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Securing the Legitimacy of Individual Sanctions in UK Competition Law

Jonathan Galloway*

Abstract – Traditional deterrence theory relies on a combination of probability and severity of punishment to impose a perception of sufficiently high costs to deter wrongdoing. Yet when a very high severity of punishment counters a low probability, disproportionate outcomes give rise to societal concerns about procedural fairness and justice, such that the law loses legitimacy. Any loss of legitimacy undermines would-be offenders’ normative commitment to, and voluntary compliance with, the law. The UK has encountered significant obstacles in efforts to enhance the deterrence of competition law. The Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013 introduced individual sanctions, consisting of a criminal cartel offence and director disqualification orders, to deter anti-competitive behaviour. This article argues that poor drafting and prosecutorial failure are responsible for the failure to earn and secure the legitimacy of the cartel offence. Yet the greatest regulatory failure is not making fuller use of the disqualification powers, which have greater legitimacy. By following the approach suggested in this article the deterrent value and legitimacy of UK competition law would increase, and we would be closer to achieving the goals of the individual sanctions when they were introduced over 13 years ago.

The principal objective of individual sanctions in UK competition law is to alter the calculation undertaken by the agents who act on behalf of and bind firms,¹ thereby using deterrence theory to decrease the likelihood of the proscribed conduct being carried out in future. Traditional deterrence theory relies on a combination of probability of detection and severity of punishment to impose a perception of sufficiently high costs to deter wrongdoing.² Yet when the result is a very high penalty to counter a low probability of detection and conviction, the risk of disproportionate outcomes to the conduct can give rise to societal concerns about procedural fairness and justice, such that the regulatory enforcement activity and the specific sanctions lose legitimacy. Any loss of legitimacy

* Senior lecturer in Law, Newcastle University. Email: jonathan.galloway@newcastle.ac.uk. I would like to thank Caron Beaton-Wells, Alison Dunn, Ole Pedersen, Michael O’Kane, and particularly the anonymous referee for useful and thoughtful comments that have improved the finished article, although all errors and omissions of course remain my responsibility alone.

¹ See A Riley and DD Sokol, ‘Rethinking Compliance’ (2015) 3(1) *Journal of Antitrust Enforcement* 31, 43.

² See e.g. J Bentham, ‘Principles of Penal Law’, in John Bowring (ed.), *The Works of Jeremy Bentham, Volume I* (Russell & Russell Inc. 1962) and RA Posner, *Economic Analysis of Law* (3rd edn, Little, Brown & Co 1986), 205-212.

has the potential to undermine would-be offenders' normative commitment to the law, such that they are less likely to engage in voluntarily compliance. Legitimacy concerns can also give rise to increased levels of political and judicial scrutiny of the exercise of enforcement discretion, and could easily encounter more sceptical juries who are responsive to legitimacy concerns held by the wider public. Thus, efforts to increase the effectiveness of sanctions, as a means of preventing proscribed conduct, can be self-defeating by undermining the law's legitimacy as a result. The legitimacy of sanctions can be nurtured, and societal concerns ameliorated, by patient and prudent exercise of enforcement discretion, especially in terms of case selection. Such an approach as part of a broader enforcement strategy, which embraces a policy mix and use of diverse tools, would build support for the sanctions, and could also engender greater voluntary compliance with the law. Importantly, well-judged exercise of enforcement discretion can earn legitimacy for the regime, even in the presence of pre-existing legislative defects.

The UK has pursued a path of trial and error, quite literally, in its efforts to enhance the general deterrent effect of UK competition law since 2002. The Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013 contained provisions that sought to establish effective individual sanctions in UK competition law so as to deter, and thus prevent anti-competitive behaviour as part of a broader policy objective to boost the competitiveness of UK markets, and generally help spur economic growth.³ The individual sanctions consist of the recently amended criminal cartel offence under s 188, which can result in imprisonment of up to five years,⁴ and the power to apply for a competition disqualification order under s 204⁵ of the Enterprise Act 2002 (EA02). The individual sanctions complement the enforcement tools of the Competition and Markets Authority (CMA), formerly the Office of Fair Trading (OFT), which normally consists of the power to impose fines against firms, and thereby prevent sanctions from being treated strictly as a cost of doing business.⁶

This article argues that the legislative reforms enacted by the Enterprise and Regulatory Reform Act 2013 (ERRA13) have eroded the already questionable legitimacy of the cartel offence, and suggests how enforcement discretion should now be exercised in order to rebuild the legitimacy of individual sanctions in UK competition law. It does this by briefly introducing the concept of legitimacy as derived from the regulatory enforcement literature in order to identify key principles for regulatory enforcement with community confidence. This article also identifies the legitimacy concerns that arise from a strategy focused on deterrence theory alone. The discussion alludes to shortcomings that would arise whenever any regulatory enforcement strategy is overly dependent on

³ In relation to the Enterprise Act 2002 see e.g. the Department of Trade and Industry, A World Class Competition Regime (CM 5233, July 2001) particularly chapters 1 and 7, available at < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265534/5233.pdf> accessed 18 November 2016. In relation to the Enterprise and Regulatory Reform Act 2013 see the Department for Business, Innovation, and Skills, Growth, Competition and the Competition Regime, Government Response to Consultation (BIS/12/512, March 2012), at 3.2 and 7.10 in particular, available at: < <https://www.gov.uk/government/publications/growth-competition-and-the-competition-regime-government-response-to-consultation>> accessed 18 November 2016.

⁴ S. 190(1) EA02.

⁵ S 204 EA02 inserted s 9A into the Company Directors Disqualification Act 1986.

⁶ For discussion of the difficulties in devising effective sanctions against corporations, see B Fisse and J Braithwaite, Corporations, Crime and Accountability (CUP 1993), 41-44.

operationalising deterrence theory. Yet, this article is focused on identifying and addressing legitimacy defects inherent within the specified individual sanctions, and given the regular public pronouncements from Government and the UK competition authority, past and present, that the aim of sanctions is to deter anti-competitive behaviour,⁷ this article to an extent thus assumes the existence of a prevailing enforcement strategy set upon deterrence. As such, a detailed analysis of the over-arching enforcement strategy in UK competition law, and proposals to catch up with other regulatory regimes that embrace policy and sanction mixes, informed by behavioural insights, are less relevant to the operation of the individual sanctions, and their legitimacy, and are mostly outside the scope of this article and left to other work in the field.⁸

Moving from the abstract to a positive analysis of UK competition law, this article proceeds to first analyse the legitimacy issues inherent within the legislative drafting of the individual sanctions, and secondly the exercise of enforcement discretion by the OFT, and now the CMA. While criminal sanctions can provide an important enforcement tool in competition law's sanction mix, such powers would ideally derive legitimacy from public support for their introduction. It is argued that enforcement of the cartel offence had no such support and prior to the ERRA13 it was already suffering from a significant lack of legitimacy through a mixture of poor legislative drafting and failure by the OFT. This was in spite the opportunity to earn legitimacy through astute case selection and advocacy. It will be argued that the OFT's, and now also the CMA's, greatest failure arises from the inability to use enforcement discretion to earn legitimacy for the defective cartel offence. This article will also argue that the legitimacy defects of the criminal cartel offence have been amplified as a result of the Government's ERRA13 reforms, and that the CMA should thus begin to make significant use of its powers to apply for director disqualification orders, while patiently employing a prudent case selection approach for future cartel offence prosecutions. The OFT and the CMA have failed to apply for any competition disqualification orders (CDOs) under s 9A of the Company Directors Disqualification Act 1986 (CDDA86) since it entered into force on 20 June 2003. The lack of CDO applications is perplexing given the periods of significant uncertainty surrounding the cartel offence, when CDO applications would have demonstrated enforcement activity and provided a deterrent value (consistent with the enforcement strategy) while awaiting a suitable case to prosecute under s 188 EA02. The recent first use of disqualification undertaking powers by the CMA under s 9B of the CDDA86 is a late but welcome first step in routinely using these powers. This article ultimately argues that the recent reforms to the cartel offence, with resulting uncertainty (and the lesson hopefully learnt to wait for the 'right' test case) provides a propitious set of circumstances to bring the first CDO application and make greater use of competition disqualification powers. Establishing the meaningful threat of a CDO against individuals will start to build a higher probability of individual sanction in UK competition law

⁷ See e.g. UK Government consultations (n 3) and M Grenfell, CMA Executive Director for Enforcement, 'UK competition enforcement – progress and prospects' Speech to the IFLR Competition Law Forum, 9 November 2016, available at: <<https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law>> accessed 18 November 2016.

⁸ See e.g. discussion in J Galloway, 'Competition law and regulatory compliance: reconceptualising deterrence to shape behaviour' in J Galloway (ed.), *Intersections of Antitrust: Policy and Regulation* (OUP forthcoming).

without giving rise to the same level of legitimacy concerns that bedevil the cartel offence. Routine use of the specific CDO powers would enhance the UK competition enforcement toolkit, and provide for effective, efficient, and legitimate enforcement activity.

1. *Legitimacy and Enforcement Strategy*

Hawkins argues that '[l]egitimacy is an imperative for public organizations, hence regulatory agencies' practices help to secure them their place in the moral order'.⁹ Yet it also logically follows that the agencies' practices can serve to undermine, as opposed to secure, their regulatory place and standing in society if the practices are perceived as lacking legitimacy. It thus becomes necessary to articulate a concept of legitimacy which will serve to guide and set the boundaries of regulatory activity. Hawkins points to Gusfield's view that prosecution 'when viewed as right, proper, and appropriate, is legitimate' and when viewed in this way it would thus have moral legitimacy and the ability to adopt an instrumental approach for action in the public interest.¹⁰ In this sense exercise of enforcement discretion with legitimacy has the potential to provide ex post facto legitimacy to a defective legislative design. Hodges goes further and adopts a broader sense of legitimacy, albeit he also considers the acquisition and retention of it no less important:

'[b]y the legitimacy of the system, we mean the processes by which the rules are made, applied, observed, enforced and sanctioned. Every aspect should be perceived to be fair. This requires there to be fairness in fact (compliance with the individuals' personal ethics...) and for the practices to be perceived as fair, which requires transparency in the procedures.'¹¹

Perceptions of what is fair, right, proper, and appropriate can thus be argued to be principles that act as constraints upon regulatory action. Furthermore, regulators' accountability to the wider public for policy choices and the exercise of enforcement discretion is necessary to provide for legitimacy while carrying out activity in furtherance of their mandate.¹² Determining the regulatory approach to fulfil a mandate, i.e. deciding upon the enforcement strategy, becomes crucial in order to ensure that enforcement activity is effective, efficient, and maintains legitimacy by having community confidence.¹³

⁹ K Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002), 209.

¹⁰ *Ibid.*, 417, referring to JR Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (University of Illinois Press 1963).

¹¹ C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing 2015), 27.

¹² WE Kovacic and M Winerman, 'The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness' (2015) 100 *Iowa Law Review* 2085, 2090 and 2095. Also see I Simonsson, *Legitimacy in EU Cartel Control* (OUP 2010), 271.

¹³ See N Gunningham, 'Compliance, Deterrence and Beyond' (2015) RegNet Research Paper N.87, Regulatory Institutions Network.

The regulatory literature has historically focused upon the weight that should be afforded to variants and mixes of deterrence theory and retributivism in determining enforcement strategy. The former theory assumes that decision-makers are rational actors, capable of being influenced by increasing the perceived cost of infringements. The latter theory is premised upon the moral legitimacy of wrongdoers receiving their just deserts in a proportional way, which seeks to encourage compliance by building on established normative values.¹⁴ Both theories have well chronicled deficiencies and thus regulatory enforcement strategy, notably in the environmental law domain, has long since rejected the dichotomy as a false one and drawn on both theories, and innovative methods, in order to attain effective, efficient, and legitimate enforcement.¹⁵ As will be shown however, the enforcement strategy underpinning UK competition law is very heavily focused upon traditional deterrence theory, with the result that enforcement in practice has tended to resort to use of the wrong enforcement tools at the wrong time. The legitimacy concerns resulting from the singular enforcement strategy¹⁶ have served to undermine the effectiveness of s 188 EA02 in UK competition law.

Individual sanctions are part of a competition authority's enforcement toolkit and are intended to both prevent infringements of competition law, i.e. prevent anti-competitive behaviour, and to address the infringements that have nonetheless taken place.¹⁷ Given that sanctions under the predominantly public enforcement systems in the EU and UK will rarely have a direct role in providing a means of corrective justice,¹⁸ the main task of sanctions can only be to prevent infringements by deterring future wrongdoing, and in so doing also ensure offenders get their 'just deserts' as a consequence of their conduct. That said, historically the OFT, and now the CMA also,

¹⁴ For a useful account of both theories of criminal justice see RL Christopher, 'Deterring Retributivism: the Injustice of "Just" Punishment' (2002) 96(3) *Northwestern University Law Review* 843.

¹⁵ See e.g. N Gunningham (n 13) as well as I Ayres and J Braithwaite, *Responsive Regulation* (OUP 1992), 21, which rejects the artificial 'crude polarisation' between deterrence and compliance models of regulation.

¹⁶ The heavy reliance upon deterrence theory in competition law enforcement strategy is discussed in detail in C Hodges (n 11), ch 4, particularly 89-91 and 131-133.

¹⁷ See the typology identified in WPJ Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) *World Competition* 183 which also includes 'clarifying the content of the prohibitions' as a further task of competition law enforcement.

¹⁸ Two related exceptions come to mind. The first of which is the recently established, and potentially significant, power of the CMA to approve voluntary redress schemes at the time of, or following, the adoption of an infringement decision. Where the CMA approves a voluntary redress scheme it may reduce a penalty that would otherwise be imposed in a relevant infringement decision by up to 20%. This new power was part of a series of reforms designed to incentivise increased levels of private enforcement of competition law in the UK, and is found in ss 49C-49E *Competition Act 1998* (as inserted by s 81 and Schedule 8, paragraphs 10 – 12 of the *Consumer Rights Act 2015*). Also see the CMA Guidance on the approval of voluntary redress schemes for infringements of competition law (14 August 2015, CMA40): <<https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>> accessed 18 November 2016. The other exception is the explicit allowance in EU law that compensation paid as a result of a consensual settlement could be a mitigating factor when determining the level of fine to impose, see Article 18(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 ('the Damages Directive').

have focused upon general deterrence¹⁹ to such a great extent²⁰ that enforcement can (and this article argues it does) lose the perception of proportionality with the result that the corollary task of providing ‘*just desert*’ is somewhat forgotten.

In order to achieve compliance through effective deterrence, sanctions must be tailored to impact upon the factors present when firms, or agents acting on their behalf, decide whether or not to participate in a cartel. Tyler argues that policy makers tend to adopt an instrumental perspective on how to achieve compliance by seeking to deter proscribed behaviour through impacting upon the perceived gains and losses that are expected from engaging in the conduct.²¹ Such an instrumental perspective closely follows Becker’s model, arguing that would-be-offenders determine their conduct according to a rational cost-benefit analysis, which implies that sanctions should thus be designed to outweigh any rewards that are to be had by acting illegally.²² It is this approach that underpins traditional deterrence theory and provides a justification for punishment.²³ In order to effect change in the cost-benefit analysis undertaken by would-be-offenders, Posner highlights the necessity to choose a combination of probability and severity of punishment, which will impose sufficient cost to outweigh the anticipated benefits.²⁴ Given that the probability of punishment (i.e. likelihood of detection and punishment) tends to be low due to enforcement variables, it must therefore be offset by a high level of severity in order to deter.²⁵

The shortfalls of traditional deterrence theory are widely acknowledged and its ability to provide a complete model to achieve legal compliance by deterring would-be-offenders is questionable on a number of fronts. There are social psychological studies suggesting that, for some crimes at least, an increase in sanction severity does not act as a deterrent but an increase in the probability of sanction does.²⁶ This view has considerable support,²⁷ including specifically in the competition law field²⁸ where it has been

¹⁹ Thus the sanction is fixed at a level that ‘might be expected to deter others from committing a similar offence’, to be contrasted with specific deterrence aimed at preventing recidivism, see A Ashworth, ‘Sentencing’ in M Maguire, R Morgan & R Reiner (eds), *Oxford Handbook of Criminology* (OUP 2007), 993.

²⁰ See e.g. M Grenfell (n 7) and discussion below.

²¹ TR Tyler, *Why People Obey the Law* (Yale University Press 1990), 3 and 21.

²² GS Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 169.

²³ See also J Bentham (n 2) and RA Posner (n 2).

²⁴ RA Posner (n 2) at 207.

²⁵ See T Calvani and TH Calvani, ‘Custodial sanctions for cartel offences: An appropriate sanction in Australia?’ (2009) 17 *Competition & Consumer Law Journal* 119, 128-129. Indeed Posner outlines an efficiency argument ‘for combining heavy prison terms for convicted criminals with low probabilities of apprehension and conviction’, see Posner (n 2) 212.

²⁶ See E Aronson, TD Wilson & RM Akert, *Social Psychology* (4th edn, Prentice Hall 2002) 584-587, WN Evans, D Neville & JD Graham, ‘General deterrence of drunk driving: Evaluation of American Politics’ (1991) 11 *Risk Analysis* 279, and RB Voas, HD Holder & PJ Gruenewald, ‘The effect of drinking and driving interventions on alcohol-related traffic crashes within a comprehensive community trial’ (1999) 92 *Addiction* S221.

²⁷ See e.g. Tyler (n 21) 21, and C Parker, ‘Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 250.

²⁸ For the view of a former leading antitrust official see e.g. DI Baker, ‘Punishment for Cartel Participants in the US: A Special Model?’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 31.

suggested that ‘empirical deterrence research persistently finds that the factors that make the most difference to compliance behaviour are the perceived likelihood of detection and enforcement, more than the objective severity and subjective fearsomeness of the sanctions imposed’.²⁹ This is not to suggest that a frequently levied small financial fine achieves a greater deterrent value than a rarely used sanction of imprisonment of course. Yet a criminal offence that is perceived as so fundamentally flawed as to be unable to be successfully prosecuted at trial may carry such a low deterrent value that alternative enforcement tools are required in order to sustain a requisite minimum level of deterrence. Some proponents of traditional deterrence theory recognise the difficulties arising from combining very low-level enforcement (a small probability of sanction) with extremely high sanctions, finding the extremely high sanction to be a sub-optimal use of resources,³⁰ but those proponents nonetheless continue to adhere to the basic matrix of low probability and high severity of punishment.³¹ Traditional deterrence theory thus rests on the questionable assumption that high sanctions will alter conduct and deter would-be-offenders, and where this is not achieved it is usually because the sanctions are not high enough. This article argues that the same basic assumption exists in relation to individual sanctions in UK competition law, and this creates legitimacy issues that are highlighted in detail below.

Perhaps the principal legitimacy issue with traditional deterrence theory is that it becomes overly concerned with general deterrence³² such that a gap opens up between the sanction imposed and the offending conduct in individual cases. That gap creates disproportionate outcomes that give rise to societal concerns about procedural fairness and justice. Yeung comments that deterrence-based accounts of punishment are ‘prone to generating counter-intuitive outcomes which may appear at odds with the community’s perception of fairness and morality’,³³ and we know that perceptions of fairness are key to underpinning legitimacy. Traditional deterrence theory may be thought to set aside concerns about the severity of sanction by arguing that the benefit to society from lower crime justifies any seemingly disproportionate or unfair sanction imposed on the individual offender,³⁴ although it is far from clear that a jury, or the judiciary for that matter, would willingly impose a sanction perceived to be disproportionate so as to further a broader goal of general deterrence. Yet this response undermines what may be an even more important means of preventing cartel activity and achieving compliance: encouraging a societal view of cartel behaviour as inherently wrong and the law proscribing that conduct as fair, right, proper, and appropriate. Such a societal view

²⁹ C Beaton-Wells and C Parker, ‘Justifying criminal sanctions for cartel conduct: a hard case’ (2013) 1(1) *Journal of Antitrust Enforcement* 198, 205-206.

³⁰ The Posnerian approach might thus be described as advocating for ‘absolute deterrence’ whereas the other (arguably more pragmatic) approach is akin to an ‘injury to others’ strain of traditional deterrence theory. See discussion in K Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing 2004), 63-72.

³¹ MK Block & JG Sidak, ‘The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then’ (1979-1980) 68 *Geo LJ* 1131.

³² See A Ashworth (n 19).

³³ Yeung (n 30) 70.

³⁴ Bentham acknowledges this by commenting that ‘punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, which it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who have given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.’ Bentham (n 16) 396.

would help provide for a strong normative commitment to the law.³⁵ Recent empirical research in this field has found that the strongest predictor of awareness of the law and a perceived probability of sanction, both key for achieving compliance, was agreement with the law itself.³⁶ Furthermore, a perception of fair and neutral law enforcement and decision-making demonstrates the State's, and thus the regulator's, legitimacy to those subject to regulation, and individuals are known to feel a greater duty to obey, and willingness to comply with laws and regulators that are perceived as legitimate.³⁷ The converse is that laws and sanctions that are considered unfair by society have diminished legitimacy, which can have a negative impact on legal compliance.³⁸ One of the views of legitimacy put forward by Tyler, Fagan, and Geller, suggests that 'legitimacy of legal authorities is earned, if not negotiated, through actions that demonstrate its moral grounding.'³⁹ This is an important contribution. The implication is therefore that actions (and laws) that are perceived as unfair can deprive a regulator of their cloak of legitimacy in the eyes of the regulated, thereby negatively impacting on voluntary compliance with the law.

Given the deficiencies in the classic deterrence model, one could turn to retributivism as a tool to try to prevent anti-competitive behaviour.⁴⁰ Interestingly, Simester and von Hirsch argue that when using the criminal law to deter, the act of criminalisation is *ex ante* rational coercion, and this can only be legitimate where the threat involves a punishment that would be deserved.⁴¹ Perceived in this way, rational coercion, or traditional deterrence theory, can only be justified where there is also justification on retributive grounds for the threatened punishment. Retributivism may thus act as a considerable constraint upon sanctions, even where a deterrence led strategy is employed.⁴² It would also be advisable to learn from other fields, including environmental regulation, where policy mixes and flexible enforcement tools have been

³⁵ See Aronson, Wilson & Akert (n 26) 587-588 and Parker (n 27) 257-258.

³⁶ Beaton-Wells and Parker (n 29) 209-210, specifically dealing with the context of a criminal cartel offence. The same empirical research found that individuals who believed price-fixing should not be against the law were an astonishing seven times more likely to believe that it was in fact not against the law.

³⁷ See e.g. J Jackson, 'On the Dual Motivational Force of Legitimate Authority' LSE Law, Society and Economy Working Papers 4/2015, d4. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564592> accessed 18 November 2016.

³⁸ See Tyler (n 21), 26, 178, K Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy and Tax Non-Compliance' (2005) 32 *Journal of Law and Society* 562, and E Fehr and B Rockenbach, 'Detrimental effects of sanctions on human altruism' (2003) 422 *Nature* 137. For a discussion of these issues in the competition law context see L Guttuso, 'Leniency and the Two Faces of Janus: Where Public and Private Enforcement Merge and Converge' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion*, (Hart Publishing 2015), 295 – 296.

³⁹ TR Tyler, J Fagan, and A Geller, 'Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization' (2014) 11(4) *Journal of Empirical Legal Studies* 751, 754.

⁴⁰ See PH Robinson and JM Darley, 'The Utility of Desert' (1997) 91(2) *Northwestern University Law Review* 453, and KM Carlsmith, JM Darley, & PH Robinson, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83(2) *Journal of Personality and Social Psychology* 284.

⁴¹ AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011), 8.

⁴² This also has implications for the exercise of enforcement discretion by the regulator, as punishment needs to be perceived as deserved in order to maintain legitimacy. See discussion further below.

debated and deployed for many years.⁴³ Yet there is little evidence to suggest that the enforcement strategy in relation to the individual sanctions in UK competition law has embraced such an approach, and the objective of this article is to argue how best to secure legitimacy within the existing deterrence led enforcement strategy, rather than to remould that strategy in this work.⁴⁴ The next section argues that s 188 EA02 was ‘pre-programmed to become a regulatory failure’⁴⁵ as a result of poor legislative drafting. Yet there was potential for redemption if the early enforcement activity was crafted around a strategy to earn normative commitment to the law, and thereby enhance its legitimacy.

2. *Legislative Drafting*

The rationale for introducing s 188 EA02, as well as s 9A CDDA1986, was strongly motivated by the perceived inability of fines against firms to serve as a meaningful deterrent against anti-competitive conduct.⁴⁶ This confirms that the enforcement strategy underpinning individual sanctions was hardwired to traditional deterrence theory and eschews decades of regulatory theory advances that promote policy mixes, as opposed to reliance on a singular approach. There was also a failure to consider the merits of more flexible approaches advocated by influential theories such as ‘responsive regulation’, which allows for an incremental escalation of regulatory response depending upon the firm’s response of future compliance.⁴⁷ Another flexible approach is ‘smart regulation’, partially a response to perceived shortcomings in the responsive regulation model, and as such it broadens the regulatory context to include a range of instruments, institutions, and encompasses other influences upon firm behaviour and compliance.⁴⁸ Smart regulation continues to rely upon a means of incremental escalation of response but seeks to ensure that the response is a holistic one taking account of the range of means of influencing compliance behaviour. While these approaches may not be well suited to unadulterated transplantation into the competition ‘regulatory’ context, they ought to be studied to avoid the known failings of a singular policy approach. Fines for anti-competitive behaviour are themselves strongly motivated by the desire to secure deterrence by following a Beckerian approach⁴⁹ at an EU⁵⁰ as well as UK level.⁵¹ Nonetheless, the

⁴³ See e.g. I Ayres and J Braithwaite (n 15), MK Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution 2000), and N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (OUP 2008).

⁴⁴ For this see e.g. discussion in J Galloway (n 8).

⁴⁵ S Wilks, ‘Cartel Criminalisation as Juridification: Political and Regulatory Dangers’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 355. Kadish could be said to have implied a similar outcome when criminal sanctions are used to enforce economic offences that lack public opprobrium, SH Kadish, ‘Some observations on the use of criminal sanctions in enforcing economic regulations’ (1963) 30(3) *U Chi L Rev* 423.

⁴⁶ See Department of Trade and Industry White Paper, *A World Class Competition Regime*, 2001 (Cm 5233), 7.13-7.15 and box 7.3.

⁴⁷ See e.g. I Ayres and J Braithwaite (n 15), and J Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002).

⁴⁸ See e.g. N Gunningham (n 13), and N Gunningham, ‘Regulation: from traditional to cooperative’ (2015) RegNet Research Paper No.91, Regulatory Institutions Network.

⁴⁹ Becker (n 22). Becker’s deterrence model was first applied to antitrust by WM Landes in ‘Optimal Sanctions for Antitrust Violations’ (1983) 50 *U Chi L Rev* 652.

⁵⁰ The Court of Justice of the EU has recognized the need to ensure the ‘necessary deterrent effect’ of fines, see e.g. Cases 100-103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, [106].

limits imposed on fines so as to avoid undesirable outcomes from regulatory intervention, including bankruptcy,⁵² prevent fines from reaching an optimal level of deterrence.⁵³ It is arguable that the advent of leniency programmes, first instituted by the US in 1978 but regarded as fairly ineffective until significant revisions in 1993,⁵⁴ has boosted deterrence through increasing the probability of sanction, yet it is not clear that fines can overcome the agency problem⁵⁵ and thus may always produce a sub-optimal level of deterrence. Additionally, recent empirical research and subsequent analysis is starting to question the assumption that leniency programmes and increasing leniency applications signify an increase in the probability of detection and sanction, instead suggesting that evidence of their impact on deterrence is rather weak, and that they can be vulnerable to being ‘gamed’ by firms.⁵⁶

The objective to achieve general, as well as specific, deterrence is also clearly recognised in the European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C201/02, 4, 30-31, 37. See J Faull and A Nikpay (eds), *The EU Law of Competition* (3rd edn, OUP 2014), 8.661 – 8.673. The goal of deterrence is also regularly cited in press statements regarding case decisions, e.g. J Almunia, Speech to the European Parliament ECON Committee, State of Play and Priorities, 30 November 2010, Brussels (SPEECH/10/703), where Commissioner Almunia stated ‘The large fines of our last decision [Air Cargo cartel] rekindled the debate on our [cartel] policy, so let me restate one of its principles: our fines must be high enough to deter anti-competitive behaviour, but not so high as to put firms out of business.’

⁵¹ The applicable fining guidelines for infringement decisions by the CMA under the Competition Act 1998 explicitly highlights the twin objectives of fines to: i) reflect the seriousness of the infringement; and ii) ‘ensure that the threat of penalties will **deter** both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.’ See the OFT’s Guidance as to the appropriate amount of a penalty (OFT423, September 2012), 1.4, which has been adopted by the CMA Board, see Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (CMA8), 95.

⁵² Which would increase the level of concentration in the market and sit at odds with the normal aims of competition authority intervention, see e.g. C Craycraft, JL Craycraft, & JC Gallo, ‘Antitrust Sanctions and a Firm’s Ability to Pay’ (1997) 12 *Review of Industrial Organisation* 171.

⁵³ There is a wealth of literature pointing to the inability of fines to provide an optimal level of deterrence, see e.g. discussion of the ‘deterrence trap’ in JC Coffee, Jr, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1980-1981) 79 *Mich L Rev* 386. More recent literature includes Wils (n 5), JM Connor, AA Foer, and S Udwin, ‘Criminalizing Cartels: An American Perspective’ (2010) 1(2) *New Journal of European Criminal Law* 199, B Wardhaugh, ‘Closing the Deterrence Gap: Individual Liability, the Cartel Offence and the BIS Consultation’ (2011) 10(3) *Competition Law Journal* 175, JM Connor and RH Lande, ‘Cartel as Rational Business Strategy: Crime Pays’ (2012) 34 *Cardozo Law Review* 427, F Smuda, “Cartel Overcharges and the Deterrent Effect of EU Competition Law (2014) 10(1) *Journal of Competition Law and Economics* 63, and GJ Werden & MJ Simon, ‘Why Price Fixers Should Go to Prison’ (1987) 32 *Antitrust Bulletin* 917.

⁵⁴ C Beaton-Wells, ‘Leniency Policies: Revolution or Religion?’ in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion*, (Hart Publishing 2015), 18 – 19.

⁵⁵ See e.g. F Thépot, ‘Leniency and Individual Liability: Opening the Black Box of the Cartel’ (2011) 7(2) *Competition Law Review* 221.

⁵⁶ C Marvão and G Spagnolo, ‘What do we know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence’ and A Stephan and A Nikpay, ‘Leniency Decision-Making from a Corporate Perspective: Complex Realities’, both in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion*, (Hart Publishing 2015). Also see JE Harrington Jr and MH Chang, ‘When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?’, 11 August 2014, available on SSRN at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530545> accessed 18 November 2016, and NH Miller, ‘Strategic Leniency and Cartel Enforcement’ (2009) 99 *American Economic Review* 750.

In opting to introduce individual sanctions as a complementary, not alternative, enforcement tool to sit alongside fines, Parliament was thereby acting to increase the severity of the sanction attached to anti-competitive behaviour. That one of the individual sanctions recruited the criminal law, with the potential for imprisonment for up to 5 years, in an instrumental fashion to achieve deterrence with only 11% of the public supporting such a sanction,⁵⁷ only served to dramatically increase the enforcement obstacles to addressing anti-competitive behaviour. The very low level public support for imprisonment at the time of introducing the cartel offence suggests that the wider public would not regard the sanction as fair, right, proper, and appropriate, thus immediately creating a legitimacy concern.⁵⁸ Enforcement activity would have to address this concern in order to overcome the legitimacy defect and attain community confidence. Furthermore, instrumentalism, even when the sanctions are well targeted, is known to encounter problems due to an overly narrow focus on problem-solving, and a lack of foresight to address the resulting broader challenges.⁵⁹ It has been the subsequent efforts to ensure the effectiveness of the criminal cartel offence (s 188 EA02), measured in a narrow sense, which have ironically further eroded its legitimacy.

The legitimacy of the criminal cartel offence has been questioned since s 188 EA02 first entered into force. Any normative justification for criminalising cartels is based upon their perceived harmful economic effects, and is thus premised upon a policy choice in favour of free markets and a high value being placed upon benefits stemming from competitive markets.⁶⁰ Yet as Harding, Beaton-Wells and Edwards explain, harmful outcomes and competition law intervention are far more ‘contingent and ambiguous’ in the case of cartels than in many other spheres in which the criminal law is employed and the harm is more self-evident.⁶¹ As the normative justification for cartel criminalisation is less intuitive than for many other crimes, such as for harms against the person or property, it thus requires persuasion and a strong narrative of harm that withstands scrutiny in each case. The more complex justification for criminalisation thus creates legitimacy and credibility challenges that must be addressed by competition law enforcement. If competition law enforcers fail to convincingly depict defendants as morally blameworthy and their prosecution as just, then prosecution, which Hawkins has described as the ‘need to dramatize a measure...of activity’ in order to build support for the enforcer’s mandate,⁶² will further erode the enforcer’s legitimacy instead of strengthening it. Kovacic is more specific and highlights the necessity for a competition authority to build acceptance for new criminal sanctions and establish their legitimacy.⁶³

⁵⁷ A Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ (2008) 5 Competition Law Review 123.

⁵⁸ See K Hawkins (n 9), 417, referring to JR Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (University of Illinois Press 1963).

⁵⁹ See e.g. F Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar 2011), 24.

⁶⁰ C Harding, C Beaton-Wells and J Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion*, (Hart Publishing 2015), 240

⁶¹ *Ibid.*, and 244.

⁶² K Hawkins (n 9), 244.

⁶³ WE Kovacic, ‘Criminal Enforcement Norms in Competition Policy: Insights from US Experience’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 70.

The need to build legitimacy for s 188 EA02 was acute given the aforementioned lack of public support for criminalisation⁶⁴ and what can surely now be described as erroneous drafting of the original offence to outlaw agreements made or implemented ‘dishonestly’. Persuasive critiques have pointed to a number of problems of using the dishonesty standard in this context,⁶⁵ none more so than by highlighting that the construction and context of s 188 EA02 amounts to the law attempting to ‘pull itself up by its own bootstraps’.⁶⁶ Criminalising the cartel offence was ahead of public opinion, and it thus sought to *establish* societal condemnation of cartels by the process of criminalisation itself⁶⁷ (as opposed to reflecting a pre-existing societal consensus). The problem lay, however, in that the chosen dishonesty standard was assumed to *reflect* existing societal views and was not designed to help foster a hardening of attitudes.⁶⁸ Dishonesty requires that a jury regard the conduct as dishonest according to the ‘ordinary standards of reasonable people’⁶⁹ in order to secure a conviction. The drafters concocted an illogical combination of seeking to use successful prosecutions as a means of remedying the lack of public support for criminalisation (i.e. using the criminal law as an educational tool), while inserting a substantive test such that the reasonable person would have to agree that the conduct was already dishonest in order for a jury to convict.⁷⁰ The Australian Government also considered and ultimately rejected incorporating the dishonesty standard into the Australian cartel offence after it had been included in s 188 EA02 in the UK.⁷¹ Given the plethora of difficulties associated with the adoption of the dishonesty test, not to mention the wider damage that is associated with overuse of the criminal law,⁷² it was destined to cause prosecutors considerable difficulty and this was realised in

⁶⁴ Stephan (n 57).

⁶⁵ See e.g. J Joshua and C Harding, ‘Breaking Up the Hard Core: The Prospects for the Proposed Cartel Offence’ (2002) *Criminal Law Review* 933

⁶⁶ R Williams, ‘Cartels in the Criminal Law Landscape’ in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 289.

⁶⁷ This approach has been described as both forward-looking and top-down, see respectively P Whelan, ‘A Principled Argument for Personal Criminal Sanctions Punishment under EC Cartel Law’ (2007) 4 *Competition Law Review* 7, and C Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels’ (2006) 14 *Critical Criminology* 181, 200.

⁶⁸ See J Joshua, ‘DOA: Can the UK Cartel Offence be Resuscitated?’ in C Beaton-Wells & A Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 148.

⁶⁹ The substantive test for dishonesty was laid down in *R v. Ghosh* [1982] 2 All ER 689, and also requires that the defendant him or herself also realised that their conduct was dishonest by those standards.

⁷⁰ Indeed Joshua points to the lack of rigour of analysis in the selection of dishonesty by the drafters, J Joshua and C Harding (n 65) particularly II.B. Additionally see A MacCulloch, ‘Honesty, Morality and the Cartel Offence’ (2007) 28(6) *ECLR* 355, 361-362, and D Corker, ‘Opinion: Criminal Cartel Offence Revision’ (2014) 13(3) *Competition Law Journal* 262, 263.

⁷¹ See B Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 *Australian Business Law Review* 235, Calvani and Calvani (n 25) 135-137, F Haines and C Beaton-Wells, ‘Ambiguities in Criminalizing Cartels: A Political Economy’ (2012) 52 *British Journal of Criminology* 953, and A MacCulloch, ‘The Cartel Offence: Is Honesty the Best Policy?’ in BJ Rodger (ed) *Ten Years of UK Competition Law Reform* (DUP 2010).

⁷² See discussion in Williams (n 66) and A Stephan, “‘The Battle for Hearts and Minds’: The Role of the Media in Treating Cartels as Criminal’, in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 384. More generally also see discussion in G Lamond, ‘What is a Crime?’ (2007) 27(4) *OJLS* 609.

the only contested prosecution under the original s 188 EA02.⁷³ Even with its hands on an imperfect legislative tool however, the OFT had the opportunity to earn legitimacy⁷⁴ through astute exercise of enforcement discretion, particularly in relation to case selection, and pro-active advocacy to build support for the offence from vital constituents, including the courts (judges and juries), the business community, and the wider public.⁷⁵ The next section addresses the exercise of enforcement discretion by the OFT and argues that through a series of missteps and poor judgment, it failed to seize the opportunity to earn legitimacy for the cartel offence and establish a normative commitment to s 188 EA02.

3. Exercise of Enforcement Discretion

Justice should be blind yet we all recognise the value of precedent, and so selecting a suitable test case to establish precedent is an important symbolic exercise of enforcement discretion that rests with the regulator. Hawkins highlights the threat posed by ambivalence about right and wrong, such as with a lack of public support for criminalising cartels, and he identifies the need for selective symbolic action to maintain legitimacy where ‘there is a lack of substantial moral and political consensus about the agency’s mandate’.⁷⁶ In such circumstances, it becomes crucial that the symbolic enforcement activity targets conduct that is widely perceived as morally blameworthy,⁷⁷ so that a perception of fair, right, proper, and appropriate enforcement is built up. Where the symbolic enforcement activity targets conduct that is not easily characterised as wrongful according to established norms, it would be unable to command community confidence and may further undermine legitimacy, rather than remedying the regime’s defects. Indeed Hawkins also suggests that enforcement activity regarded as undeserved ‘invites condemnation as vindictiveness’ by the public and the firms that are subject to regulation.⁷⁸ Such a scenario hardly fosters community confidence in the regulator, nor engenders a compliance culture within the business community. The OFT had a mixed record in exercising its judgment to build legitimacy with regards to its civil enforcement powers. Early investigations involved well-known consumer goods such as board games⁷⁹ and replica football strips,⁸⁰ those where the National Health Service, and thus the UK taxpayer, was the victim of anti-competitive behaviour,⁸¹ and later investigations

⁷³ See the jury verdict of not guilty against Nicholas Stringer and Clive Dean in the criminal cartel prosecution involving galvanized steel tanks. Note that a third defendant, Peter Nigel Snee, pleaded guilty under s 188 EA02 before the trial commenced. See ‘CMA statement following completion of criminal cartel prosecution’ CMA Press Release, 24 June 2015, <<https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>> accessed 18 November 2016. Also see L Fortado, ‘UK antitrust watchdog loses criminal case’ Financial Times, 24 June 2015.

⁷⁴ See discussion above, and particular in reference to Tyler, Fagan, and Geller (n 39), 754.

⁷⁵ See Kovacic (n 63) 59-60.

⁷⁶ K Hawkins (n 9), 244-245.

⁷⁷ Ibid.

⁷⁸ Ibid., 302-303.

⁷⁹ OFT Decision No. CA98/8/2003 Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games, 21 November 2003.

⁸⁰ OFT Decision No. CA98/6/2003 Price-fixing of Replica Football Kit, 1 August 2003.

⁸¹ Decision of the Director General of Fair Trading No. CA98/2/2001 Napp Pharmaceutical Holdings Ltd and Subsidiaries (NAPP), 30 March 2001.

included the construction,⁸² tobacco,⁸³ and dairy industries.⁸⁴ In focusing on these products and industries, which are more easily recognisable to the general public than obscure component parts higher up in the supply chain, the OFT was undoubtedly building moral and political consensus for tough sanctions against anti-competitive behaviour.⁸⁵ The selection of these cases would have helped to illustrate the harm that can result from anti-competitive behaviour to the OFT's key constituents, thus justifying (and giving legitimacy to) the OFT's enforcement powers and strategy. This approach would have helped to establish normative commitment to the civil prohibitions, and would have helped to overcome any legitimacy deficit that existed as a result of applying traditional deterrence theory in implementing the civil sanctions. Nonetheless, the OFT's case selection under its civil enforcement programme was also the subject of some criticism,⁸⁶ although the heaviest blow was struck against its case management processes and internal quality review.⁸⁷ The OFT's case selection record and prioritisation strategy for its civil enforcement programme had some clear successes that were tempered, perhaps overshadowed, by the problems in managing investigations through to outcomes, and its poor record on appeal. On the OFT's record regarding its criminal enforcement programme however, the OFT's exercise of enforcement discretion in case selection was just as damning as the overall level of enforcement activity and its devastating performance in court.

The immediate task facing the OFT when selecting the first case to bring under s 188 EA02 was presumably to identify a case where the evidence was particularly strong, the facts were fairly straightforward, and an injury to some defined group of individuals could be fairly assumed, even if it need not be proven. This would allow the OFT, as a new prosecutor, to build an unambiguous narrative that the conduct was harmful and, irrespective of the requirements of the substantive law, morally blameworthy according to established norms. By placing the conduct within a known and understood framework of values⁸⁸ it would be regarded as fair, right, proper, and appropriate to judge and jury that the defendants were facing a criminal prosecution, with the potential sentence of imprisonment.⁸⁹ Such a prosecution would be perceived as legitimate, and be capable of helping to overcome any pre-existing legitimacy deficiencies within the legislative

⁸² OFT Decision No. CA98/2/2009 Bid rigging in the construction industry in England, 21 September 2009.

⁸³ OFT Decision in Case CE/2596/03: Tobacco, 15 April 2010.

⁸⁴ OFT Decision No. CA98/3/2011 Dairy retail price initiatives, 26 July 2011.

⁸⁵ Kovacic (n 63) 65-66 and Stephan (n 72) 391-392. For a positive view of the OFT's early civil enforcement work under the Competition Act 1998, see A Riley, 'Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement' in BJ Rodger (ed) *Ten Years of UK Competition Law Reform* (DUP 2010).

⁸⁶ See discussion in e.g. C Graham, 'The Reform of UK Competition Policy' (2012) 8(3) *European Competition Journal* 539, D Ridyard, 'Another Fine Mess: OFT Proposals Pave the Way to Effects-Based Analysis of Competition Law Penalties' (2013) 34(3) *ECLR* 128, P Freeman, 'Competition Policy in the UK – Lessons from the Past Decade' (2011) 10(4) *Competition Law Journal* 251, 260-261.

⁸⁷ See National Audit Office, 'The Office of Fair Trading: Enforcing Competition in Markets', HC 593 (2005–06), 17 November 2005, and discussion in S Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK' (2011) 7(1) *European Competition Journal* 1.

⁸⁸ Hawkins (n 9), 244-245.

⁸⁹ See a general discussion of fairness and legitimacy in this context by Kovacic (n 63) 53-55, particularly 60.

regime. It would have been naïve to form the view that all the OFT needed to do in its first prosecution was to satisfy a strict reading of the offence as judges do more than oversee advocates seeking to persuade juries, and juries come into the jury box with the same views as the general public. The judiciary has various procedural tools that can be deployed to derail or weaken a criminal prosecution⁹⁰ and so early prosecutions needed to be clear cut and dealing with unambiguously wrongful conduct, thus implicitly reassuring the judiciary that it was fair and just that the individual(s) were facing imprisonment,⁹¹ and that the OFT was a competent prosecutor.⁹²

As it happens the first s 188 EA02 prosecution was more thrust upon the OFT, than selected by it. The case arose out of a bid-rigging and price-fixing cartel in the international market for supplying marine hoses. Given that marine hoses are large flexible rubber hoses used to transfer oil, and the harm was primarily inflicted upon offshore extraction and transportation companies, far up in the supply chain, this case would never be one to galvanise public support for criminalisation. Indeed, the esoteric nature of the product created a barrier in itself in prosecuting the case before a jury, and the prosecutor would have had a difficult task in building sympathy for the victims of this cartel so that imprisoning the cartellists appeared a fair, right, proper, and appropriate outcome. However, the circumstances of the case made it unnecessary to win over a jury as the three defendants agreed to plead guilty following their arrest in the United States and subsequent plea agreements with the US Department of Justice. The terms of the plea agreements for Peter Whittle, David Brammar, and Bryan Allison were remarkable, and entailed them agreeing to minimum jail terms in the United States, but they would return to the UK in order to plead guilty to the cartel offence under s 188 EA02, and serve their sentences in the UK.⁹³ If the sentences handed down by the UK courts equalled or exceeded the terms of the US plea agreements then the US prison sentences would essentially be discharged. Crucially, as part of the plea agreements the defendants agreed not to seek shorter periods of imprisonment from the UK courts than agreed as part of the plea agreement, and if shorter sentences were imposed by the UK courts, the defendants agreed to return to the United States for further sentencing⁹⁴ (and would be liable to extradition proceedings if they refused to voluntarily return).

⁹⁰ See Kovacic (n 63) 53. For a discussion of judicial reluctance to make use of incarceration in cartel cases see Harding, Beaton-Wells, & Edwards (n 60).

⁹¹ See Hawkins (n 9), 303, Calvani and Calvani (n 25) 137-140, DD Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201, 237, DM Low and CW Halliday, 'Redesigning a Criminal Cartel Regime: The Canadian Conversion' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 103, and P Massey and JD Cooke, 'Competition Offences in Ireland: The Regime and its Results' in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 121.

⁹² For a discussion of the impact of court doubts about the capability of the US FTC in the 1970s and 1980s see WE Kovacic, 'The Modern Evolution of US Competition Policy Norms' (2003-2004) 71 *Antitrust Law Journal* 377, 397-399, 413.

⁹³ See plea agreements entered into in *U.S. v. Peter Whittle* (Criminal No. H-07-487-03, *U.S. v. David Brammar* (Criminal No. H-07-487-02), and *U.S. v. Bryan Allison* (Criminal No. H-07-487-01), <<http://www.justice.gov/atr/cases/allison.htm>> accessed 18 November 2016.

⁹⁴ See plea agreements entered into in *U.S. v. Peter Whittle* (Criminal No. H-07-487-03, *U.S. v. David Brammar* (Criminal No. H-07-487-02), and *U.S. v. Bryan Allison* (Criminal No. H-07-487-01) at paragraphs 16-17 of those agreements, <<http://www.justice.gov/atr/cases/allison.htm>> accessed 18 November 2016.

On the one hand, through this case, the OFT was able to ‘jump-start’ its criminal enforcement programme,⁹⁵ and the United States benefitted from offenders serving jail time abroad as well as attaining the soft-power benefit of purportedly strengthening a fellow criminal antitrust regime. On the other hand, this precedent-setting case would not assist with earning legitimacy for the cartel offence before juries, and the predetermined, packaged nature of the prison sentences always risked undermining efforts to build support of the judiciary for the offence. It was therefore far from the ideal case with which to establish greater normative commitment to the law. Yet the OFT had little other option than to go along, particularly as political pressure would have been building to make use of the criminal enforcement powers that it gained over 4 years previously,⁹⁶ and the defendants’ counsel were pushing the plea agreements to ensure their clients served jail time in the UK, closer to home.⁹⁷

Given the lack of societal support for criminalisation in the UK, and that the House of Lords had previously ruled that cartel conduct was not criminal before the Enterprise Act 2002 entered into force,⁹⁸ it came as a shock to the defendants, and likely a pleasant surprise to the OFT, that the Crown Court judge imposed longer sentences upon the defendants than they had agreed to under the terms of the US plea agreement.⁹⁹ Judge Rivlin also imposed director disqualification orders (DO) on all three defendants, although on the basis of s 2 CDDA86 allowing for the imposition of a DO following conviction of an indictable offence, and not on the basis of s 9A CDDA86 allowing competition disqualification orders to be imposed. The longer jail sentences did not stand however, as the English Court of Appeal reduced the terms of imprisonment down to the terms that the defendants agreed to in the US plea agreements.¹⁰⁰ It is the ruling of the Court of Appeal that has led at least one commentator to describe it as a ‘pyrrhic victory’ for the OFT.¹⁰¹ In rendering the Court’s judgment Hallett LJ took several opportunities to highlight the judges’ discomfort that the defendants were not seeking to reduce their sentences to below the terms of their US plea agreements, so as to avoid having to return to the US upon their UK release.¹⁰²

With the convictions the OFT was provided with its first success under s 188 EA02, yet it was no closer to providing much needed legitimacy to the offence, not least because Hallett LJ stated that ‘we have our doubts as to the propriety of a US prosecutor

⁹⁵ Calvani and Calvani (n 25) 139-140.

⁹⁶ Indeed Beaton-Wells argues that the OFT was overly risk averse and waited too long for the ‘right’ case, which perhaps resulted in its predicament in *Marine Hoses*, see C Beaton-Wells, ‘Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges’ in C Beaton-Wells & Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011), 194.

⁹⁷ For an excellent insight into the cartel operations as well as the circumstances of the US arrest and plea agreement negotiations see An Interview of Bryan Allison by M O’Kane, ‘Does prison work for cartelists? – The view from behind bars’ (2011) 56(2) *Antitrust Bulletin* 483.

⁹⁸ *Norris v. U.S.* [2008] 1 AC 920, also see discussion in P Whelan, ‘Resisting the Long Arm of Criminal Antitrust Laws: *Norris v The United States*’ (2009) 72(2) *MLR* 272.

⁹⁹ Judgment of HHJ Geoffrey Rivlin QC in *R. v. Whittle, Allison, & Brammar*, unreported, Southwark Crown Court, 11 June 2008.

¹⁰⁰ *R. v. Whittle, Allison & Brammar* [2008] EWCA Crim.2560, 14 November 2008

¹⁰¹ J Joshua (n 68) 138-139.

¹⁰² See *R. v. Whittle, Allison & Brammar* [2008] EWCA Crim.2560, 14 November 2008 at [27] – [32].

seeking to inhibit the way in which counsel represent their clients in a UK court'.¹⁰³ Given the judicial doubts it seems unlikely that the sentences handed down could be clearly regarded as fair, right, proper, and appropriate from a UK perspective, and thus the outcome of the first cartel offence prosecution has glaring legitimacy issues. On the face of it the convictions in *Marine Hoses* appeared to boost the OFT's objective of preventing cartels by indicating a rise in the probability of sanction, and so boosting overall deterrence. On deeper analysis however, the circumstances of the case most likely diminished the perception of the cartel offence and the OFT as capable of exercising prosecutorial enforcement discretion in fair and appropriate manner in the eyes of key constituents, i.e. the judiciary, legal and business communities, and the wider public.¹⁰⁴ As discussed above, a diminishing perception of fairness and neutrality can undermine legitimacy and voluntary compliance with the law.¹⁰⁵ This is especially true as a perceived increase in deterrence cannot overcome a lack of normative commitment to the law, and the law itself already had legitimacy issues arising from the original legislative framing.

While *Marine Hoses* was somewhat foisted on the OFT, the decision to select an alleged two firm cartel, involving the price-fixing of air passenger fuel surcharges between British Airways (BA) and Virgin Atlantic Airways (VAA), as the test case for the first contested prosecution was within its own control.¹⁰⁶ On the face of it, a case involving well known firms and rivals colluding to fix the charges imposed on air passengers has the potential to resonate with the general public, and thus the pool of potential jurors. Jurors would likely understand and relate to the facts of a case involving the setting of fuel surcharges, and even if the formulas for the setting of prices quickly become complicated, they may well know someone who paid such a charge while booking a transatlantic flight, enabling a sense of the impact of any collusion in the real world. In short, the case appeared to be able to be categorised as involving obviously wrongful conduct that was easily framed within established moral norms, such that exercising discretion to prosecute would be perceived as fair, right, proper, and appropriate. Yet the suitability of the case as the OFT's first contested prosecution begins and ends with the proximity of the conduct to the ordinary consumer and average person

¹⁰³ *R. v. Whittle, Allison & Brammar* [2008] EWCA Crim.2560, 14 November 2008 at [28]. As a more general matter, UK courts' resistance to plea bargaining is well known and should come as no surprise, see e.g. discussion in M Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Edward Elgar 2012), 152, and press reporting such as J Croft and M Peel, 'Judge condemns BAE plea deal' *Financial Times*, 21 December 2010, and C Binham and E Hammond, 'Judge calls for more funding for SFO' *Financial Times*, 24 May 2012. It may be that the introduction of deferred prosecution agreements (DPAs) into UK law, as a result of the Crime and Courts Act 2013 Schedule 17, will bring about a more general shift in the attitude of the courts in this area, although it is perhaps unlikely that any shift would alter the view taken of a US prosecutor seeking to constrain the options open to a UK court.

¹⁰⁴ For a discussion of the sense of fairness of the US plea agreement system see M O'Kane (n 97).

¹⁰⁵ See above notes 37-39, and accompanying text.

¹⁰⁶ Although this is not to dismiss the likely presence of pressure upon the OFT to reach a decision in the case, and separately to increase the use of its criminal enforcement powers. The pace of international developments in parallel cartel investigations also likely added pressure on the OFT officials to decide whether to bring a prosecution in the UK or not, see e.g. the plea agreement entered into by British Airways with the US Department of Justice under which BA agreed to pay a \$300 million criminal fine for its role in fixing the price of passenger and cargo flights, 1 August 2007, <http://www.justice.gov/archive/atr/public/press_releases/2007/224928.htm> accessed 18 November 2016.

on the high street. One foreseeable difficulty with the operation of modern day criminal enforcement programmes is the tension between competition authority leniency programmes and criminal prosecutions.¹⁰⁷ Under the terms of leniency programmes in most developed competition law jurisdictions, the first firm to approach the authorities with information relating to a cartel not already under investigation will receive full immunity from civil sanctions, and its employees will receive immunity from prosecution.¹⁰⁸ The lure of immunity is designed to destabilise cartels and create a race to confess amongst cartelists,¹⁰⁹ and the conventional wisdom is that these programmes are overwhelmingly successful.¹¹⁰ The tension arises in the criminal law sphere where the principle of equal treatment applies and criminal co-conspirators would generally not be expected to receive vastly differing treatment,¹¹¹ especially in jurisdictions where the prosecutor must aim to be an unbiased pursuer of justice.¹¹² Yet in a multi-party cartel two equally culpable cartelists may be subjected to extremely different treatment, with one firm and its employees receiving full immunity, and the other potentially receiving multi-million dollar fines, and key individuals being imprisoned for up to 10 years (to use the US as an example). The US antitrust criminal enforcement programme has thrived in spite of this tension with leniency, yet this may be due to a number of factors peculiar (so far at least) to the US antitrust regime and its enforcement experience, and not easily or quickly replicated elsewhere. The implications of the relationship between criminalisation and leniency are still to be fully understood,¹¹³ but the existence of plea bargaining in the US,¹¹⁴ coupled with an established enforcement record, built on astute and prudent case selection,¹¹⁵ are certainly factors in the cohabiting relationship in US antitrust. Notwithstanding the tolerated cohabitation between criminal sanctions and leniency in the US, there are several reasons to expect that the inherent tension between

¹⁰⁷ Indeed to some extent there is also a tension between leniency programmes and civil antitrust enforcement given that leniency results in disparate treatment before the law, one commentator describes the existence of leniency programmes as prioritizing efficiency objectives over moral condemnation, see Furse (n 103) 46.

¹⁰⁸ For a good comparative discussion of the strengths and weaknesses of the EU and US antitrust leniency programmes see N Zingales, 'European and American Leniency Programmes: Two Models Towards Convergence?' (2008) 5(1) Competition Law Review 5.

¹⁰⁹ CR Leslie, 'Trust, Distrust and Antitrust' (2004) 82(3) Texas Law Review 515.

¹¹⁰ See e.g. MA Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies* (Edward Elgar 2011), particularly Chapter 7, and JS Sandhu, 'The European Commission's leniency policy: a success?' (2007) 28(3) ECLR 148, although see notes 54-56 and accompanying text.

¹¹¹ The difficulty in combining immunity with a criminal enforcement programme is particularly acute in jurisdictions adhering to the principle of mandatory prosecution, on this point and that of the principle of equal treatment see P Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (OUP 2014), 240-241.

¹¹² See e.g. the principles that must be followed by the Crown Prosecutors in England and Wales, such that their decisions must be unbiased and objective, detailed at <<https://www.cps.gov.uk/about/principles.html>> accessed 18 November 2016. This approach is in contrast to the heralding of high conviction rates and sentences in jurisdictions where prosecutors are elected officials, or political appointees.

¹¹³ See Harding, Beaton-Wells, & Edwards (n 60), 234.

¹¹⁴ For a useful discussion of the value of plea bargaining in the US as compared with other jurisdictions see OECD Competition Committee, 'Plea Bargaining/Settlement of Cartel Cases' (DAF/COMP(2007)38, 22 January 2008), available at: <<https://www.oecd.org/competition/cartels/40080239.pdf>> accessed 18 November 2016.

¹¹⁵ See discussion in P Whelan (n 111), 271 – 272.

the two will exacerbate the legitimacy problems in trying to establish the criminal cartel offence in the UK, not least as a result of the UK's case selection history.¹¹⁶

The tension between leniency and criminal enforcement arose in *R. v. Burns and others (British Airways)*¹¹⁷ as VAA sought immunity under the terms of the UK leniency programme in March 2006, which prompted the OFT to instigate twin track civil and criminal investigations involving separate case teams.¹¹⁸ The OFT's handling of the criminal investigation following VAA's immunity application exposed many procedural failings on its part.¹¹⁹ The failings ranged from the OFT's approach to securing admissions of guilt from VAA managers,¹²⁰ its failure to undertake detailed analysis of how passenger fuel surcharges and flight fees are actually fixed, and particularly its overreliance on VAA's solicitors to provide it with relevant evidence.¹²¹ Hodges notes the importance of actual and perceived fairness, and transparency, in enforcement procedure to secure legitimacy,¹²² yet it is clear that the potential perception of bias towards VAA with each of these procedural failings creates significant legitimacy problems. The final issue led to a significant failure to disclose evidence pre-trial, such that 70,000 emails previously thought to be lost were recovered mid-trial, some of which would have had an 'appreciable impact' on the evidence to be presented.¹²³ The breach of the OFT's statutory duty to disclose the emails, combined with its failure to undertake the pricing analysis resulted in the trial collapsing three weeks into a trial that was expected to last six months. These failings, and the high profile collapse of the trial, was predicted to 'seriously undermine the credibility of the UK's criminal offence'.¹²⁴ A key reason for the debilitating effect on the criminal cartel offence was that in addition to undermining confidence in the OFT to bring prosecutions, it also very publicly diminished the perceived likelihood of sanction under s 188 EA02, thereby reducing the deterrent value of the offence, which was its *raison d'être*.

¹¹⁶ For a wider discussion of the relationship and tensions inherent between criminalization and leniency see Harding, Beaton-Wells, & Edwards (n 60).

¹¹⁷ The tensions in the case, which were expertly handled by the trial judge, are discussed in detail in N Purnell, C Bellamy, N Kar, D Piccinin, and P Sahathevan, 'Criminal Cartel Enforcement – More Turbulence Ahead? The Implications of the BA/Virgin Case' (2010) 9(3) *Competition Law Journal* 313.

¹¹⁸ OFT Decision No. CA98/01/2012 Airline passenger fuel surcharges for long-haul flights, 19 April 2012, paragraphs 22 – 26.

¹¹⁹ The OFT itself acknowledged several mistakes in the handling of the case in a subsequent internal Board review, see OFT, Project Condor Board Review (December 2010), < https://assets.digital.cabinet-office.gov.uk/media/556876fce5274a1895000008/Project_Condor_Board_Review.pdf > accessed 18 November 2016.

¹²⁰ Although this proved to be less of an issue in light of the ruling of the Court of Appeal in *R. v. George* [2010] EWCA Crim 1148, discussed in text below.

¹²¹ See 'OFT under fire over whistleblowers after BA price-fixing trial fails' *The Guardian*, 11 May 2010. The accusation was also made by Ben Emmerson QC that the OFT 'delegated disclosure' to VAA's solicitors and that it had been 'guilty of incompetence on a monumental scale', as reported in 'OFT under fire over whistleblowers after BA price-fixing trial fails' *The Guardian*, 11 May 2010.

¹²² C Hodges (n 11), 27.

¹²³ As reported in 'Collapsed BA price-fixing trial places OFT and Virgin in the dock' *The Telegraph*, 11 May 2010.

¹²⁴ See Stephan (n 72) 392.

In addition to the OFT's analytical failings, selecting the *British Airways* case for the first contested prosecution in the first place was a devastating failure in judgment.¹²⁵ It is hard to envisage how the OFT could earn legitimacy through demonstrating fair, right, proper, and appropriate exercise of enforcement discretion in a case involving a two firm cartel, when one firm's employees are immunized and the other's employees are subjected to the full force of the criminal law.¹²⁶ Prosecutions in cases where some firms and/or their employees have been granted leniency or immunity may well be legitimate. Yet it is difficult to avoid a perception of enforcement bias in a two-party cartel where one party has immunity, and where the prosecution seeks legitimacy by implicitly framing the conduct within a set of moral norms. The OFT's policy of targeting high impact cases¹²⁷ backfired spectacularly.¹²⁸ It appears clear that the OFT became overly concerned, perhaps blinded, with demonstrating the severity of sanction to achieve general deterrence, and lost sight of the need to ensure the fairness, and appropriateness of the sanctions sought in each and every case.¹²⁹ In its instrumental approach to both the criminal law and leniency in this case, the OFT served to further erode the more important task of establishing normative commitment to the law, particularly given its pre-existing legitimacy defects. Indeed a similar criticism has been made by the Competition Appeal Tribunal in relation to the OFT's civil enforcement programme.¹³⁰ It is the link between the infringement and sanction that secures the procedural fairness of the sanction and helps retain normative commitment and overall legitimacy. The failed prosecution in *British Airways* prompted a thorough internal Board review by the OFT, which recommended several structural, procedural, and human resource reforms,¹³¹ yet

¹²⁵ The OFT subsequently acknowledged, with some understatement, that 'it was not ideal as the OFT's first contested criminal case', OFT, Project Condor Board Review (n 119), 2.

¹²⁶ See discussion in P Whelan, 'Protecting Human Rights in the Context of European Antitrust Criminalization' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer 2010), 173 – 175, Furse (n 103) 157 – 159, and P Crowther, 'Opinion: Reform of cartel legislation lacks specificity' *The Lawyer*, 11 April 2011. For an excellent account of the conflicts and practical difficulties associated with prosecutorial dependence upon one firm's employees as 'immunised witnesses' in prosecutions against their co-cartelists, see A MacCulloch and B Wardhaugh, 'The Baby and the Bathwater: The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy, A paper prepared for the Centre for Competition Policy Conference, UEA, 14 June 2012, available on SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089369> accessed 18 November 2016.

¹²⁷ See e.g. discussion regarding the OFT's prioritisation around impact and outcome, in a speech by J Fingleton, former Chief Executive of the OFT, 'UK Competition Policy: the first decade' at the 40th Anniversary of Cleary Gottlieb Steen & Hamilton LLP, London, <<http://www.fingletonassociates.com/speeches/uk-competition-policy-first-decade/>> accessed 18 November 2016. Also see M Bloom, 'The Competition Act at 10 years old: enforcement by the OFT and the sectoral regulators' (2010) 9(2) *Competition Law Journal* 141, 141 – 142.

¹²⁸ See reporting by C Binham, 'Cloud hangs over crime agencies as chiefs step down' *Financial Times*, 23 February 2012.

¹²⁹ See notes 26-39 above and accompanying text.

¹³⁰ *Eden Brown Limited v. OFT* [2011] CAT 8, Final Judgment of 1 April 2011 at paragraph 99 where the CAT stated: 'in having regard to the need for deterrence, it is important not to lose sight of the need for the penalty properly to reflect also the culpability of the undertaking in terms of the seriousness, and hence the scale and effect of the infringement'.

¹³¹ OFT, Project Condor Board Review (n 119). See press reporting by A Osborne, 'Flight of the OFT's Condor was doomed to crash on the BA runway', *The Telegraph*, 17 December 2010.

the wider legacy is probably its contribution to the debate as to whether the criminal cartel offence was fit for purpose.

The OFT's criminal enforcement record under s 188 EA02 neither begins nor ends with *British Airways* and so it is useful to consider the record in full. In the 11 years of the OFT's criminal cartel powers it has secured one uncontested prosecution, suffered a humiliating collapse at trial, opened and closed three investigations,¹³² and transferred two across to the Competition and Markets Authority (CMA) on 31 March 2014.¹³³ This thin record undoubtedly created a very low perception of the likelihood of sanctions, and it sits in stark contrast to the pre-EA02 prediction that introducing a criminal cartel offence would lead to six to ten prosecutions a year.¹³⁴ Even if that estimate was always going to be wildly optimistic, the enforcement record under s 188 EA02 would likely be of the kind Baker had in mind when commenting that: 'having a criminal law against a profitable activity is unlikely to be effective as a deterrent if the normal prosecutions are so infrequent as to appear more like random lightning strikes or prosecutorial vendettas'.¹³⁵ Empirical studies support this by pointing to the greater importance of the perception of likelihood of sanction, over the severity of sanction, in motivating compliance.¹³⁶ The legitimacy concerns that always surrounded s 188 EA02 were only heightened in light of the manner in which the OFT exercised its enforcement discretion, particularly in relation to its judgment when selecting cases to prosecute. Yet it was not quite the fatal blow for the offence as the UK Government decided to try to legislate to improve the effectiveness of s 188 EA02.¹³⁷

¹³² The investigations concerned suspected cartel activity in the supply of agricultural products (from April 2010 – August 2011), between suppliers in the automotive industry (from February 2010 – October 2011), and between commercial vehicle manufacturers (from September 2010 – December 2011).

¹³³ These investigations involved suspected criminal cartel conduct in the construction industry, and suspected criminal cartel conduct in relation to the supply of galvanized steel tanks for water storage. The former case has resulted in a guilty plea from one defendant and proceedings are ongoing by the CMA (<<https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>> accessed 18 November 2016), and the latter case resulted in a guilty plea from one defendant before trial, and in the finding of two other defendants as not guilty at trial in June 2015, see further discussion below (see 'CMA statement following completion of criminal cartel prosecution' CMA Press Release, 24 June 2015, <<https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>> accessed 18 November 2016).

¹³⁴ Office of Fair Trading, *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) at 3.6. Although note that some may not regard the thin record as having a particular impact on firms' risk assessments given the continuing existence of the cartel offence and at least one prosecution, see B Rusch, 'Risk Modelling and Antitrust Risk Assessment in Light of UK Cartel Enforcement Policy' (2014) 13(1) *Competition Law Journal* 107.

¹³⁵ Baker (n 28) 35.

¹³⁶ See above at notes 26-28 and accompanying text. Also see PH Robinson and JM Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) *OJLS* 173, 205, and M Levi, 'Hitting the suite spot: sentencing frauds' (2010) *Journal of Financial Crime* 116, 125 – 126.

¹³⁷ The UK Government set out its reform proposals in Department for Business, Innovation, and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform* (BIS/11/657) (March 2011), <<https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform>> accessed 18 November 2016. The Government response to the consultation was outlined in Department for Business, Innovation, and Skills, *Growth, Competition and the Competition Regime, Government Response to Consultation* (BIS/12/512) (March 2012), <

4. *The Nightmare Reform of the Cartel Offence*

In assessing the deterrent value and legitimacy of the UK competition authorities' criminal enforcement programme, as well as the impact of the changes brought about by the Enterprise and Regulatory Reform Act 2013 (ERRA13), it is unnecessary to consider the alternative reform proposals for s 188EA02 put forward before the Act was passed, which already has a considerable literature base.¹³⁸ Instead it is important to focus on the reforms that have been implemented, and assess whether these reforms will facilitate a much-needed improvement in the effectiveness and legitimacy of the criminal cartel offence under s 188 EA02. It is the argument of this article that the reforms will not improve the effectiveness or legitimacy of the cartel offence, and in fact they have already created significant uncertainty in the law as a result of a bizarre new statutory defence, such as to further undermine and fail to secure the legitimacy of the criminal cartel offence.

The ERRA13 brought about several significant reforms to the UK competition law regime of relevance here, including the merger of the OFT and Competition Commission (CC) into the new CMA¹³⁹ and of course the amendments to the operation of the cartel offence. The Government's reforms removed the dishonesty standard and crafted the revised cartel offence so that it does not include cartel arrangements made openly, which is to say arrangements that have been published before being implemented. The primary motivation here was to remove dishonesty because of the perception that it was making the offence harder to prosecute,¹⁴⁰ setting aside that criminal offences *should* be hard to prosecute,¹⁴¹ in the belief that this would thereby facilitate an increase in the number of prosecutions and in the perception of likelihood of sanction. As with the introduction of individual sanctions under the EA02, the ERRA13 reforms were clearly motivated by an instrumental motivation to increase the deterrent effect of sanctions in UK competition law, without much thought as to whether it would help engender community confidence in the offence. In order to remove dishonesty without leaving an

<https://www.gov.uk/government/publications/growth-competition-and-the-competition-regime-government-response-to-consultation>> accessed 18 November 2016.

¹³⁸ For a gateway into the reform debate before the passing of the ERRA13 see Wardhaugh (n 53), A Bailin, 'Doing Away with Dishonesty' (2011) 10(3) Competition Law Journal 169, J Joshua, 'Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?' (2010) theantitrustsource, August, P Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (2013) 33(3) OJLS 535, and R Patel, 'The Removal of Dishonesty from the Cartel Offense and the Publication Defense: A Panacea?' (2012) May CPI Antitrust Chronicle 1.

¹³⁹ Although note that the Competition Commission had no role in relation to the criminal cartel offence, or the civil prohibition against anti-competitive agreements under s 2 CA98, prior to the ERRA13, and so the merger of itself had no direct impact on the criminal enforcement programme.

¹⁴⁰ Government Response to Consultation (BIS/12/512) (n 137), paragraph 7.2. The Government was also supported by the OFT in deciding to remove dishonesty, see Chapter 5 of 'The OFT's response to the Government's consultation', June 2011 (OFT1335), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312068/L-O-competition-regime-for-growth.pdf> accessed 18 November 2016.

¹⁴¹ See Bailin (n 138) 173.

overly broad, almost strict liability criminal offence,¹⁴² additional safeguards were necessary. The ERRA13 inserted statutory exclusions under s 188A, which apply where customers are notified of the potentially criminal arrangement in advance of entering into agreements with the parties to the cartel,¹⁴³ as well as where sufficient information relating to the arrangement is published before implementation.¹⁴⁴ The latter publication exclusion is somewhat anachronistic as it is satisfied only where the information is published via an advertisement in any of the London Gazette, the Edinburgh Gazette, or the Belfast Gazette.¹⁴⁵ It is useful to remember that any cartel arrangements that are either notified to customers, or published in the UK official public record, are not excluded from civil liability under s 2 CA98 (or from exposure to actions for damages for that matter), although engaging in an openly anti-competitive arrangement is deemed of less seriousness than covert conduct such that the criminal law is not utilized. One can briefly ponder whether the general public would consider it fair, right, proper, and appropriate to use publication of a notice of a cartel arrangement in the London Gazette, as the litmus test for criminality. Nonetheless, further safeguards against an overly broad criminal offence are also inserted into s 188B EA02, which provides for three new defences to the offence. The first two defences are a natural extension of s 188A EA02, and provide a defence to the conduct where the individual lacks intent at the time of making the agreement to conceal the nature of the arrangements from customers¹⁴⁶ on the one hand, or the CMA¹⁴⁷ on the other. Yet it is the third defence that surprised observers and has given rise to concern and debate.¹⁴⁸

In a spectacular display of self-defeating legislative drafting s 188B(3) EA02 provides a defence to the cartel offence where an individual can show that ‘before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.’ The CMA has stated that it regards ‘professional legal advisers’ as applying to external and in-house legal advisers whether qualified in the UK or a foreign jurisdiction.¹⁴⁹ The breadth of this defence to an offence that carries a 5 year term of imprisonment is astounding, particularly as read literally it does not require the individual to even make a good faith attempt to follow any legal advice provided. The lack of Parliamentary debate on the defences, although they were clearly introduced with a

¹⁴² bearing in mind that s 188 EA02 is already an inchoate offence where an agreement to implement a cartel is as much of an offence as implementation of one, see P Gilbert, ‘Changes to the UK Cartel Offence – Be Careful What You Wish For’ (2015) 6(3) *Journal of European Competition Law & Practice* 192.

¹⁴³ S 188A(1)(a) EA02, and also see CMA Cartel Offence, Prosecution Guidance (CMA9), 4.13.

¹⁴⁴ s 188A(1)(c) EA02, and also see CMA Cartel Offence, Prosecution Guidance (CMA9), 4.15.

¹⁴⁵ The Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014, SI 2014/535.

¹⁴⁶ S 188B(1) EA02.

¹⁴⁷ S 188B(2) EA02, and also see CMA Cartel Offence, Prosecution Guidance (CMA9), 4.23.

¹⁴⁸ See e.g. P Whelan, ‘Does the UK’s New Cartel Offence Contain a Devastating Flaw?’ (21 May 2013) post on UEA Competition Policy Blog, <<https://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/>> accessed 18 November 2016, A Stephan, ‘Four key challenges to the successful criminalization of cartel laws’ (2014) 2(2) *Journal of Antitrust Enforcement* 333, Corker (n 63) 265, and A Stephan, ‘The UK cartel offence: a purposive interpretation?’ (2014) 12 *Criminal Law Review* 879.

¹⁴⁹ CMA Cartel Offence, Prosecution Guidance (CMA9) at 4.24.

concern to avoid an overly broad criminal offence,¹⁵⁰ displays a level of rigour of review on a par with the OFT's analysis in *British Airways*. While there is a strong argument for the judiciary to adopt a bold purposive interpretation to avoid the 'manifest absurdity' of merely seeking legal advice acting as a complete defence,¹⁵¹ the interests of legal certainty would be best safeguarded by again seeking legislative reform, ideally to remove s 188B(3) entirely. The insertion of s 188B(3) EA03 has clearly created significant uncertainty as to how effectively the cartel offence can be enforced in the future and by introducing a broad new defence, it also operates to further lower the perceived likelihood of sanction under s 188 EA02. This is a perverse outcome when the reforms were designed to increase the deterrent effect by removing dishonesty to make it easier to prosecute individuals under s 188 EA02.

Removing dishonesty while inserting the obtaining of legal advice as a defence is a flawed reform that, surprisingly, could even be argued to be premature. While the dishonesty standard undoubtedly posed significant challenges for prosecutors, and conceptually it was not a good fit given the lack of public support for imprisoning cartellists,¹⁵² it provided the OFT with the potential to earn legitimacy through astute exercise of enforcement discretion. Interestingly, UK public opinion towards price fixing appears to have hardened considerably between 2007 and 2014 alone. In 2007 just 11% believed that imprisonment was an appropriate punishment for individuals involved in the decision to fix prices, whereas this rose to 27% by 2014.¹⁵³ In addition, the 63% who agreed that price fixing was dishonest in 2007 (and 25% held the view strongly), had rose to 91% in 2014 (with 51% holding the view strongly).¹⁵⁴ While the vast majority of public opinion believes price fixing to be dishonest, there is not yet a majority in support of individuals being imprisoned as a result of engaging in that conduct. It is conceivable that what Hawkins describes as 'selective symbolic action',¹⁵⁵ i.e. exercise of enforcement discretion by the CMA, most likely though a policy and sanction mix of further advocacy efforts, and selection of the right test case, could have seen the first successful contested prosecution without changing the law. It is somewhat ironic therefore¹⁵⁶ that after the passing of the ERRA13 there have been two distinct prosecutions under the original s 188 EA02, the first originated with the OFT and was continued by the CMA, whereas the second was initiated by the CMA (these will be referred to as the 'legacy prosecutions'). In *Galvanised Steel Tanks* the OFT charged an individual, Peter Nigel Snee, under the original s 188 EA02 with making a dishonest agreement in the supply of galvanized steel tanks for water storage.¹⁵⁷ Mr Snee later

¹⁵⁰ See discussion in A Stephan (n 148) 883.

¹⁵¹ Ibid.

¹⁵² See A Stephan (n 57) 133.

¹⁵³ Compare the results reported in A Stephan (n 57) with A Stephan, 'Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA', July 2015 CCP Working Paper 15-8, available on SSRN at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642181> accessed on 18 November 2016.

¹⁵⁴ Ibid.

¹⁵⁵ K Hawkins (n 9), 244.

¹⁵⁶ The late revival of the cartel offence by the OFT was also surprising and contrary to conventional wisdom that no further prosecutions would be possible until reforms entered into force, see e.g. A Stephan, 'How dishonesty killed the cartel offence' (2011) *Criminal Law Review* 446.

¹⁵⁷ OFT press release of 27 January 2014 (Press Release 04/14), <<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2014/04-14>> accessed 18 November 2016.

entered a guilty plea under s 188 EA02, and received a 6 month suspended jail sentence,¹⁵⁸ whereas his two alleged co-cartelists were found not guilty by a jury, in what was the first time that a jury had considered s 188 EA02.¹⁵⁹ As the dishonesty standard continues to apply to cartel behaviour agreed or implemented between 20 June 2003 and 31 March 2014, it remains possible for the CMA to bring other criminal charges under the original offence. The CMA has brought a second legacy prosecution case, in which Barry Kenneth Cooper has pleaded guilty to a charge of making a dishonest agreement concerning the supply of precast concrete drainage products.¹⁶⁰ The wisdom of expending public resources to bring a second legacy prosecution must surely be in doubt in light of Mr Snee's lenient sentence and the failure to convince a jury that the two co-defendants, who pled not guilty in *Galvanised Steel Tanks*, had acted dishonestly. Notwithstanding this legacy of the original cartel offence, the ERRA13 reforms have done little to improve (and may have further eroded) the legitimacy of cartel criminalization, or to increase normative commitment to the law, and the CMA is now entirely dependent on the judiciary to avoid the offence being undermined as a result of s 188B(3) EA02. The decreasing likelihood of sanction under s 188 EA02 in the aftermath of *British Airways* prompted Parliament to intervene in order to make it easier to prosecute the offence so as to boost deterrence. Yet this legislative manoeuvre may well have further eroded the legitimacy of the offence by undermining proportional justice and a sense of what is fair and right,¹⁶¹ as well as reducing deterrence due to the inclusion of s 188B(3) EA02. Additionally, the not guilty verdicts in *Galvanised Steel Tanks*, while involving the pre-ERRA13 offence, mark a failed prosecution for the CMA and likely perpetuate the perception of low probability of sanction under s 188 EA02. The overall level of deterrence has also likely suffered as Mr Snee was able to avoid serving any time in jail, notwithstanding his suspended sentence and the community service. The legitimacy of s 188 EA02 moving forward may well suffer a fatal blow if a wily cartel exploit s 188B(3) EA02 and the courts adopt a literal interpretation.¹⁶² The courts have, understandably, hardly been convinced by the prosecutorial efforts to date, and most of the earlier failures were not attributable to the inclusion of the dishonesty standard.¹⁶³ Given that the tension with leniency and the civil enforcement programme remains, the stakes are even higher for the CMA when exercising enforcement discretion to select its first prosecution under the revised s 188 EA02. The CMA will need time and good

¹⁵⁸ Mr Snee was also sentenced to serve 120 hours community service. His sentence reflected his cooperation with the CMA investigation, and that he was a witness against his two alleged co-cartelists. See CMA Press Release available at: <<https://www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel>> accessed on 18 November 2016.

¹⁵⁹ See CMA statement (n 122). Also see L Fortado (n 73). Details of the CMA investigation can be found on the CMA website: <<https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>> accessed 18 November 2016.

¹⁶⁰ Details of the CMA investigation and prosecution can be found on the CMA website: <<https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>> accessed 18 November 2016.

¹⁶¹ See discussion in P Whelan (n 126) 174.

¹⁶² For a discussion of why legitimacy matters and the importance of fairness in penalty drafting, not least to juries and judges, see LM Ouziel, 'Legitimacy and Federal Criminal Enforcement Power' (2013-2014) 123 *Yale Law Journal* 2236, 2322 – 2324.

¹⁶³ See e.g. R Patel (n 138).

judgment¹⁶⁴ in order to resuscitate the new cartel offence if Parliament decides against revising s 188B(3) EA02. Given this likely period of uncertainty and inaction (aside from any further legacy cases), the circumstances are propitious for the CMA to consider other options to enhance the legitimacy of the individual sanctions in UK competition law, and start to make routine use of its director disqualification powers.

5. *The Path to Legitimizing Individual Sanctions – CDOs*

The CMA, like the OFT before it, has the power to apply to the High Court, or the Court of Session in Scotland, for a competition disqualification order (CDO) to be imposed under s 9A of the Company Directors Disqualification Act 1986 (CDDA86).¹⁶⁵ In hearing the application the Court *must* issue a disqualification order if the individual is a director of a company that has breached competition law, and the individual's conduct as a director makes them unfit to be concerned with company management.¹⁶⁶ Alternatively the CMA also has the power to accept competition undertakings from an individual who is a director of a company that has breached competition law, where their conduct makes them unfit to be concerned in company management, and they offer to enter into a disqualification undertaking.¹⁶⁷ CDOs and competition undertakings can both be for a term of up to 15 years.¹⁶⁸ The CDO regime was introduced at the same time as the criminal cartel offence,¹⁶⁹ but in practice they are likely to be mutually exclusive as conviction under s 188 EA02, if charged as an indictable offence, would allow the Court to immediately issue a disqualification order under s 2 CDDA86, as happened in *Marine Hoses*.¹⁷⁰ This may be a factor in explaining the OFT's original focus on bringing prosecutions against directors under the cartel offence, in that it could lead to an almost two-for-one sanction when disqualification under s 2 CDDA86 followed conviction under s 188 EA02. It is also perhaps fortuitous that the CMA has a standalone CDO power as it was originally recommended in order 'to put the matter beyond doubt' that a disqualification order could be made against individuals convicted of the cartel offence, should the courts not interpret s2 CDDA86 to achieve that result.¹⁷¹ It is more likely however that the OFT, and now the CMA, have prioritized bringing prosecutions under the criminal cartel offence as it carries the potential for more symbolism and to have greater impact,¹⁷² as well as a greater deterrent value. Indeed empirical research carried

¹⁶⁴ For a discussion of some of the complexities likely to face prosecutions under the revised cartel offence see Corker (n 70).

¹⁶⁵ As inserted by s 204 of the Enterprise Act 2002, and amended by the Enterprise and Regulatory Reform Act 2013.

¹⁶⁶ Ss 9A(2)-(3) CDDA86.

¹⁶⁷ S 9B CDDA86.

¹⁶⁸ S 9A(9) and s 9B(5) respectively of the CDDA86.

¹⁶⁹ For a detailed, practical discussion of the CDO regime see J Galloway, 'Chapter 2A Competition Disqualification Orders' in A Mithani, *Directors' Disqualification* (LexisNexis, Looseleaf).

¹⁷⁰ Judgment of HHJ Geoffrey Rivlin QC in *R. v. Whittle, Allison, & Brammar*, unreported, Southwark Crown Court, 11 June 2008, as the disqualification orders imposed by the Crown Court were not appealed they are not relevant to *R. v. Whittle, Allison & Brammar* [2008] EWCA Crim. 2560.

¹⁷¹ 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) at paragraph 7.11.

¹⁷² See the London Economics Final Report commissioned by the OFT, *The impact of competition interventions on compliance and deterrence* (December 2011, OFT1391), 9-10.

out by Deloitte for the OFT, may justify this as criminal penalties are perceived as more important than director disqualification in deterring infringements.¹⁷³ Yet it is also noteworthy that those who responded on behalf of companies ranked CDOs as more important than adverse publicity and fines, and only just behind criminal penalties, in achieving deterrence.¹⁷⁴ Given the distinct deterrent value of CDOs,¹⁷⁵ the CMA has the opportunity to increase the overall effectiveness of individual sanctions in competition law by making use of s 9A CDDA86 (for the first time) and sending the message that there is an increasing likelihood of individual sanctions being imposed, notwithstanding the uncertainty surrounding s 188 EA02. Perhaps more importantly, use of the CDO powers would also enable the CMA to seek a greater normative commitment to individual sanctions for anti-competitive behaviour. There is strong evidence to suggest that CDOs would be more widely supported by the public, thus affording the CMA with greater levels of community confidence, and that they would be regarded as a more proportionate sanction to cartel conduct than the criminal cartel offence.¹⁷⁶ Indeed empirical research carried out in 2014 suggests that 75% of the British public believe that individuals who decide to fix prices should be banned from holding senior management positions, in contrast to only 27% who believe the individuals should face imprisonment.¹⁷⁷ The low level of public support for imprisonment, 11 years after s 188 EA02 first entered into force, highlights the ongoing legitimacy problem facing the CMA in exercising discretion to use that particular enforcement tool. The CMA has recently demonstrated its willingness to make use of its disqualification powers by procuring the first ever disqualification undertaking as a result of individual conduct related to a competition law infringement, under s 9B CDDA86. Following on from a CMA infringement decision against two online retailers for agreeing not to undercut each other on Amazon,¹⁷⁸ the CMA has recently secured a disqualification undertaking from one of the managing directors involved.¹⁷⁹ The use of disqualification undertaking powers in this case appears entirely appropriate given that it rests upon an infringement stemming from a two party cartel (Trods Ltd and GB eye Ltd) where one party (GB eye Ltd) has gained full immunity and protection against prosecution for its employees. The analogy that can be drawn against the basic scenario in *British Airways* suggests that the CMA may be turning to its director disqualification powers after learning the lessons from past failures,

¹⁷³ The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT by Deloitte (OFT962, November 2007), 72, Table 5.11.

¹⁷⁴ *Ibid.*

¹⁷⁵ See discussion in A Stephan, 'Disqualification Orders for Directors Involved in Cartels' (2011) 2(6) *Journal of European Competition Law & Practice* 529.

¹⁷⁶ Stephan (n 153).

¹⁷⁷ *Ibid.*, see responses to Q10. Note that the same research suggests a nuanced position is held by the general public, as 76% believe that price fixing should be treated as a criminal offence because of the harm caused by artificially inflated prices (responses to Q11), although this may be explained by a more lenient attitude towards individuals in contrast to the businesses involved (contrast responses to Q8 and Q10).

¹⁷⁸ CMA Infringement Decision, Online sales of posters and frames (Case 50223, 12 August 2016) against Trods Ltd and GB eye Ltd, <<https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf>> accessed 6 December 2016.

¹⁷⁹ The CMA secured a disqualification undertaking from Daniel Aston not to act as a director of any UK company for 5 years, see CMA Press Release of 1 December 2016 <<https://www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach>>

and it is hoped that this case is the first in a step by the CMA towards making routine use of its various director disqualification powers.

This article does not seek to claim that CDOs and disqualification undertakings are the perfect enforcement tool, or that the wider director disqualification regime is itself without problems.¹⁸⁰ Yet making use of a sanction mix and demonstrating flexibility in determining the most appropriate enforcement tools in specific cases could well be more effective than adopting a ‘one-size-fits-all’ approach whenever cartel offence prosecutions may technically be pursued.¹⁸¹ Director disqualification orders require diligent enforcement and resources for monitoring in order to prevent individuals evading DOs, and becoming involved in the running of firms through informal means, such as consultancy work,¹⁸² or from being compensated by the firm notwithstanding the DO.¹⁸³ The UK has responded to these recurring doubts regarding the CDDA86 regime by maintaining public registers of disqualified directors,¹⁸⁴ and increasing enforcement powers, limitation periods within which to bring DO applications, and expanding the statutory definitions for unfitness and acting as a shadow director.¹⁸⁵ In spite of concerns regarding the limitations of director disqualification regimes, the time has come for the small but growing number of competition authorities with DO powers to pro-actively make use of, and test the utility of this particular enforcement tool.¹⁸⁶

Lord Woolf described the purpose of the CDDA86 as being ‘the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a

accessed 6 December 2016, as well as a copy of the disqualification undertaking <<https://assets.publishing.service.gov.uk/media/583ff903e5274a1303000040/daniel-aston-director-disqualification-undertaking.pdf>>

accessed 6 December 2016.

¹⁸⁰ For a discussion of the merits of the director disqualification regime see e.g. A Belcher, ‘What makes a director fit? An analysis of the workings of section 17 of the Company Directors Disqualification Act 1986’ (2012) *Edinburgh Law Review* 386, S Griffin, ‘The disqualification of unfit directors and the protection of the public interest’ (2002) 53(3) *Northern Ireland Legal Quarterly* 207, A Hicks, ‘Director disqualification: Can it deliver?’ (2001) *Journal of Business Law* 433, D Milman, ‘Disqualification of directors: an evaluation of current law, policy and practice in the UK’ (2013) *Company Law Newsletter* 1, and D Milman, ‘Partial disqualification orders’ (1991) 12 *Company Lawyer* 224.

¹⁸¹ See e.g. Gunningham and Grabosky (n 43).

¹⁸² See C Beaton-Wells & B Fisse, ‘US policy and practice in pursuing individual accountability for cartel conduct: A preliminary critique’ (2011) 56(2) *The Antitrust Bulletin* 277, 292-295,

¹⁸³ See discussion in A Khan, ‘Rethinking Sanctions for Breaching EU Law: Is Director Disqualification the Answer?’ (2012) *World Competition* 77, 93-96, and WPJ Wils, ‘Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment’ (2001) *EUI/Robert Schuman Centre for Advanced Studies Workshop Proceedings*, 29.

¹⁸⁴ See the registers maintained by Companies House (<<http://wck2.companieshouse.gov.uk/dirsec>> accessed 18 November 2016) and The Insolvency Service (<<https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorssummary-new.asp>> accessed 18 November 2016).

¹⁸⁵ Note the most recent set of reforms introduced by the Small Business, Enterprise and Employment Act 2015, and the Deregulation Act 2015, discussed by P Nailey, ‘Legislative Comment: Deregulation Bill and Small Business, Enterprise and Employment Bill enacted to amend company law’ (2015) *Company Law Newsletter* 1.

¹⁸⁶ For concurring international views see DH Ginsburg & JD Wright, ‘Antitrust Sanctions’ (2010) 6(2) *Competition Policy International* 3, and Beaton-Wells & Fisse (n 182).

company.¹⁸⁷ The director disqualification regime's concern with good corporate management, and obviously not preventing anti-competitive behaviour, creates a blind spot for CDOs in that they only apply to directors, not lower-level management and staff, who can easily be responsible for a firm's involvement in a cartel. In a partial attempt to counter this limitation, and recognise the responsibility of directors for instigating a culture of compliance within the organisation,¹⁸⁸ the CDO applies to three categories of director conduct. A director can be caught under s 9A CDDA86 if: firstly, their conduct contributed to the breach of competition law;¹⁸⁹ secondly, if their conduct did not contribute to the breach but they had reasonable grounds to suspect a breach and took no steps to prevent it;¹⁹⁰ and thirdly where they did not know but ought to have known that the conduct constituted a breach of competition law.¹⁹¹ The result is that s 9A CDDA86 could extend to a large number of directors in instances involving a breach of competition law. Furthermore, the requisite breach is satisfied where there is an infringement of the prohibition against anti-competitive agreements in both UK¹⁹² and EU law,¹⁹³ as well as the prohibition against abuse of a dominant position in both UK¹⁹⁴ and EU law.¹⁹⁵ The breadth of the CDO power therefore captures a considerably wider range of conduct than the cartel offence, and combined with the period of disqualification of up to 15 years it is a significant sanction in its own right. As with s 188 EA02 however, its deterrence value is diminished by a very low perceived likelihood of sanction as neither the OFT, nor CMA have ever applied to the court for a CDO to be issued, albeit we now have the first disqualification undertaking under s 9B CDDA86.

The failure to apply for any CDOs in 13 years is baffling, and many believed that a change was underway in 2010.¹⁹⁶ Following the Deloitte research¹⁹⁷ the OFT undertook a review of its approach to enforcing its CDO powers, and sought to revise its guidance in order to signal that it was willing to seek a CDO if any of the three categories of director conduct, outlined above, were satisfied.¹⁹⁸ Originally, the OFT had differentiated between the different categories of director conduct such that it had stated that it was 'likely to apply for CDO' where the director's conduct contributed to the breach, i.e.

¹⁸⁷ *Re Blackspur Group plc (No. 2), Secretary of State for Trade and Industry v Davies & Ors (No. 2)* [1998] BCC 11 at 15.

¹⁸⁸ For a particularly good discussion of the merits of director disqualification as an individual sanction as compared to criminalization, see Khan (n 183).

¹⁸⁹ S 9A(6)(a) CDDA86.

¹⁹⁰ S 9A(6)(b) CDDA86.

¹⁹¹ S 9A(6)(c) CDDA86.

¹⁹² S 2 CA98, also known as the 'Chapter 1 prohibition'. This provision is the civil equivalent of the criminal cartel offence, but covers a far broader range of conduct than s 188 EA02.

¹⁹³ Article 101 of the Treaty on the Functioning of the European Union (TFEU).

¹⁹⁴ S 18 CA98, also known as the 'Chapter II prohibition'.

¹⁹⁵ Article 102 TFEU.

¹⁹⁶ See e.g. the belief that applying for CDOs had become a priority for the OFT in 2010, discussed in Stephan (n 72) 392.

¹⁹⁷ The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT by Deloitte (OFT962, November 2007).

¹⁹⁸ OFT, Competition disqualification orders: proposed changes to the OFT's guidance (OFT1111con, August 2009), particularly paragraphs 4.19 – 4.23, and the changes reflected on p.19. Also see comments on the revised guidance by P Collins, former Chairman of the OFT, 'Competition Law: Sanctions, Redress and Compliance', speech at King's College London, 27 June 2011.

where the director was directly involved in the conduct.¹⁹⁹ Secondly, the OFT stated that it was ‘quite likely to apply for CDO’ where the director’s conduct did not contribute to the breach but he or she had reasonable grounds to suspect a breach and took no steps to prevent it, i.e. where there was a failure to take corrective action.²⁰⁰ Finally, the OFT stated merely that ‘CDO application not ruled out’ where the director did not know but ought to have known that a breach had taken place, i.e. where the director failed to keep him or herself sufficiently informed.²⁰¹ The OFT revised its guidance in June 2010 and ostensibly stated that it was likely to apply for a CDO where any of the three categories existed,²⁰² and regularly indicated to competition practitioners and the general public that it would be making ‘greater use’ of its CDO powers.²⁰³ The revised OFT guidelines thus sought to deter anti-competitive behaviour more effectively by threatening directors with disqualification when they were directly as well as indirectly involved in the conduct, and indeed also where they did not but ought to have known that the company was involved in a breach of competition law.²⁰⁴ Yet, this amounted to the same pattern of trying to increase the perceived severity of sanction (by being willing to apply for a CDO in a wider range of circumstances), whilst not actually increasing the likelihood of sanction given that no CDO applications were made.

The 2010 policy changes amounted to a false dawn for the use of the OFT’s CDO powers although the first use of disqualification undertaking powers by the CMA is a significant advance on previously empty rhetoric. While the CMA’s 2015/16 annual plan made no mention of using its CDO powers even when listing its enforcement tools, and it continues to highlight the potential to prosecute criminal cartel activity,²⁰⁵ the *Online Posters* case suggests a willingness to make use of disqualification powers not demonstrated before. If the CMA is serious about increasing the deterrent value of individual sanctions in UK competition law, and doing so in a way that secures the legitimacy of serious sanctions attached to anti-competitive conduct, it should start to make routine use of its CDO and broader disqualification powers. Indeed the arguments in favour of doing so are compelling and numerous.

A practical reason for the CMA to expend resources on building for a first s 9A CDDA86 application, or at least continuing to pursue disqualification undertakings, is the uncertainty surrounding s 188 EA02 due to the s 188B(3) EA02 defence, and the time for new cases to come on stream since the revised offence took effect on 1 April 2014. The not guilty verdicts in the *Galvanised Steel Tanks* prosecution and the guilty plea in the *Precast Concrete Drainage Products* case also likely brings the legacy cases under the

¹⁹⁹ OFT Guidance, Competition disqualification orders (OFT510, May 2003), paragraphs 4.17 – 4.18.

²⁰⁰ Ibid, paragraph 4.19.

²⁰¹ Ibid, paragraphs 4.20 – 4.21.

²⁰² OFT Guidance, Director disqualification orders in competition cases (OFT510, June 2010) at paragraph 4.18.

²⁰³ See e.g. speech by J Fingleton, former CEO of the OFT, ‘The appropriate balance between corporate and individual sanctions and business education in incentivising compliance with competition law’ presented at the Mentor Group’s London Forum on 16 September 2010, at paragraph 40.

²⁰⁴ For a discussion of the revised guidance see J Ellison, ‘Individual Deterrence and Competition Disqualification Orders’ (2011) 10(1) Competition Law Journal 65.

²⁰⁵ Competition and Markets Authority Annual Plan 2015/16, Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013, 1.8, <<https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2015-to-2016>> accessed 18 November 2016.

old dishonesty standard to an end, and thus the CMA should make more resources available to supporting CDO applications. Regarding resources more generally, criminal investigations and prosecutions are known to consume significant resources that can divert attention from elsewhere,²⁰⁶ whereas CDO applications would be far less costly in organisational terms (as well as far less risky in reputational terms), and thus a more efficient enforcement tool. A further practical reason to pursue CDOs and competition disqualification undertakings is that both sanctions are part of a wider company director disqualification regime that has been established for a considerable period of time. Furthermore, the courts are very familiar with the DO regime, and so there is a wealth of decisional practice for guidance.²⁰⁷ An extension of this is that the CMA should be able to tap into the expertise within the Insolvency Service at the Department of Business, Innovation, and Skills. It should be feasible for the CMA to organise secondments, or civil service staff exchanges, with the Insolvency Service in order to bring experience and expertise in-house in making DO applications. The CMA also has more control over disqualification orders granted under s 9A CDDA86 than under s 2 CDDA86, where the latter follows on from a s 188 EA02 conviction. In what appears to be a nuanced drafting oversight at the time of the EA02, the CMA has standing to appear before the court (and raise matters it considers relevant) where an individual disqualified under s 9A applies for leave to act as a director under s 17 CDDA86, but the CMA does not have leave to appear in s 17 cases involving a disqualification order under s 2 CDDA86, even where this has arisen out of a competition law matter.²⁰⁸ In other words, had the three directors in *Marine Hoses*²⁰⁹ sought leave of the court, under s 17 CDDA86, to act as a director during the period of their disqualification, the OFT would not have had standing to address the court on the matter, and the same continues to apply to the CMA.

A more fundamental and policy-orientated rationale for the CMA to make use of its CDO powers is that establishing a record of CDO applications will increase the perceived likelihood of individual sanction, and thus increase the overall deterrent value. Given the very high level of public support for director disqualification (in cartel cases at least),²¹⁰ the CMA would enjoy community confidence and will be able to secure the legitimacy of individual sanctions by bringing these applications. While CDO applications would not need to entirely replace prosecutions of the criminal cartel offence, enforcement activity against individuals via CDOs and disqualification undertakings demonstrates vigilant enforcement to those holding the CMA accountable for providing value for public funding, whilst giving the CMA time to patiently await the right case for a criminal prosecution. Some scholars have highlighted the potential for the complexities of criminal sanctions as enforcement tools to lead to enforcement inertia,²¹¹

²⁰⁶ See discussion in Wilks (n 45) 347-348, 356-357.

²⁰⁷ See N Kar, R Walker, and G Davis, 'Competition disqualification orders and the lessons which can be learned from the insolvency context' (2011) 10(4) Competition Law Journal 306.

²⁰⁸ This oversight and gap in the power of the OFT, now CMA, to supervise the observance of disqualification orders arising out of competition law cases, was identified by Mithani and Galloway (n 169).

²⁰⁹ *R. v. Whittle, Allison, & Brammar*, unreported, Southwark Crown Court, 11 June 2008.

²¹⁰ See n 176 and accompanying text.

²¹¹ See V Brisimi and M Ioannidou, 'Criminalising cartels in Greece: A tale of hasty developments and shaky grounds' (2011) 34(1) World Comp 157, 160, and A Jones and R Williams, 'The UK response to the

or poor case selection, yet seeking to develop the CDO powers for a period of time could ultimately save the cartel offence by preventing another high profile prosecutorial failure. A final argument could be made that as CDOs entail a lesser deprivation of liberty than the criminal cartel offence, it ought to be used as the primary individual sanction to increase deterrence, and leave s 188 EA02 as a ‘last resort’²¹² for the most serious cartel cases. For all of these reasons this article strongly encourages the CMA to exercise its enforcement discretion to maximize the effectiveness, efficiency, and legitimacy of individual sanctions at its disposal, and to make routine use of its CDO powers, building upon the shoot of hope in *Online Posters*.

6. Conclusion

S 188 EA02 was introduced over 13 years ago in order to prevent cartel behaviour through application of deterrence theory and achieve better results than fines targeted at firms could achieve alone. The coupling of a maximum punishment of five years imprisonment²¹³ and the expectation of between six to ten prosecutions a year fulfilled the severity of sanction and probability of sanction formula under traditional deterrence theory for altering the cost-benefit analysis seemingly undertaken by would-be-offenders. Yet there are two fundamental problems that arise from the application of this formula to the cartel offence. Firstly the criticism that severe sanctions under traditional deterrence theory can result in perceived disproportionate outcomes thereby weakening their legitimacy due to doubts about whether they fair, right, proper, and appropriate, can also be levied against the cartel offence. This is especially relevant given the low level of public support for sending cartelists to jail in the UK. Secondly (and perhaps most obviously) efforts to bring prosecutions under the cartel offence have fallen far below initial expectations, and have been compounded by high profile failings in the exercise of enforcement discretion, such that both the OFT and CMA have failed to earn legitimacy for s 188 EA02, and the perceived probability of sanction is likely now very low.

These fundamental problems have weakened the deterrent value of the cartel offence, and legislative reforms that sought to revive s 188 EA02 have only served to further question the legitimacy of the offence and make it more difficult to secure normative commitment to the law and voluntary compliance on the part of would-be cartelists. Perhaps these problems should not be surprising for an offence that has been described as ‘an exercise in gesture politics intended as much to capture headlines as to deter wrongdoing.’²¹⁴ Yet the problems associated with the cartel offence also provide an opportunity, and the timing is propitious, to earn legitimacy for individual sanctions in competition law by seeking to establish the CDO, and competition undertakings, as a likely sanction in response to anti-competitive wrongdoing. Any shift away from an established policy approach, such as this article’s suggestion of placing a lower emphasis upon seeking criminal prosecutions, is difficult for authorities that can become ‘hard-wired’ to an approach favoured by political masters, yet it is also clear that tough

global effort against cartels: is criminalization really the solution?’ (2014) 2(1) *Journal of Antitrust Enforcement* 100, 122.

²¹² For a discussion of the last resort theory in criminal law, even though it would not support a retrenchment of the criminal law, see D Husak, ‘The Criminal Law as Last Resort’ (2004) 24(2) *OJLS* 207.

²¹³ s 190(1) EA02.

²¹⁴ Wilks (n 45) 355.

questions are required in order to try to increase compliance with the law.²¹⁵ If the CMA wants to prevent anti-competitive behaviour through deterring wrongdoing and also securing voluntary compliance, it should reassess past approaches and adopt a strategy that prioritises earning legitimacy for the individual sanctions. This article argues that such a revised strategy should first make use of s 9A CDDA86 powers, and build upon *Online Poster*²¹⁶s by routinely seeking disqualification undertakings under s 9B CDDA86, at least until a perfect test case for prosecution under s 188 EA02 arises, or Parliament corrects its flawed reform in establishing the defence in s 188B(3) EA02.

²¹⁵ For an analogous and compelling argument in relation to the weight placed upon leniency programmes by competition authorities, see WE Kovacic, 'A Case for Capping the Dosage: Leniency and Competition Authority Governance', in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion*, (Hart Publishing 2015), 129 – 130.

²¹⁶ See n 178 and n 179 and accompanying text.