

Institution: University of East Anglia
Unit of Assessment: 20 Law
Title of case study: Strengthening the Design of Criminal Cartel Offences
<p>1. Summary of the impact</p> <p>Stephan's research identifies difficulties with a dishonesty element in the offence of agreeing to fix prices with a competitor. It has had impact in the UK and Australia. In 2011, the Department for Business Innovation and Skills published a consultation document, citing Stephan's findings in justifying proposals to drop dishonesty in favour of a new cartel offence. In Australia, a draft criminal offence which required dishonesty was proposed in 2008. Following submissions by academics and practitioners which cited Stephan's work, the dishonesty element was dropped. A 2009 Australian Senate Standing Committee report supported this change, quoting one of Stephan's papers.</p>
<p>2. Underpinning research</p> <p>The impact is underpinned by two pieces of research completed by Stephan at the University of East Anglia:</p> <ol style="list-style-type: none"> 1. Public Attitudes to Price Fixing. This study consisted of a public survey designed by Stephan. It was conducted by YouGov Plc in March 2008, with funding from the ESRC Centre for Competition Policy (CCP). A representative sample of 1,219 residents of Great Britain were asked a series of questions online, to gauge their attitudes to cartel practices and appropriate sanctions. The study gave some indication of how a jury might respond to the prosecution of individuals under the offence. The first key finding was that, although three quarters of respondents recognised cartel practices were harmful, their attitude towards punishment was not in step with criminalisation. Only 11% favoured imprisonment, with most indicating public naming and shaming as the most suitable punishment. The second key finding related to dishonesty. 60% felt price fixing was dishonest, with only 20% strongly feeling so. This suggests that such practices are not considered tantamount to theft or fraud (which is the area of law where the standard of 'dishonesty' comes from). 2. Implications of the Dishonesty standard. Dishonesty was included in the UK's cartel offence in order to signal the seriousness of behaviour like price fixing and send out a strong message to the public and to the business community. Cartels had historically been treated with a measure of ambivalence by successive British governments. This paper argued that this function was flawed because dishonesty relies on a contemporary judgement by the jury, which assumes that public attitudes are sufficiently hardened in the first place. This is because in order for an individual to be convicted of the offence, a prosecutor must convince the jury that what the defendant did was dishonest 'by the ordinary standards of reasonable and honest people' and that he knew what he was doing was dishonest by those standards (<i>R v Ghosh</i>). Apart from the obvious danger that the jury will simply conclude that price fixing is not objectively dishonest, the defendant may deny his actions were dishonest by claiming he was motivated by a desire to avoid bankruptcy and save jobs (for example). The paper also discusses the House of Lords decision in <i>Norris v United States</i>. Although this case concerned price fixing in the context of the crime of <i>conspiracy to defraud</i>, it hinged on the same issue of dishonesty. The Lords ruled that secret price fixing could not in itself be dishonest unless it was accompanied by 'aggravating factors' such as misrepresentation, violence, fraud or inducement of a breach of contract. <p>Together, these two pieces of research argue that dishonesty sets the bar too high, making it very difficult for prosecutors to secure convictions of individuals involved in cartel behaviour, to the detriment of deterrence and the economy's welfare. This is reflected in the OFT's failure to</p>

successfully prosecute a single criminal case. The only three convictions to date resulted from a US plea bargain and extradition arrangement.

3. References to the research

1. A. Stephan, 'Survey of Public Attitudes to Price Fixing and Cartel Enforcement' (2008) 5 *Competition Law Review* 123-145 (previously CCP Working Paper 07-12 with the same title).
2. A. Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) 6 *Criminal Law Review* 446-455 (previously CCP Working Paper 8-19, with the title 'The UK Cartel Offence: Lame Duck or Black Mamba?' 2008).

£6,000 grant awarded by ESRC Centre for Competition Policy to Andreas Stephan in November 2006, for the purposes of commissioning a public survey to be carried out by YouGov Plc in Spring 2007. Title: 'Survey of Public Attitude to Cartels'.

Both pieces of research were originally CCP working papers and were subsequently accepted for publication in peer reviewed academic journals. The public survey was the first study of its kind anywhere in the world and inspired a similar study to be completed in Australia by academics at the University of Melbourne in 2010. Both papers were widely cited in subsequent publications. These included papers published in the *Modern Law Review*, *Australian and New Zealand Journal of Criminology*, *International Journal of Economics and Business*, *Australian Business Law Review*, *European Competition Law Review*, *World Competition*, and *European Competition Journal*.

4. Details of the impact

United Kingdom

The UK Government's consultation document, *A Competition Regime for Growth*, recommended that dishonesty be dropped and that a new cartel offence be adopted. In justifying this recommendation it drew particular attention to Stephan's survey study (reference 3.1), summarising and discussing its key findings in one paragraph, stating that Stephan's 2007 working paper had found that only around six in ten people in Britain believe that price-fixing is dishonest and two in ten people believe that it is not. The consultation endorsed the conclusion that juries may not be as ready to convict for an offence based on dishonesty as originally hoped. (source 5(a) at para 6.14). This change in policy was supported by the Office of Fair Trading. The Senior Director of the OFT's Cartels and Criminal Enforcement Group, Ali Nikpay, made reference to Stephan's survey paper in a policy speech setting out the reasons why the OFT supported abandoning the dishonesty requirement, and explaining (source 5(c) at p 21) that Stephan's survey data demonstrated that most people did not see price fixing as inherently dishonest. Ali Nikpay has subsequently indicated (source 5(d)) that the survey was "hugely influential in terms of informing a change in UK competition policy" and that it "was relied upon in making the case for reform in the Office of Fair Trading and the Department of Business, Innovation and Skills... despite significant opposition from business groups and practitioners."

The final reform is contained in the Enterprise and Regulatory Reform Act 2013 which amends the current cartel offence in section 41(2) (see source 5(b)) by removing the requirement of dishonesty.

Australia and New Zealand

In 2007, the Australian government proposed draft legislation criminalising cartel behaviour. It drew inspiration from the UK's offence and included the same requirement of dishonesty. Stephan's public survey study (in its CCP working paper form) was picked up by a number of Australian academics and practitioners, notably Caron Beaton-Wells (University of Melbourne) and Brent Fisse (Brent Fisse Lawyers, New South Wales). In a submission made to the Australian government in March 2008 (commenting on the criminal offence proposed in the Exposure Draft

Bill), they cited the survey as lending empirical backing to their criticisms of the proposed dishonesty element (source 5(e). pp 29 and 31), where they say that “even serious cartel misconduct may not be regarded as dishonest by jurors” and that this is in part due to jurors’ lack of familiarity with cartels, a point also made by Stephan.

A subsequent Australian Senate Standing Committee report on the criminalisation of cartel behaviour (source 5(f). pp 22-23) supported a move by the Australian government to omit dishonesty from their cartel offence. In doing so, they quoted the main argument from the second study (reference 3.2) to lend support to this move:

“As Andreas Stephan from the University of East Anglia has observed: ‘...[the dishonesty element has failed to harden attitudes] in the absence of regular convictions and may be problematic because dishonesty necessitates a contemporary moral judgement on the part of the jury and therefore relies on attitudes being sufficiently hardened in the first place’”

The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill was ultimately enacted as the Competition and Consumer Act 2010, introducing two cartel offences in sections 44ZZRD and 44ZZRE which are not based on a standard of dishonesty, but place importance on demonstrating knowledge or belief.

In July 2012, a reference to the survey work (references 3.1) was made during a debate in the Parliament of New Zealand. There Raymond Huo MP said (source 5(h), “...the results of a 2008 survey of public attitudes in the United Kingdom precisely mirrored the results of a similar survey recently conducted in Australia - that is, there is substantial majority support for the view that cartel conduct is unacceptable, but a minority of that think that cartel conduct should be a criminal offence, and less than a quarter think that individuals should be jailed for it. It is difficult to see why public attitudes would differ greatly in New Zealand.” The debate was in the context of the passage of the New Zealand Commerce (Cartels and Other Matters) Amendment Bill, which when enacted will criminalise cartel behaviour.

The Rt Hon. Lord Justice Gross’ Review of Disclosure in Criminal Proceedings (September 2011) cited the paper published in the Criminal Law Review (references 3.2), in his discussion of cartel cases (source 5(i)).

5. Sources to corroborate the impact

- a. Department for Business Innovation and Skills, ‘A Competition Regime for Growth: A Consultation on Options for Reform’ (March 2011). Available: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>
- b. Enterprise and Regulatory Reform Act 2013 (from HL Bill 45 of 2012-13) At 41(2): ‘In subsection (1) [s. 188 Enterprise Act 2002], omit “dishonestly”.’ Available: <http://www.legislation.gov.uk/ukpga/2013/24/section/47/enacted>
- c. Ali Nikpay (Senior Director, Cartels and Criminal Enforcement Group, Office of Fair Trading), ‘UK cartel enforcement – past, present, future’. Speech to the Law Society Anti-Trust Section (11 December 2012). Available: http://www.offt.gov.uk/shared_offt/speeches/2012/1112.pdf
- d. Supporting letter from Ali Nikpay, Partner at Gibson, Dunn & Crutcher LLP (former Senior Director, Cartels and Criminal Enforcement Group, Office of Fair Trading), describing nature of impact within the OFT and Department for Business, Innovation and Skills. 8 August 2013.
- e. C Beaton-Wells and Brent Fisse, SUBMISSION: The Exposure Draft Bill, Draft ACCC-

Impact case study (REF3b)

CDPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia. (7 March 2008). Available:

http://archive.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf

- f. Commonwealth of Australia. Standing Committee on Economics: Trade Practices (Cartel Conduct and Other Measures) Bill 2008. February 2009.
- g. Competition and Consumer Act 2010 (Australia) Part IV (sections 44ZZRD and 44ZZRE), introducing criminal cartel offences that do not require dishonesty. Available: <http://www.comlaw.gov.au/Details/C2011C00003>
- h. *Hansard* (New Zealand Parliament) 24 July 2012, Volume 682, Page 3868. Available: http://www.parliament.nz/en-NZ/PB/Debates/Debates/b/8/d/50HansD_20120724_00000028-Commerce-Cartels-and-Other-Matters-Amendment.htm
- i. The Rt Hon. Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (September 2011) FN62. Available: <http://www.judiciary.gov.uk/JCO%2FDocuments%2FReports%2Fdisclosure-review-september-2011.pdf>