar, and law firms with competition practices
- ✦ Main reason: should be **tried in front of a jury** to see if it is problematic
 - This fails to consider the strong theoretical arguments
 - This fails to consider CCP's (empirical) survey on attitudes to cartels
 - This fails to consider (legal) arguments based on human rights (i.e. legal certainty)
- The other reasons for keeping dishonesty included:
 - Small number of cases due to other reasons (eg inexperience of OFT; lack of cartels...)
 - *Ghosh* test works well in other contexts
 - Ensures moral culpability in the criminal offence

Part IV: Other Responses to the Consultation Document



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- **Option 1:**
 - Too much discretion given to prosecutors
 - Best to reduce scope through legislation rather than guidance (Art 7 ECHR)
- **Option 2:**
 - Might result in offence which is narrower than it need be
 - Interpretational difficulties
 - Would run counter to development of EU – abolition of white list in block exemptions
- **Option 3:**
 - Clearest expression of immoral behaviour with cartel activity
 - Secrecy could be linked to non-beneficial agreements
 - Cartelists may not always take active steps
- **Option 4:**
 - Could conflict with legitimate commercial confidentiality

Summary of Responses on the Cartel Offence (Part 1)

Contributor	Comment
Addleshaw Goddard	Retain dishonesty
Allen & Overy	Intention to deceive rather than dishonesty
American Bar Association	Option 3
Arnold & Porter	Option 3 (plus guidance on secrecy)
Arriva plc	Remove dishonesty (none of the options are good)
Ashurst LLP	Retain dishonesty
ACCC	Provides detail on Australian regime
Berwin Leighton Paisner	Retain dishonesty
Bird & Bird	Retain dishonesty (or Option 3)
British Airways	Retain dishonesty
BT plc	Retain dishonesty
Canadian Competition Bureau	Provides overview of Canadian regime
Confederation of British Industry	Retain dishonesty (if not, Option 1)
Centrica	Retain dishonesty
CCP	Option 4
Charles Russell LLP	Retain dishonesty
Cleary Gottlieb	Retain dishonesty
Clifford Chance	Retain dishonesty
Compass Lexecon	Retain dishonesty
Corker Binning	Retain dishonesty
Dundas & Wilson LLP	Retain dishonesty

Summary of Responses on the Cartel Offence (Part 2)

Contributor	Comment
Edwards Angell Palmer & Dodge	Retain dishonesty
Eversheds LLP	Retain dishonesty
Freshfields	Retain dishonesty
C Harding & J Joshua	Option 2
Herbert Smith LLP	Retain dishonesty
In-House Competition Lawyers Association	Retain dishonesty
International Chamber of Commerce UK	Require intention (if not, Option 1)
Joint Working Party of Bars & Law Socs	Retain dishonesty (if not, Option 3)
Law Society of Scotland	Active concealment
Linklaters LLP	Retain dishonesty
A MacCulloch	Intention to distort competition
Maclay Murray & Spens LLP	Retain dishonesty
Norton Rose	Retain dishonesty
OFT	Option 4
Orrick, Herrington & Sutcliffe LLP	Retain dishonesty
J Pickering	Questions advisability of Option 4
Pinsent Masons LLP	Retain dishonesty
N Purnell QC	Retain dishonesty
Reed Smith LLP	Option 3
Scottish Power	Retain dishonesty
Shepherd & Wedderburn	Retain dishonesty

Summary of Responses on the Cartel Offence (Part 3)

Contributor	Comment
Simmons & Simmons	Retain dishonesty (further research required)
Slaughter & May	Retain dishonesty
City of London Law Society	Retain dishonesty
UK Competition Law Association	[Unavailable at present]
Virgin Media	Retain dishonesty
Vodafone Ltd	Retain dishonesty
B Wardhaugh	Option 1
P Whelan	Option 4
S Wilks	Submitted article [does not support any of the options]

- ✦ **BIS decided** to go with (a slightly revised) **Option 4**:
 - 'To remove the 'dishonesty' element ... and define [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'
 - Necessary to specify format for publication (eg London Gazette)
- ✦ BIS acknowledged that there may be very rare cases where a cartel agreements has countervailing benefits
 - But it is 'reasonable' to require disclosure to ensure no criminality
- ✦ The removal of dishonesty will **increase number of cases** and improve deterrence
- ✦ Cartel cases are **serious** – even without dishonesty – due to the potential harm from cartels
- ✦ BIS noted that a 'small number preferred' Option 4
 - CCP, OFT and me!



- ✦ The Enterprise and Regulatory Reform Bill (ERRB) received its first reading in the House of Commons on 23 May 2012
- ✦ The Bill was given Royal Assent on 25 April 2013
- ✦ In over 2000 pages of Hansard there are a handful (~30) pages dedicated to the CO

- ✦ Points made include:

Katja Hall (CBI Representative):

Dishonesty makes it difficult to prove CO

If remove it and leave offence as is, it will catch legitimate activity

Should consider 'intent to deceive'

Simon Pritchard (ex OFT, Allen & Overy):

Problem with dishonesty is subjective element of *Ghosh* test

People will rationalise their behaviour ('there was a good reason for it')



✦ Points made include:

Catherine Waddams (CCP):

Dishonesty is difficult to prove

Concerned about ability to give consumers choice by publishing

Robert Bell:

Could capture benign agreements which would get exemption

Chi Onwurah MP:

Tables amendment requiring 'intention of substantially reducing competition'; publication defence not practical (like registration)

Norman Lamb MP notes problems with this but promises to deal with her concerns

Norman Lamb MP later tables amendment providing for three additional defences and guidance (accepted by HC and HL)



✦ (1) **'Dishonesty'** was **removed**

✦ (2) There was a **carve out of agreements made openly:**

Customers given relevant information prior to sale;

Bid-rigging: person requesting bids informed at time of bid; or

Relevant information published at time of making the agreement

✦ (3) **** Additional defences:**

Did not intend nature of agreement to be concealed from customers

Did not intend nature of agreement to be concealed from CMA

Took reasonable steps to disclose nature of agreement to lawyers in order to get advice prior to its making or implementation

✦ (4) **Prosecutorial guidance**

Principles to be applied in determining whether proceedings should be initiated



✦ **Additional defences:**

Two defences based on lack of intention to conceal:

Can link these defences to 'deception'

Lack of intention to conceal, perhaps lack of deception

May be difficult to prove, so perhaps not so relevant

Advice from lawyers:

No obligation to take the advice

Could be used to **short circuit the offence**

Lawyers **do not have to disclose** (otherwise criminal) cartel to authorities

✦ **Prosecutorial guidance**

Will reserve judgement on this until the guidance is published

But at least not used to carve out Article 101(3) TFEU type agreements, so not as problematic at Option 1 in CD

- ✦ The Cartel Offence was introduced to deter cartel activity
- ✦ It was **not successful** and **change was necessary**
- ✦ BIS was **correct** to go with **Option 4**:
 - ‘Dishonesty’ requirement was a burden and unnecessary
 - Can achieve the aims of the ‘dishonesty’ requirement with the ‘carve out’ of agreements made openly
- ✦ However: one of the **new defences** is very problematic and should **not have been included**: getting advice from lawyers
- ✦ On the whole: the CMA has a **decent offence** in place
- ✦ It needs to **demonstrate** that it has teeth in order for deterrence to occur (and for immoral cartel activity to be punished)