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I. INTRODUCTION

In March 2011, the U.K. Government Department for Business, Innovation and Skills (“BIS”) consulted upon proposed reforms to the U.K. competition regime.² The reforms proposed in the Consultation generated a great deal of interest primarily because certain of them had the potential to represent a step change in the regime (e.g., one of the proposals was to change to a prosecutorial model of antitrust enforcement). Following the Consultation, BIS decided to progress a more modest set of reforms³ (e.g., BIS chose to retain the administrative model of antitrust enforcement). Even the most high-profile reform, the merger of the Office of Fair Trading (“OFT”) and the Competition Commission into a single Competition and Markets Authority (“CMA”), is unlikely to change much in practice, given that it will ostensibly be structured so as to ensure no change to the fundamental way in which decisions are made.⁴

While little may have changed for businesses, the Government’s reforms could have more significant repercussions for individuals. The removal of the dishonesty element from Section 188 of the Enterprise Act 2002 (the “cartel offense”) has the potential significantly to change the nature of the criminal cartel regime because it seems to lower the threshold for a successful conviction. This article examines the basis for reform, analyzes whether the decisions adopted in BIS’s Response are likely to have their desired impact, and considers a possible alternative for legislation.

II. BACKGROUND

The criminal cartel offense (encapsulated in s. 188 Enterprise Act 2002) was developed because of a concern that the civil competition law regime (and, in particular, the penalties imposed on the undertaking in question) did not go far enough to deter cartel conduct.⁵ The

¹ Associate at Cleary Gottlieb Steen & Hamilton LLP. The author would like to thank Peter Freeman, John Temple-Lang, and Paul Gilbert, all of Cleary Gottlieb Steen & Hamilton LLP, for their input on an earlier draft of this article. Special thanks go to Jon Zimmermann of Cleary Gottlieb Steen & Hamilton LLP for his help in preparing this article. The views expressed are personal and not necessarily those of Cleary Gottlieb Steen & Hamilton LLP.

² BIS Consultation, *A Competition Regime for Growth: A Consultation on Options for Reform* (March 2011) (the “Consultation”). <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>

³ BIS Response to Consultation, *Growth, Competition and the Competition Regime*, (March 2012) (the “Response”). <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf>

⁴ In particular given that the two-staged decision structure (board decision at Phase I and panel decision at Phase II) will remain. See generally Peter Freeman, *Beware the Ides of March*, Keynote Address at the Newcastle Law School Conference (April 13, 2012).

⁵ See generally Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, (November 2001). See also the DTI White Paper entitled *A World Class Competition Regime*, p. 10 and §7 (2001).

cartel offense would, according to the then-incumbent U.K. Government, “focus the mind of potential cartelists and provide a far greater deterrent against engaging in such activities than exists in the UK under current legislation.”⁶ Additionally, it was argued that adopting sanctions that target the individuals responsible for the cartel was more appropriate than civil penalties.⁷ The cartel offense was therefore included in the Enterprise Act 2002⁸ and came into force in June 2003.

The cartel offense, as contained in the Enterprise Act 2002, included the element of dishonesty, which was to be measured by reference to the subjective and objective test in *Ghosh*.⁹ The inclusion of this element was in no small part due to the 2001 Report prepared for the OFT by Sir Anthony Hammond & Roy Penrose entitled “*Proposed criminalisation of cartels in the UK*.” In that Report, Hammond & Penrose argued that the cartel offense should include the dishonesty element because: (1) it signals that the offense is serious and should attract a substantial penalty, and (2) it would go a long way to preclude a defense argument that the activity being prosecuted is not reprehensible or that it might have economic benefits or is an activity which might have attracted exemption domestically or under EC law.¹⁰

In 2005, Sir Jeremy Lever & John Pike sought to ventilate the issue of how dishonesty might apply in the context of a cartel case. They applied the *Ghosh* test in present day conditions to the context of cartel activities by arguing that a jury would ordinarily be entitled to find that individuals have acted dishonestly if—although the undertakings concerned are ostensibly competing normally with each other—they have knowingly participated in collusive and covert arrangements to drive up or maintain prices (whether directly, or by restriction of output) at a level higher than the competitive level, and have thereby dishonestly taken advantage of the assumption of third parties that they were engaged in normal and honest competition with each other.¹¹

More prosaically, according to Lever & Pike, there should be little difficulty in showing dishonesty where the cartel agreement involved taking active steps to mislead and dishonesty

⁶ See Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, ¶1.4 (November 2001).

⁷ See, generally, Andreas Stephan, *The UK Cartel Offence: Lame Duck or Black Mamba*, CCP Working Paper 08-19, (November 2008) and Wouter P.J. Wils, *Is Criminalization of Competition Law the Answer?* 28(2) World Competition, pp. 118-159 (June 2005) [“Wils”].

⁸ The cartel offence is contained in Section 188 of the Enterprise Act 2002 and provides *inter alia* that “An individual is guilty of an offence if he **dishonestly** agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B). The arrangements must be ones which, if operating as the parties to the agreement intend, would (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service, (b) limit or prevent supply by A in the United Kingdom of a product or service, (c) limit or prevent production by A in the United Kingdom of a product, (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers, (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or (f) be bid-rigging arrangements.” [Emphasis added.]

⁹ *R v Ghosh* [1982] EWCA Crim 2 (“a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest... If it was dishonest... then the jury must consider whether the defendant himself must have realized that what he was doing was by those standards dishonest.”).

¹⁰ See generally Hammond & Penrose and the DTI White Paper at 10, *supra* note 5.

¹¹ See J. Lever & J. Pike, *Cartel Agreements, Criminal Conspiracy and the Statutory ‘Cartel Offence: Parts I & II’*, 26(2) ECLR (2005).

would not be shown where customers were informed of the existence of the cartel agreement *ex ante*. Where the facts of the case are less clear cut, in what Lever & Pike called the “middle ground,” dishonesty should more readily be inferred where the participants go to great efforts to keep the cartel secret (*i.e.*, a jury might more readily infer that the intention was to preserve an illusion of normal competition).

Since gaining criminal cartel enforcement powers, the OFT has brought criminal prosecutions in only two cases: *Marine Hose*¹² and *BA*.¹³ *Marine Hose* was not a contested case and was unusual because it involved a plea agreement with the U.S. Department of Justice. The second attempt in *BA* imploded impressively once it became clear that the OFT had committed a serious procedural error concerning disclosure (possibly due to an overreliance on the leniency applicant in a parallel civil investigation).¹⁴

For a jurisdiction that has had criminal enforcement powers for 9 years, the OFT’s record is relatively unenviable, in particular when compared to the enforcement record of the U.S. Department of Justice, which has filed around 465 cases over the same time period (though many of these were a result of plea bargain agreements).¹⁵ The paucity of prosecutions was clearly the driver for reform. In the Consultation, BIS stated:

[t]he deterrent effect of the cartel offence is weaker than was intended because there have been so few completed cases to date: only two cases have so far reached trial stage and only one of them resulted in convictions.

Although it is true that deterrence will be achieved only if the threat of prosecution is credible, one cannot dismiss lightly the fact that the very possibility of criminal sanctions under the current regime has already had a potentially significant general deterrence effect. For example, the criminalization of the cartel offence has arguably caused greater implementation of competition compliance programs, in particular for corporations above the SME threshold.¹⁶

In general, corporations and, in particular, executives, seem to be well aware of the risks. For example, the OFT’s 2011 Report on the impact of competition interventions on compliance and deterrence revealed that the passenger fuel surcharge case (ultimately a criminal prosecution) was the most widely known case among respondents.¹⁷ It can perhaps safely be argued, therefore, that there is significantly more awareness in the United Kingdom of the harm caused by cartel conduct today than there ever has been¹⁸ and this might go some way to

¹² *R vs. Whittle* [2008] EWCA Crim. 2560, [2008] All ER (D) 133 (Nov).

¹³ *R vs. George, Crawley and Others* (the BA case) (unreported) 7 December 2009, ¶11 (the “BA case”).

¹⁴ See, generally, A. Stephan, *How dishonesty killed the cartel offence*, CRIM. L.R. 446-455 (2011) and Nicholas Purnell QC, *Criminal Cartel Enforcement – More Turbulence Ahead? The Implications of the BA/Virgin Case*, Issue Eleven, Cloth Fair Chambers, (Autumn 2010).

¹⁵ See DoJ Congressional Submission FY 2013 Performance Budget, p.25; DoJ Antitrust division Workload Statistics 2001-2010, p.5; and Division Update Spring 2012, p.1.

¹⁶ Recommendation 96/280/EC, Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises.

¹⁷ See OFT Report entitled “*The impact of competition interventions on compliance and deterrence*” Section E (December 2011).

¹⁸ *Id.* at ¶1.8 (“[t]he deterrence ratios obtained in this study are significantly higher than those obtained from the business survey in Deloitte (2007)”).

dispelling the belief that one needs a laundry list of successful prosecutions in order to achieve sufficient or effective general deterrence.

III. THE CONSULTATION AND THE OFT'S RESPONSE

As explained above, the Consultation identified insufficient general deterrence resulting from a lack of successful prosecutions as a principal issue for reform. A number of possible causes for the scarcity of cases may be posited:

- First, it is possible that the OFT's lack of experience as a criminal prosecutor is the reason why it has been unable to pursue prosecutions to a successful outcome. Indeed, a procedural error, which a seasoned litigant may have avoided, was the dispositive factor in the collapse of the *BA* case. While such errors are always possible, they may be less likely where the agency has a strong pedigree of enforcement and a great deal more institutional experience. Indeed, certain developments at the OFT (*e.g.*, ramping up expert staff) indicate that this is appreciated to be a significant concern.
- Second, the OFT's inability to pursue prosecutions may be linked to the fact that relatively few U.K. cartel cases have been brought to a successful conclusion in the last 10 years. The fewer cartels that the antitrust division of the OFT uncovers, the fewer straightforward cases the enforcement division of the OFT has to prosecute (recognizing, however, that the OFT could still enforce cartel decisions of the European Commission).
- Third, it could be that the OFT's criminal enforcement division is under-resourced. The OFT's criminal enforcement budget is estimated to be between £1.6 and £3 million¹⁹ whereas the U.S. Department of Justice's budget is around \$65 million.²⁰ Even if one controls for population size, the DOJ's budget is still more than 4 times the size of the OFT's. The lack of enforcement budget might indicate that the prosecution of cartelists is not currently high on the Government's list of priorities and it could be argued that prosecutions levels will only increase once sufficient resources are devoted. (By analogy, insider trading had historically been poorly enforced, but the number of pending cases today is significantly higher due to prioritization of the infringement by the Financial Services Authority.)²¹
- Fourth, it could be that the OFT's dual role as civil and criminal prosecutor hamstrung its ability to successfully pursue prosecutions. For example, it may have been the case that the OFT found it challenging, in particular as regard decision-making, to balance the often competing requirements of the criminal and administrative regimes (*e.g.*, to ensure

¹⁹ OFT Organisation Structure, p.3 (30 June 2010); and BIS Impact Assessment p.90 ¶10 (March 2012).

²⁰ DoJ Congressional Submission FY 2013 Performance Budget, p.25; DoJ Antitrust division Workload Statistics 2001-2010, p.5; and Division Update, p. 1 (Spring 2012).

²¹ See FSA Business Plan, 2010-2011, page 31 ("The focus of our enforcement action has shifted to take a harsher stance on insider dealing offenders. In 2009 we secured guilty verdicts and custodial sentences in our first two criminal insider-dealing prosecutions. We are strongly committed to delivering similar results in 2010/11 and we already have three insider dealing trials (involving five defendants) scheduled to take place in the first half of 2010.").

that the incentives of the leniency regime remained while criminal cases were in the pipeline).

- Fifth, it could be that the elements of the cartel offense (and in particular the dishonesty requirement) were suppressing the OFT's enforcement behavior.

Only the fifth of these causes was afforded attention in the Consultation and the Response. Perhaps unsurprisingly, the Consultation did not even raise for comment the possibility that the OFT was under-resourced and needed a significantly stronger stable of prosecutors in order to bring cases more effectively. From the outset, and in no small part due to the views of the OFT, the focus was on whether the dishonesty element should remain.²²

The OFT's response to the Consultation merits close attention. The starting point of the OFT's analysis is that the cartel offense needs to be clearly defined, so that individuals can be sure about when their conduct might expose them to criminal penalties. In addition, says the OFT, the offense must have the "correct scope" (include hard core behavior and exclude agreements that have a beneficial effect). However, according to the OFT, the serious anticompetitive nature of hardcore cartels and the capacity of such cartels to cause significant damage to the U.K. economy and consumers do not depend on the dishonesty with which they were made or implemented. In support, the OFT posits the following "case for change:"

Relying on a normative concept, such as dishonesty, to define the criminal cartel offence inevitably introduces some uncertainty, particularly in an area of the law with which juries are likely to be unfamiliar. Such uncertainty is reflected to some extent in the range of factors that have been raised by those under investigation by the OFT as potential counter-arguments to the suggestion that their conduct was dishonest. These include:

- the motivation for engaging in the cartel was to preserve jobs which might otherwise be lost
- no financial benefit accrued to the individual concerned
- the individual concerned only participated because it was seen by his/her employer as part of their job
- the cartel was a response to severe pressure on suppliers by customers with 'excessive' buying power
- the defendant was aware that the conduct may have been 'wrong' from a regulatory perspective but did not consider that it was dishonest.

There is no certainty as to how a jury would approach any of these matters when assessing dishonesty, particularly in relation to conduct, which many jury members may not consider inherently dishonest.

The OFT believes that such uncertainty is inherently undesirable, both for businesses and employees seeking advice in this area, as well as for those under investigation or facing prosecution. It also makes it more difficult and resource-intensive to investigate and prosecute the offense, as even those who may be ready to admit their involvement in cartel conduct will have an incentive to contest the case in the hope that a jury will be persuaded that they were not acting

²² It is also possible that BIS was influenced by Australia's decision not to include the dishonesty element in the cartel offence. See Caron Beaton-Wells, *Criminalising Cartels: Australia's Slow Conversion*, 31 WORLD COMPETITION L. & ECON. REV., 205 (2005) and ¶ 6.16 of the Consultation.

dishonestly. This in turn impacts on the number of cases that can realistically be investigated and prosecuted and the level of deterrence that can be achieved.

Also, under the OFT's leniency policy, it is a condition for the grant of a no-action letter conferring immunity from prosecution that the recipient must admit that they have committed the cartel offence. The OFT believes that the inclusion of dishonesty as an element of the offence is likely to act as a disincentive for both individuals and businesses to report their involvement in cartel activity, thus reducing the effectiveness of the leniency policy in enabling the OFT to uncover and take enforcement action against cartels.

As may be seen from this extract, the OFT's motivation for change is a desire to secure greater "certainty" over the prosecutions it intends to progress by lowering the standard for prosecution. The possibility that juries would be able to weigh the harm caused by cartel behavior against the individuals' circumstances in a given case and come to a reasoned, proportionate, and fair decision on the basis of evidence presented is dismissed as too complex, notwithstanding that juries are required to conduct this form of balancing exercise on a regular basis in relation to other financial crimes.²³ In other words, the fact that "there is no certainty as to how a jury would approach any of these matters when assessing dishonesty" is not unique to the cartel offense and is an element that, in all likelihood, would have developed over time had the OFT been able to bring a greater number of cases to judgment. Private litigants and public prosecutors face such uncertainty regularly and it might even be said that the uncertainty reinforces the rigor applied to examining and assessing the evidence.

The OFT's intention also seems to be to deprive defendants from the opportunity to present counter-arguments of the type listed above. It is not clear, however, why such counter-arguments should not be employed and why some of the listed factors (*e.g.*, the fact that a defendant did not accrue any financial benefit from the activity) might not be highly relevant to a jury's decision to deprive someone of his freedom (*i.e.*, those factors are relevant to determining whether a cartel is objectively dishonest under the *Ghosh* test). The arguments employed by the OFT seem to reveal a lack of confidence in a jury's ability to recognize that cartels are harmful and a concern that juries will be more persuaded by "everyday" arguments (*e.g.*, "I was trying to save jobs") than they would be economic analysis of the harm caused by cartels. Given that there are, as yet, no contested cases, there is no certainty that juries would think or decide in this way and reform based on supposition would not seem to be sound.²⁴

The fact that the dishonesty element may make it "more difficult and resource-intensive to investigate and prosecute the cartel offence because those who may be ready to admit their involvement in cartel conduct will have an incentive to contest the case in the hope that a jury will be persuaded that they were not acting dishonestly" should bear no relevance to the decision of whether it is the appropriate standard for criminality. It should come as no surprise to the OFT that individuals will want to defend criminal prosecutions against them and the law should not be molded, so as to make it impossible or unattractive to do so.

²³ See, for example, the insider trading cases: *R v McQuoid* [2009] EWCA Crim 1301; and *R (Uberoi and Another) v City of Westminster Magistrates' Court* [2009] 1 WLR 1905).

²⁴ See, generally, Alex Bailin QC, *Doing Away with Dishonesty*, COMP. L.J., 169 (2011).

Finally, the argument that the requirement of dishonesty somehow prejudices the OFT's leniency regime fails to appreciate that the incentives of employees and corporations are often misaligned in cartel cases (*e.g.*, a corporation, whose directors carry fiduciary duties towards its shareholders, will, acting rationally, often value immunity/leniency over fines over and above the personal consequences to a certain category of employees). If anything, the removal of the dishonesty element and lowering of the standard will only serve to emphasize the misalignment, such that employees are less willing to avail themselves to internal legal departments or superiors through fear of personal prosecution.²⁵

As may be seen from the above, the OFT's case for change does not appear to be wholly compelling and there are not insignificant question marks surrounding the appropriateness of the motivation.

IV. THE DECISION

Of the 110 responses submitted to the Consultation, only 11 (or 10 percent of respondents) argued to remove the dishonesty offense.²⁶ Nearly four times as many argued to keep the dishonesty element in the offense and the remainder made no comment, suggesting that they did not perceive a significant failing in the operation of the offense or its general deterrent effect. BIS's decision to remove the dishonesty element went against the majority view. The basis for the decision was ostensibly that the removal would "improve enforceability" and thereby increase deterrence, "bringing levels [of imprisonment] closer to what was intended when the offense was introduced." More specifically, BIS argued that:

Notwithstanding the lack of live evidence of difficulties arising during the course of a jury trial in a contested case, the Government has concluded that it is more likely than not that the inclusion of the 'dishonesty' element in the cartel offence is in fact inhibiting the OFT in prosecuting cases. 'Dishonesty' offences appear to be particularly difficult to prosecute in a white-collar criminal environment. This conclusion is supported by the experience of the Crown Prosecution Service in prosecuting cases based on fraud and conspiracy to defraud.

...

This approach is consistent with the definition of other economic crimes, such as insider dealing, which requires proof that the defendant knew he had inside information, but does not require proof of dishonesty."²⁷

The above statement makes express that BIS has decided to change the standard for the cartel offense without sufficient evidence to make a reasoned and/or informed decision. More prosaically, despite the fact that we are yet to see one contested case tried and determined by the judiciary, BIS has determined that the test does not work. Surprisingly, there is not even

²⁵ Although cooperation is possible, the exact alignment of the interests of corporations and employees is potentially unattainable in cartel cases where the threat of criminal prosecutions exists. It is the very reason why each party should be separately represented.

²⁶ Namely, the American Bar Association, Arnold & Porter, Arriva, the ESRC, Prof. Christopher Harding and Julian Joshua, the Law Society of Scotland, the OFT, Prof. Stephen Wilks, Reed Smith, Prof. Bruce Wardhaugh, and Dr. Peter Whelan.

²⁷ Response, *supra* note 3, ¶¶7.8 and 7.11.

anecdotal evidence from the OFT to the effect that it attempted to bring prosecutions in certain cases but did not do so due to a lack of confidence that it could satisfy the dishonesty standard.

The basis for change appears, therefore, to be: in part, mere assumption (*i.e.*, that it is more likely than not that the dishonesty element inhibits cases); in part, an unsubstantiated and potentially irrelevant reference to the experience of the Crown Prosecution Service; and in part, an assertion that the standard will be consistent with the definition of other economic crimes. As regards the last of these reasons, it bears emphasis that certain economic crimes currently have, and will continue to have, a dishonesty element (*e.g.*, misleading statements and practices and theft).²⁸ In addition, consistency in the standard of economic crimes would also seem to be a poor basis for change given that the respective maximum penalties for each varies according to severity of the offense, as demonstrated in the following table:

Crime	Actus Reus	Mens Rea	Maximum Penalty
<i>Provision of false or misleading information to an auditor or actuary (FSMA 2000 s.346 and 398)</i>	Providing materially false or misleading information to the FSA or to an auditor or actuary.	Knowing or being reckless as to the possibility that the information is materially false or misleading.	Misleading an auditor/actuary: Imprisonment for a term not exceeding 2 years or a fine (or both). Misleading the FSA: a fine.
<i>Insider Dealing (CJA 1993 s.52, 53, 61)</i>	Dealing in price-affected securities on a regulated market (or as or through a professional intermediary) when in possession of inside information.	Expecting the dealing to result in a profit attributable to the fact that the information in question was price-sensitive, and reasonably believing that the information had not been disclosed widely enough to ensure that those taking part in the dealing would be prejudiced by not having the information.	Imprisonment for a term not exceeding 7 years or a fine (or both).
<i>Misleading statements and practices (FSMA 2000 s.397)</i>	Concealing material facts.	(i) Dishonesty in concealing the facts; and (ii) intending to induce, or being reckless as to the possibility of inducing, the person from entering into,	Imprisonment for a term not exceeding 7 years or a fine (or both).

²⁸ Section 397 Financial Services and Markets Act 2000 (“FSMA”).

		or refraining from entering into an agreement, or exercising, or refraining from exercising, any rights.	
<i>Conspiracy to Defraud</i>	Depriving a person of something, which is his, or to which he would be or might be entitled or to injure some proprietary right of a person (<i>Scott v Metropolitan Police Comr</i> [1975] AC 819).	Dishonestly (<i>Ghosh</i> test applies) causing an economic loss or prejudice that was foreseen (but need not have been intended - <i>R v Allsop</i> (1976) 64 Cr App Rep 29; and <i>Wai-Yu-tsang v R</i> [1992] 1 AC 269).	Imprisonment for a term not exceeding 10 years or a fine (or both).
<i>Money Laundering</i> (POCA 2002, s.327, 334, 340(3))	Concealing, disguising, converting or transferring criminal property, or removing it from England, Wales, Scotland or Northern Ireland.	Knowing or suspecting the property is criminal property.	Imprisonment for a term not exceeding 14 years or a fine (or both).

In the Response, BIS also attempted to justify the removal of the dishonesty element from the criminal cartel offense by arguing that the removal allows the maintenance of a distinction between the cartel offense and the enforcement of Article 101 Treaty on the Functioning of the European Union (“TFEU”). This is argued to be necessary to avoid the offense being classified as “national competition law” for the purposes of Council Regulation (EC) 1/2003 EC, thereby negating the jurisdiction of the English courts (and also preventing the enforcement of the cartel offense in cases where the European Commission had opened a civil investigation into the same conduct).²⁹ This argument was made in *IB v. The Queen* in an attempt to argue that the Crown Court could not prosecute the BA executives in circumstances where, as was the case, there is an effect on inter-state trade (on the basis that the Crown Court was not a “designated” competition authority under the Enterprise Act 2002).

BIS’s argument suffers from a misreading of the Court of Appeal’s decision *IB v. The Queen*.³⁰ In that case, the Crown argued that that the cartel offense was not aimed at competition law but at dishonesty and that dishonesty was the feature that distinguished the offense from “national competition law” (which makes it somewhat ironic that BIS now argues that the removal of dishonesty further distinguishes the cartel offense from national competition law).

²⁹ See Response, *supra* note 3, ¶7.3.

³⁰ *IB v The Queen* [2009] EWCA Crim 2575 (on appeal from the Crown Court ruling in *R v George, Crawley, Burnett and Burns* [2010] EWCA Crim 1148).

However, the Court of Appeal dismissed this argument (“[i]nsofar as it was suggested on behalf of the Crown that the section 188 offense is not part of national competition law because it contains the requirement of dishonesty, we do not agree”).³¹

The basis for deciding that the cartel offense was not “national competition law” for the purposes of Regulation 1/2003 was unrelated to the dishonesty element; it concerned the fact that the cartel offense did not involve the direct enforcement of national equivalents to Articles 101 and 102 TFEU. According to the Court of Appeal, there was no risk of inconsistency in the different proceedings despite the overlap in facts.³² Significantly, the Court of Appeal also held that even if the cartel offense were regarded as “national competition law” for the purposes of Regulation 1/2003, the English courts would still have jurisdiction to enforce given that the relevant articles of Regulation 1/2003 do not expressly exclude the jurisdiction of the courts. Accordingly, it is inaccurate and inconsistent to say that the removal of dishonesty would assist in ensuring that the cartel offense did not become “national competition law” and, even if it did, such classification would not be detrimental given that it would not serve to oust jurisdiction.

V. OVER-CRIMINALIZATION AND THE PUBLICATION DEFENSE

In changing the standard for the cartel offense, BIS seems to have recognized that there would exist a significant risk of over-criminalization if the proposal simply involved removing the dishonesty element (*i.e.*, the offense would become a strict liability offense, as it is in the United States). In order to minimize such a risk, BIS proposed that the offense would not be made out if the agreement were “made openly” (*i.e.*, published in advance in an appropriate publication).

The rationale for this defense seems to be that because cartels are by their nature secret, an “open” arrangement between competitors would not be regarded as a cartel. (This line of reasoning may have been influenced by Lever & Pike’s seminal 2005 article, referenced above, which seemed to argue that making and operating secret price-fixing agreements could, of itself, constitute a crime.)³³ Indeed, in the words of BIS, “ultimately consumers who are informed about arrangements can choose to contract elsewhere.” The approach raises a number of concerns:

- First, given that cartels are regarded as the most serious and damaging forms of anticompetitive conduct, it is not clear why BIS has chosen not to punish those who in engage in this activity openly. The act of publishing does nothing, of itself, to justify or legitimize the existence of the cartel or make the offense somehow less pernicious. Publication would not, for example, necessarily assist customers in a heavily cartelized industry, as they would likely be unable to gain elsewhere a price that reflects true competitive dynamics.³⁴

³¹ *IB v The Queen* [2009] EWCA Crim 2575 (on appeal from the Crown Court ruling in *R v George, Crawley, Burnett and Burns* [2010] EWCA Crim 1148), at paragraph 26.

³² *IB v The Queen* [2009] EWCA Crim 2575 (on appeal from the Crown Court ruling in *R v George, Crawley, Burnett and Burns* [2010] EWCA Crim 1148), at paragraphs 34-37.

³³ See Lever & Pike, *supra* note 11.

³⁴ See Scott Summers, *What Should the Dishonesty Element of the UK Cartel Offense be Replaced With*, COMP. L., 53 (2012)

In addition, it might be argued that the framework of publication would not necessarily destabilize a cartel's equilibrium (or lead to an increase in the number of leniency applications) if cartelists somehow mistakenly regard publication as a form of justification. Publication is perhaps most likely to benefit the OFT whose enforcement teams would have a ready source of intelligence but, depending on the modality of publication and the way it develops in practice, even this benefit may not be realized (e.g., if companies take the view that benign agreements such as R&D agreements should be published out of an abundance of caution or if the method of publication does not reveal sufficient information about the agreement). Although cartels are by their nature secret, that element does not necessarily assist in setting the appropriate framework for criminality.

- Second, the pace and pressure of day-to-day commerce typically afford suppliers and customers little time to conduct wide-ranging research into the activities of their counter-parties. The additional burden created (i.e., requiring companies to research whether their proposed counter-party has made any publications in the *London Gazette*) risks decelerating significantly the speed of commercial transactions, particularly if the terms of the search are not straightforward (as is often the case given the various guises, brands, and corporate identities under which corporations enter into agreements).
- Third, it is not clear why companies will have the incentive to publish the existence of the agreement given that it is not, strictly speaking, in its interests to do so (publication affords protection to the individual, not to the company, and there are downsides to such disclosure—see below). There seems to be a clear conflict between the incentives of the individual and those of the company/employer.
- Fourth, given the lack of legal clarity on the types of agreements or concerted practices that (potentially) breach Chapter I Competition Act 1998 or Article 101 TFEU, companies will not have a readily ascertainable method of determining which agreements should be published and which should not. Analysis of agreements that have the potential to breach Chapter I Competition Act 1998 or Article 101 TFEU often requires the input of legal and economic experts, and definitive answers are not always possible. Accordingly, if adopted, the proposed publication requirement may well raise costs to industry.
- Fifth, there are potentially misaligned obligations as regards the level of detail to be published. In order to be effective, the notification in the *London Gazette* would presumably need to contain sufficient detail for a customer to understand the potential implication on its transaction. However, such publication might be inconsistent with, or even breach, confidentiality principles, such as applicable confidentiality provisions in the agreement in question or the secrecy requirements of other legislation (e.g., the requirement in the Takeover Code for secrecy before announcements).³⁵

³⁵ See the City Code on Takeovers and Mergers, Section D, Rule 2: Secrecy Before Announcements.

- Sixth, BIS's publication defense would only apply once an agreement is finalized or implemented. Cartel agreements or concerted practices can be established before they are finalized / implemented and there, therefore, appears to be a lacuna in the defense.

The proposed solution leaves much to be desired and, if the decision to remove the dishonesty element is progressed, an alternative should be considered.

VI. ALTERNATIVE STANDARD

Given the legal and practical difficulties associated with BIS's proposed method of avoiding over-criminalization and the questionable emphasis placed on the issue of openness vs. secrecy, it may well be worth reconsidering whether over-criminalization can be avoided without linking the cartel offense to a requirement to publish.

BIS recognizes in the Response that the cartel offense "will still require proof of the mental elements of intention to enter into an agreement and intention as to the operation of the arrangements in question" and this position finds support in academic literature. For example, when identifying the key characteristics of criminal law for the purposes of the criminal enforcement of cartel conduct, Wouter Wils argued in 2005 that the characteristics and spirit of criminal law require a "guilty state of mind."³⁶ Similarly, in *Norris*, the House of Lords demonstrated that cartel conduct had not historically been criminalized by considering a line of English cases, which showed that cartel conduct was only criminal where it was accompanied by certain types of aggravating features (such as fraud, misrepresentation, violence, intimidation, inducement to breach of contract, *etc.*).³⁷ It is notable that each of the referenced aggravating features requires a guilty mind.

Although only a short time has passed since the Response, a number of commentators have expressed concerns about BIS's proposed approach. MacCulloch argues, for example, that the cartel offense should be formulated in terms of the cartelist's "intention to subvert the competitive process," on the basis that without the dishonesty element, the U.K. cartel offense should reflect the central concern clearly.³⁸ Similarly, Whelan argues that the cartel offense should be linked to the "moral norm against deception" (a variant of the open vs. secret debate that concerns the cartelist's subjective intention to mislead or deceive the customer that the price being agreed is competitive, *i.e.*, the offense would be made out if it could be shown that the individual's intention was to deceive).³⁹ Wardhaugh also highlights the uncharacteristic failure to focus on the retributive elements of the offense ("framing the offense in terms of secrecy or lack of openness will have the effect of establishing perverse incentives to focus litigation on whether

³⁶ See Wils, *supra* note 7, at 118-159.

³⁷ See *Norris v. United States* [2008] UKHL 16, paragraph 17 ("The effect of these authorities may be succinctly summarised. The common law recognized that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable.").

³⁸ Angus MacCulloch, *The Cartel Offence: Defining an Appropriate Moral Space*, as yet uncited.

³⁹ Dr. Peter Whelan, *BIS, the Cartel Offence, and Option 4*, Newcastle Law School Conference (April 13, 2012).

or not the activity was conducted sufficiently openly, rather than on the harm the activity may have caused”).⁴⁰

Although each approach is slightly different, the common thread seems to be that the proposed modifications to the cartel offense have not focused sufficiently on the behavior or state of mind of the person agreeing to the sale of the cartelized product or service. The focus on general deterrence of cartel conduct, which is undoubtedly and rightly one of the drivers for active enforcement of the cartel offense, has overshadowed entirely another key principle of punishment: individual retribution.⁴¹ In other words, the cartel offense does not exist exclusively to generate deterrence—it also exists to exact retribution on those who engage in an activity that is morally condemned and to which an adverse stigma should be attached.⁴² In addition, Kantian principles suggest that because the penalties for breach of the offense attach to the person committing the breach, it is a pre-condition that the behavior of the individual defendant concerned must require punishment.

If the offense were linked more closely to the specific intention and frame of mind of the individual defendant concerned, then the risk of over-criminalization (and the need for a publishing defense) would seem to be less apparent. Insofar as the dishonesty element is to be removed, the focus should therefore be to remodel the cartel offense to catch those that enter into “hardcore” prohibited anticompetitive agreements, such as price-fixing or market-sharing, with a guilty mind. Under one formulation, the guilty mind would be apparent where the defendant entered into a defined category of agreements (such as hardcore price-fixing and market-sharing agreements) which he knew, suspected, or had reasonable grounds to suspect to be illegal and entered into it regardless. These mental elements, which are consistent with other recently established legislation in relation to the proceeds of crime,⁴³ should have their everyday meaning, consistent with English case law.⁴⁴

A variant of this theme has been posited by Harding & Joshua. They argue that the cartel offense should seek to catch “an agreement to act in defined illegal anti-competitive ways, doing so determinedly with an awareness of the prohibited nature of the conduct” and therefore suggest that the relevant test should be as follows:

An individual is guilty of an offence if he *intentionally agrees* with one or more persons to make or implement, or cause to be made or implemented, *legally prohibited* arrangements of the following kind...⁴⁵

Although Harding & Joshua’s objectives seem to be broadly in line with the theme of the alternative standard suggested above, the confinement of the offense to simply “intentionally”

⁴⁰ Bruce Wardhaugh, *The Cartel Offence within a “World Class” Competition Regime: An Assessment of the BIS Consultation Exercise*, as yet uncited.

⁴¹ See, generally, Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, EUROP. COMPETITION J. (March, 2009). See also B. Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CALIF. L. REV. 1141 (1983) (arguing in general that deterrence and retribution are the goals of criminal sanctions on business enterprises).

⁴² See Wils, *supra* note 7, at 118-159, ¶10.

⁴³ See Proceed of Crimes Act 2002, s.327-334 in relation to money laundering.

⁴⁴ See, for example, *R v. Da Silva* [2006] EWCA Crim 1654 in relation to the interpretation of “suspicion.”

⁴⁵ See response by Prof. Christopher Harding & Julian Joshua to the BIS Consultation.

(presumably oblique intention) leaves open the possibility that defendants are prosecuted for simply entering into a legally prohibited agreement, even absent a guilty mind. To avoid such doubt, and indeed to ensure that the OFT is prosecuting the right individuals, it might be preferable to phrase the cartel offense as follows:

An individual is guilty of an offense if he agrees with one or more other persons to make or implement, or to cause to be made or implemented arrangements of the following kind relating to at least two undertakings (A and B), which he knows, suspects, or has reasonable grounds to suspect to be illegal.

As stated above, a test of this kind is consistent with the practice in cases involving white collar or financial crime⁴⁶ and juries are often asked to consider the available evidence and determine the state of the mind of the defendant, so the OFT would face no more uncertainty than is present in the majority of criminal cases. Further, such a test would not require a jury to examine “complex economic evidence,” which was a concern identified in the Hammond and Penrose report.⁴⁷

The test is also consistent with the views of Lever & Pike, at least from the perspective of theory. Although Lever & Pike sought to design the cartel offense to catch “active steps to mislead” through the use of secrecy, their fundamental point was that the offense should catch those that have knowingly participated in collusive and covert arrangements to drive up or maintain prices.⁴⁸ Finally, and insofar as this was a legitimate concern in the first place *quod non*, the test makes it less feasible for defendants to raise arguments of the type described above (transposed from the OFT’s response to the Consultation) while leaving sufficient flexibility to the courts to determine how the offense should be imposed and developed.

VII. CONCLUSION

Although the desire to increase general deterrence through increased criminal cartel enforcement is well intended, it is not clear that BIS has conducted a sufficiently thorough or comprehensive examination of the case for reform. By its own admission, the basis for reform lacks evidence and the reluctance to consider the issues in more detail may betray a willingness for a cheap and quick fix instead of a more robust dedication to establishing an effective criminal cartel regime.

Given that the decision to remove the dishonesty element has now been made and is unlikely to be reversed, the focus of the attention should fall on implementation and, in particular, on whether the requirement to publish will be an effective means of avoiding over-criminalization and whether it will benefit customers in practice. The arguments against the approach (summarized above) are compelling and if the dishonesty element were to be removed, a test more closely linked to the state of mind of the defendant would seem to be appropriate by reference to the retributive principles of criminal law and the behavior and intentions of the defendant in question.

⁴⁶ See, for example, s. 327-334 of the Proceeds of Crime Act 2002 (money laundering).

⁴⁷ Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, November 2001.

⁴⁸ See Lever & Pike, *supra* note 11.

Even if BIS is correct and the dishonesty element is the cause for the small amount of prosecution activity to date, there is little certainty that the levels of effective enforcement will improve while other flaws in the system remain (*e.g.*, the removal of the dishonesty element would not have helped in the *BA* case). In order to have an effective regime, BIS will need to address the other errors in design such as the lack of resources available to the OFT and the limited number of antitrust investigations brought to a successful conclusion.

Aside from obvious but perhaps unlikely changes, such as an increase to the OFT's budget, one hopes that the OFT will take steps available to it to improve the process (*e.g.*, increased use of secondments from the Serious Fraud Office and, in appropriate cases, increased use of applicable extradition rules to prosecute individuals located outside the United Kingdom). BIS's decision in the Response is by no means a panacea for the existing criminal cartel regime—depending on its implementation, it might not even be a partial solution.