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Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy

The discussion in this paper examines the emergence of what may now be fairly described as the 'European cartel offence': that species of infringement of Article 81 of the EC Treaty, increasingly referred to as 'hard core cartel' activity, connoting real delinquency which justifies the imposition of severe penal sanctions. This development is significant not just as a matter of more explicit regulation within the field of competition law, but also as part of a wider context of vilification and criminalisation of certain well-established forms of cartel behaviour. As national systems (such as that in Britain) have introduced new criminal offences in relation to cartels, it is illuminating to consider and compare the evolution of the supranational 'European cartel offence'. Having its basis in the infringement of Article 81 of the EC Treaty, the offence is necessarily one of collusion, being an agreement or concertation for anti-competitive purposes. As such, the more specific nature of the 'offence' has been established incrementally, very much as the product of argument presented in appeals relating to issues of evidence and penalties. It has been necessary to consider whether the offence resides in the planning or the implementation of anti-competitive activity, or both, and whether it comprises specific acts or a continuing pattern of behaviour. The mature version of the 'offence', worked out in the jurisprudence of the European Commission and the Community Courts, is based on the organising concept of 'the cartel as a whole'. This process of forging a 'European cartel offence' provides an instructive lesson in the legal construction of criminality and the resort to a form of organisational responsibility. It also points to the emergence of a bifurcated system of both individual and corporate liability in this context.

1. BACKGROUND: THE CRIMINALISATION OF CARTELS

One of the most significant and legally interesting aspects of this area of competition law comprising the regulation of cartels has been the movement in recent years in a number of legal systems towards a tougher mode of enforcement in relation to prohibited cartel conduct, and in particular the resort to criminal law and penal sanctions.¹ Historically, the approach adopted under American law demonstrated an early willingness to use both criminal sanctions and civil litigation leading to the award of 'penal' (treble) damages as a means of reinforcing the prohibition of the Sherman Act. European legal systems on the other hand were traditionally much more committed to a 'softer' administrative regulation of competition matters² and have only very recently turned to the possibility of criminalising the more serious kinds of anti-competitive activity embodied in the concept of the 'hard core cartel'.³ Admittedly, the European Community system of competition regulation, founded upon Articles 81 and 82 (ex Articles 85 and 86) of the EC Treaty, demonstrated a more vigorous enforcement, both in terms of investigatory powers and the use of penal fines. But the latter did not amount to criminalisation in formal terms, since, despite its repressive features, it was embedded in a process officially described as administrative⁴ and not criminal; it therefore occupied a position somewhere between that of American law and that of most national European systems. However, in the last few years the hardening of legal response at the European national level, coupled with a more determined approach to enforcement in the US and EC contexts, has suggested a global convergence in cartel regulation at the level of the highest common denominator. This has resulted in a widely agreed official vilification of business cartel arrangements as 'egregious' violations, calling for determined investigation and enforcement strategies, preferably including criminal sanctions which will serve as both a deterrent and provide a convincing 'car-

¹ For a wider discussion of such developments, see C. Harding and J. Joshua, *Regulating Cartels in Europe* (Oxford 2003), esp Chs 5-10.

² For a further discussion of the historical divergence in approaches to regulation, see Harding and Joshua, note 1 above, Ch 2; and C. Harding, 'Business Cartels as a Criminal Activity', 9 *Maastricht Journal of European and Comparative Law* (2003) p. 393. On the evolution of competition regulation in Europe more generally, see D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford 1998).

³ A notable example is the new criminal offence under English criminal law: see the Enterprise Act 2003, s 188 et seq., and the discussion of this new offence by Harding and Joshua, 'Breaking Up the Hard Core: the Prospects for the proposed Cartel Offence', *Criminal Law Review* (2002) pp. 933.

⁴ See, e.g. Article 15 of Regulation 17 (Article 22 of the replacement measure, Regulation 1/2003).

rot and stick' in leniency programmes.⁵ Across jurisdictions, the cartel offence, once historically confined to North America, is now becoming commonplace.

But, as a matter of criminal jurisprudence, what is more precisely is comprised in this emergent species of offending conduct? This is an intriguing question especially in relation to the European or EC cartel infringement or 'offence', which is not a criminal offence as such and has been constructed incrementally through case law rather than on the basis of explicit legislative definition. The discussion here will focus primarily on the emergence of this 'European cartel offence', and also consider thereby some of the significant legal issues associated with the concept of a cartel offence. But in the first place, two definitional questions present themselves. First, what is understood by the term 'cartel'? Then secondly, in what circumstances do the activities of a cartel, or participation in a cartel, amount to a punishable offence?

2. THE CONCEPT OF A 'CARTEL'

The term 'cartel'⁶ is now widely employed to describe, in a trading and business context, an organisation of competing suppliers in a particular market, formed for the purpose of limiting competition between its members, to their economic advantage and to the disadvantage of other market participants and consumers. Such cartels agree typically on measures such as price fixing, market sharing, limitation of production, bid rigging and co-ordination of other conditions of supply. Despite its now wide usage, the word still lacks precise definition in many systems of competition and antitrust law, and is not in itself an established term of legal art. Thus, to cite a few examples, US antitrust legislation (the Sherman Act) refers to contracts, combinations or conspiracies in restraint of trade or commerce; Article 81 of the EC Treaty and the UK Competition Act refer to agreements, decisions and concerted practices which prevent, restrict or distort competition; and the earlier British legislation (the Restrictive Practices Act of 1976) spoke of agreements which contained listed restrictions. The recent Enterprise Act in the UK introduces the term 'cartel offence' but somewhat oddly (but then again perhaps not so oddly in the context of British legislative drafting) uses the term only as a title to a number of sections, referring elsewhere to the offence as the 'offence under Section 188', and that Section of the statute does not use the word cartel at all. More generally, there is a linguistic looseness in the current use of the term cartel, often for instance equating 'cartel' with an 'agreement' or 'practice'.

⁵ See C. Harding and J. Joshua, note 1 above, Chs 8-10.

⁶ For discussion of the etymology of the term, see C. Harding and J. Joshua, note 1 above, at pp. 11-16.

This is exemplified by the guidance notes issued by the UK Director General of Fair Trading on the 1998 Competition Act, when it is stated that:

Generally speaking, a cartel is an agreement between undertakings to fix prices or other trading conditions or to share out markets. A distinctive form of cartel is known as collusive tendering or bid rigging ... The aim of a cartel is to increase prices by restricting or removing competition between the participants. Cartels are operated secretly and can be hard to detect.⁷

Such an account in effect uses the word 'cartel' to describe (a) an agreement, (b) a practice which is the subject-matter of agreement and (c) a form of organisation to give effect to such an agreement. This slippery use of language may be noted as an early indication of some of the conceptual, technical and practical difficulties which have beset the emerging criminal and penal regulation of the subject, as discussed further below.

In more everyday language, 'cartel' is often used to refer to an organisation rather than an agreement or practice. In this sense it is a convenient shorthand term used to describe a *grouping* of corporate actors, bound together conspiratorially in an anti-competitive enterprise and involved in both the planning and implementation of strategies such as market sharing and price fixing. Although in one way this implies a more amorphous existence, spreading over space and time and comprising different levels of activity, it also serves to consolidate a separate group identity, providing the 'conspiracy' with some sense of personality. To view the cartel in this way serves to indicate some of the intriguing but difficult features of its legal development. It is at one and the same time a phenomenon which is difficult to pin down more precisely in legal terms, yet provides the structure for a distinctive form of collective action, which in turn provides the basis for the liability of its individual members. It is notable, for instance, that while legal investigations are carried out into the activities of a cartel and a legal determination (for instance, a decision of the European Commission) which may officially refer to the cartel as its subject, liability and sanctions are applied individually and severally to its members. The cartel is a crucial structure and object of legal action, but does not have its own legal personality.

It is not surprising then that everybody seems to recognise a cartel when they see one, but may find it difficult to supply a specific description or exact definition. One of the most useful working definitions of a business cartel for legal purposes is given by the OECD in its 1998 *Recommendation on Effective Action Against Hard Core Cartels*.⁸ This text effectively defines 'hard core' cartel activity as:

⁷ <<http://www.ofl.gov.uk/html/comp-act>>.

⁸ OECD, Paris, 27-28 April 1998 (C(98)35/Final).

An anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement between competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.

This definition has a number of virtues: clarity and simplicity, while covering what are agreed to be the principal categories of anti-competitive strategy, but also linking the agreement of anti-competitive purpose with its material realisation. Reference to 'arrangement' is suggestive of organisation and edges the definition towards an idea of structured activity which appears to be contained in the concept of the 'cartel as a whole', which will be discussed more fully below. The OECD text is a useful template for further legislative action and appears to have been a motivating factor in the recent wider drive towards criminalisation of cartels. But the important point of law and language to note at this stage is the extent to which the term 'cartel' (and even 'hard core cartel') has entered common parlance, but without a widely agreed sense of its specific definition.

3. THE CONCEPT OF AN 'OFFENDING CARTEL'

Definitional discussion of 'cartel' merges subtly with that of the 'cartel as an offence'. A comparative survey would show that most definitions of 'offending cartel conduct' (whether or not cast as criminal offences) commonly comprise two crucial components which must be linked together: an element of collusion, and a *projected* anti-competitive activity. Neither in itself is sufficient to constitute an offence. This may be seen from the analysis in Table One below of four examples, taken from US, UK and EC law, and the OECD.

Table One

| <i>Regime</i> | <i>Collusion</i> | <i>Anti-competitive object</i> |
|--|---|---|
| US law (Sherman Act) | contract, combination or conspiracy | in restraint of trade or commerce |
| EC law (Article 81 ECT) | agreement, decision or concerted practice | with the object or effect of restricting, distorting or preventing competition. |
| UK criminal law (Section 188 of the Enterprise Act) | dishonest agreement | to make or implement arrangements of the following kind (price fixing etc.). |
| OECD (Recommendation on Hard Core Cartels) | agreement, concerted practice or arrangement between competitors. | to fix prices etc. |

Under these provisions, therefore, just to engage in the anti-competitive activity in itself may be legally prohibited but does not amount to the 'offence'.⁹ On the other hand, the agreement or collusion is sufficient for purposes of the offence, but *provided that* it plans the anti-competitive activity, even if the latter is not actually carried out. The offensive cartel is very much a matter of design and collusion.

Therefore what can be found in many existing legal definitions of offending cartel activity is a broadly agreed idea of collusive business activity directed at specific anti-competitive outcomes. As will be explored in more detail below, there appear to be two principal elements embedded in this concept of offending behaviour which supply the justification for casting it as an 'offence' rather than just a prohibited act. The first may be viewed as the component of censure based on a moral blameworthiness. This arises from the act of collusion, the coming together to plan and implement something which is known to be prohibited and damaging, and to gain unfairly from that injury to others. The second may be seen as the component of harm, comprising the anti-competitive outcome of price fixing, market sharing and the like, although this may be prospective – what is crucial is that it is in mind, desired and planned, but it need not be realised in itself for purposes of the 'offence'. (The anti-competitive act or instrument in itself (e.g. the price fix or rigged bid) and its market consequences may of course be otherwise legally regulated, typically by being subject to administrative prohibition and scrutiny.)

Built into this concept of 'offending' cartel activity is a degree of possible exception or exoneration. Not all *cartels* in the sense of restrictive business agreements or plans are necessarily *offending cartels* in the sense of being subject to strong censure and punishable. There are many *horizontal* anti-competitive arrangements which are acceptable as a matter of competition policy since they are considered to have clear pro-competitive outcomes despite their restrictive first appearance: a range of co-operative agreements and joint ventures based on mutually agreed restrictions but which are likely to operate for the benefit of consumers and the market as a whole.¹⁰ Such 'pro-competitive' horizontal market restrictions are not generally referred to as 'cartels' and, although subject to careful regulation, are frequently allowed free operation with a kind of approving nod. The definition of offending cartel behaviour is therefore based on some prior market analysis which has excluded a range of anti-competitive collusion from the scope of the 'offence'. Moreover, even those 'classic' instances

⁹ That is to say, the matter is subject to regulation, probably prohibition, but is not in itself punishable (by fines, imprisonment or whatever). In terms of Article 81 of the EC Treaty, for example, a number of anti-competitive practices may be prohibited and legally void, but not attract punishment in the usual sense of the word.

¹⁰ See, e.g. the broad distinction drawn by D.G. Goyder, *EC Competition Law* (4th ed. Oxford 2003), at p. 140, between two major categories (acceptable and unacceptable) horizontal agreements.

of usually uncondonable anti-competitive activity, such as price fixing and market sharing, may be tolerated in some extreme circumstances. The main example would be the so-called 'crisis cartel', an essentially defensive rather than creative form of anti-competitive collusion, usually entailing agreed limitations on production in the context of industries facing severe recession or decline. At the EC level, an example of official tolerance of such a 'crisis cartel' concerned the *Stichting Baksteen* in the Dutch brick-making industry. Facing a considerable surplus of brick production in the 1990s, the Dutch manufacturers agreed between themselves on a closure of older and least efficient brick plants which would be supported by a levy to be paid by all the producers to compensate those whose plants were to be permanently closed down. This agreed limitation on production was approved by the EC Commission as the most acceptable way of responding to the undoubted crisis in over-production.¹¹

Thus, it is not easy to provide a hard-and-fast definition of sufficiently harmful anti-competitive conduct for purposes of the cartel offence (or, to use the language of competition policy, to incorporate into that definition a *per se* prohibition). Implicit in most, if not all, definitions of offending cartel behaviour is a kind of caveat of the kind: 'listed anti-competitive activity in so far as this is not excepted by competition policy at the time in question'.

Such, then, are the general lines of 'cartel offending', taking a broad comparative view. The more specific elements of the offence may vary from one jurisdiction to another. There are, in addition, two other particular complicating aspects of this process of offence construction. First, there is the question of formal legal context, or more specifically, whether the offence is 'administrative' or 'criminal'. This is an especially relevant question in the EC context in which, as already stated, the offending conduct is necessarily located within a process which is quite deliberately designated as 'administrative' on 'non-criminal law'. But the dichotomy between administrative and criminal law procedures and penalties is also relevant for a number of national legal systems including that of the UK.¹² Secondly, there is the complicating question of individual (or 'personal') and corporate liability: whether the offence is committed by a company or by individuals working for that company, or both. For purposes of the 'European offence', the (administrative) liability attaches in practice to companies and sanctions are imposed on corporate actors and not on individual executives as a matter of their personal liability. Having said that, individual liability is not wholly irrelevant, however, since such individuals may be prosecuted under national criminal

¹¹ *Stichting Baksteen*, OJ 1994, L 131/15; (1995) 4 CMLR 646.

¹² In the UK, the 1998 Competition Act provides for administrative 'civil' penalties, while the 2002 Enterprise Act establishes criminal liability for individuals participating in cartel activity.

law for their participation in the same cartel which has been dealt with as a matter of corporate liability at the European level.¹³

These complicating features will be addressed further below, but first, the emergence of the European cartel offence will be discussed, and its method of construction, culminating in the concept of the 'cartel as a whole'.

4. THE INCREMENTAL CONSTRUCTION OF THE EUROPEAN CARTEL OFFENCE

4.1 Constructing the offence: general problems

The European (or EC) cartel offence is very much a product of case law, and of litigation argument relating to evidence and penalties. The legal construction of this 'offence' has been based upon the broad wording of the key Treaty article (Article 81) and some provisions in secondary legislation, such as the sanctioning measures in Article 15 of Regulation 17 (Article 22 of the new Regulation 1 of 2003). None of these provisions, as authoritative legal texts, supply any explicit concept or definition of offending and punishable cartel behaviour. Rather, there has emerged by implication an idea that serious infringements of Article 81 may be subject to the penal sanctions provided in Regulation 17 and that such infringements include in particular, some of the 'classic' anti-competitive practices listed illustratively in Article 81(1), which have subsequently become more colloquially referred to as 'hard core cartels'. There is no legislative statement to this effect, but it is now sufficiently clear as a matter of the jurisprudence of the Court of Justice and the Court of First Instance and in the practice (and case law if it may be termed as such) of the European Commission.

The argument here is that this concept of offending cartel behaviour has been worked out incrementally in this body of jurisprudence. It has happened naturally enough as defending companies have, over the years and with increasing energy, appealed against Commission decisions impugning their activities and imposing penal sanctions in respect of such activities. The two main routes of legal development within this appellate jurisprudence have been arguments about evidence and arguments about the imposition of fines. Again on reflection, this could be expected: from the point of view of the defending companies there have been two main causes for appeal. First, is there sufficient evidence to characterise their behaviour as participation in a hard core cartel? Secondly, does such evidence justify the quantum of the penalty which

¹³ This has certainly happened in recent years in the US, where there have been some notable criminal prosecution of individuals, including non-US nationals, for their participation in transnational cartels. See further below.

the Commission has sought to impose? Both questions have inevitably led the Commission and the Community Courts to search for a more precise definition of the kind of behaviour which justifies this level of censure and sanction – in other words, the search for the sense of offending behaviour.

To understand how this process has led eventually to the concept of the ‘cartel as a whole’ as a basis for the cartel offence, it is necessary first of all to say something about the character of the cartel activity in behavioural terms. This means taking an internal view of the typical operation of business cartels. What may be contrasted as an ‘external’ perspective is that which is usually found in economic and legal literature on the subject – the operation of cartels within markets, their impact on market conditions and consumer interests, in other words, an assessment of the impact and effects of cartel activity. The ‘internal’ perspective on the other hand is much more concerned with the mindset and attitude of cartel participants, their relations with each other rather than to the market outside, and their motivations: elements of the phenomenon of the cartel which relate more to an ethical rather than economic assessment of behaviour. Economists and *competition lawyers* have historically been more concerned with market analysis, while the ‘internal’ analysis of cartel activity has more been the domain of sociological enquiry,¹⁴ although it should now be increasingly a matter of interest for *criminal lawyers*.¹⁵ The significance of this internal view of cartel operation, particularly for purposes of bringing the matter within the domain of criminal law, is explained by Harding and Joshua in the following terms:

It is important to appreciate that individuals who work for companies which participate in cartels have their own perspective on what is happening which is different from that of an economist, a consumer, or a competition regulator. Marketing managers and the like inhabit first of all a specific corporate environment, and then a particular business environment, both of which fashion individual and collective behaviour and outlook. Such people see themselves, for instance, as an executive of Hoffmann-La Roche, working in the pharmaceuticals industry and market, before they see themselves as a subject of textbook discussion or a character in litigation. If it is asked why some companies repeatedly engage in illegal price fixing following successful prosecution and the imposition of sanctions, part of the answer at least should be sought in the disjunction between the ‘external’ viewpoint of the regulator and the ‘internal’ viewpoint of the company executive: different goals, different interests, different values and therefore different behaviour.¹⁶

¹⁴ See in particular: D. Spar, *The Cooperative Edge: The Internal Politics of International Cartels* (Ithaca 1994).

¹⁵ For a more detailed discussion of these epistemological aspects of the subject, see Ch 10 of Harding and Joshua, *Regulating Cartels in Europe*, note 2 above.

¹⁶ *Ibid.*, at p. 33.

In other words, there needs to be some criminology of cartel participation which can be used to inform the legal process of criminalising the latter.

An empirical enquiry into the internal dynamic of business cartels reveals a fairly typical kind of purposive – it might almost be said to be ‘normative’ – a structure which gives shape to the cartel as a sociological phenomenon. Although generic descriptions should be treated with caution, since the evidence suggests that individually cartels do behave and work out differently according their particular membership and even market context,¹⁷ nonetheless all cartels do share some common *structural features*. Thus all anti-competitive business cartels generally have the same common broad objectives and comprise an organisation based upon a sentiment of truce between rivals, with again some common organisational elements. Most importantly, there will be a common denominator of collusion or conspiracy, facilitated by clandestine meetings or subtle contacts, dedicated towards the implementation of a common anti-competitive plan. Secondly, there is typically a temporal element to all this: cartels are not one-off episodes of profit-making, but are continuing and structured projects of co-operation. And thirdly, but as a more complicating element of the cartel, they are characterised by a certain fragility and nervousness. Ultimately companies participate for their own individual economic well-being and profit, to be achieved through collective action, but there is frequently some uncertainty as to the extent and duration of their interest in doing so. Typically, therefore, commitment and loyalty may be variable and, as is characteristic of many conspiracies, the stronger interests of some members may lead to their assumption of a dominating role as the ‘gang leaders’, taking on a directive and perhaps also ‘bullying’ enforcement role. In short, cartels are complex organisations with their own significant internal dynamic and this should be taken into account in any attempt to define legally the kind of participating behaviour which is being characterised as offensive.

The relevance of this kind of analysis to the debate on criminalisation of cartels arises from the sense that it is not just the anti-competitive outcome which is objectionable but also and in particular the deliberate, covert, and knowingly unlawful collective scheming and planning to achieve those anti-competitive ends. In this way, the infrastructure of such scheming and planning becomes the focus for its regulation as a delinquent and punishable activity. Thus, what may be seen as especially condemnable in the business cartel is its *structure of conspiracy* and this supplies the point of distinction between the softer administrative regulation of anti-competitive practice in itself, and the more repressive and increasingly criminal law regulation of ‘hard core’ conspiratorial activity. It is the clearer and more precise identification and definition

¹⁷ See for instance the discussion and material used by Spar in *The Cooperative Edge*, note 14 above.

of this kind of conspiratorial structure that in effect has been sought in recent efforts in a number of jurisdictions to work out the nature of the 'cartel offence'.

In general terms, therefore, a starting proposition in this exercise may be the following phenomenological observation: typically a business cartel involves the participation of a number of corporate business rivals in a number of meetings and agreed acts of implementation over a period of time. The question is then one of deciding where to locate the 'offence' within this bundle of conduct. The difficulty in the question arises from the number of choices: for instance, whether it should be based on individual or collective action; or on specific events (meetings, acts of implementation) or on a course of conduct. Some of the main possibilities in this respect may be sketched out in Table Two below.

Table Two

| | |
|--|---|
| (1) Individual participation in one meeting | (2) Individual participation in one act of implementation |
| (3) Individual participation in both a meeting and act of implementation | (4) Individual participation in a network of collective activity over time |
| (5) Collective participation in individual acts (as in (1) – (3) above) | (6) Collective participation in a network of activity over time (as in (4) above) |

These permutations may be further complicated by the issue of personality – whether the offence is committed by the company or by individuals actually participating in meetings or involved in putting the cartel's policy into effect on specific occasions.

This is far from being an academic exercise, as the Commission found, to some extent to its cost, when companies started to search for grounds for appeal against its decisions. Once the process had matured into something like a criminal proceeding (even if not formally described in those terms), requirements of procedural justice demanded some rigour and clarity in carrying out the 'prosecution'. To enable an effective exercise of rights of defence in such a procedure, it was necessary to specify more precisely the 'charge' against the defending companies. Of what offence they accused and how was it to be proven against them? Moreover, if companies were to be penalised for engaging in such activities, what act or acts more precisely, were the basis for whatever sanctions were being applied? Underlying such questions are the principles of legality and specificity of crimes,¹⁸ discussed further below. Important

¹⁸ The principle expressed in Latin as *nullum crimen sine lege, nulla poena sine lege*. For a useful short discussion of the principle and its international application, see A. Cassese, *International Criminal Law* (Oxford 2003), pp. 139-148. As Cassese points out, common law systems tend to be less dogmatic about application of the principle, partly as a result of the readier resort to judge-made

issues of evidence, penalty and justice thus require some clearer identification and construction of an offence. For instance, was the offence (or 'infringement', to use the formal language of the EC procedure) proven by participation in one meeting or in a network of activity? The evidence for one or the other could be more or less problematical. Was the penalty based upon participation in a single meeting or other act, or upon a more wide-ranging participation in various activities? The nature and size of the penalty would surely have to relate to the kind and extent of involvement. Whereas administrative regulation can afford to be less specific in its modalities, the ethical and legal stakes are higher in criminal or quasi-criminal proceedings and, at the very least, Article 6 of the European Human Rights Convention and its EC analogies would require a more rigorous specification of what was being impugned and penalised in a more repressive kind of proceeding.

Furthermore, once the matter has entered this more specific domain of offence regulation and criminal law and the possibility emerges of a range of specific offensive acts, another requirement of justice and fair treatment enters the picture: the need to guard against double jeopardy. The principle *non bis in idem* is widely accepted as a guarantee against 'double counting' of offences and 'recycling' of evidence so as to penalise a defendant more than once in relation to essentially the same act or conduct. A potential legal minefield for a prosecuting authority dealing with cartels would be the temptation to define the overall conduct of the cartel as a number of different specific offences, so generating a higher degree of legal offensiveness than would appear to be factually justified. A crude exploitation of double jeopardy would for example be the imposition of a serial liability and a number of penalties for engaging in a number of meetings, each individually penalised, and in an 'umbrella' or network of cartel arrangements at the same time. Such an approach would inevitably be criticised as a violation of the principle *non bis in idem*.

In the EC context, a number of these issues may be conveniently illustrated by the unravelling of the Commission's case against the *Wood Pulp Cartel* in the early 1990s.¹⁹ In this admittedly complex and convoluted litigation relating to what appeared to be a provable cartel violation, the Commission's prosecution came to grief in the appeal against its decision, mainly on account of problems in specifying the nature of the

law. See also the view of the European Court of Human Rights in *SW and CR v United Kingdom*, judgment of 27 October 1995.

¹⁹ Cases 89/85 etc, *Ahlström Oy and others v Commission* [1993] ECR I-1307. There is a good deal of legal commentary on the case and its outcome; see, e.g., A. Jones, 'Wood Pulp Concerted Practice and/or Conscious Parallelism?' 14 *ECLR* (1993) p. 273; G. Van Gerven and E. Navarro Varona, 'The Wood Pulp Case and the Future of Concerted Practices', 31 *CMLRev* (1994) p. 575. For a convenient summary of the course of the litigation and main issues, see the account in Harding and Joshua, *Regulating Cartels in Europe*, note 2 above, at pp. 153-159.

offending conduct. The case remains famous in antitrust history mainly for its discussion of oligopoly and the extent to which parallel market behaviour could be relied upon in itself as evidence of collusion. It appears from the report of the proceedings before the Court of Justice that the Commission had some clear material evidence of collusion through a number of meetings between the parties, but had decided to use the case to try to establish an infringement of Article 81 on the basis of circumstantial market evidence alone. In its *Fourteenth Report on Competition Policy* the Commission referred to the proceedings as 'the first time that concertation on prices ... is proved by an economic analysis showing that under the given circumstances the similarity of prices was inexplicable unless there was concertation beforehand.'²⁰ The advantage for the Commission in being able to do this was clear: if the argument succeeded it could remove the necessity for searching for difficult-to-discover material evidence of meetings and other communications, allowing instead a concerted practice to be deduced from market analysis. This was an instance of evidential issues leading to the development of substantive law, since logically such an argument might imply that the 'offence' consisted in the parallel behaviour, or more precisely in the device facilitating parallel pricing (allegedly in this case a system of price announcements).

However, the Commission's insistence that the price announcements were sufficient evidence of an infringement caused the Advocate General and the Court a good deal of disquiet. Advocate General Darmon stated that he was unsure whether the Commission was prosecuting the price announcements in themselves or using them as the main evidence of prior collusion; he confessed that he found the Commission's analysis 'shadowy'.²¹ The Court asked the Commission to clarify this point but neither Court nor Advocate General considered that the Commission had done so. The Court subsequently rejected the possibility that the price announcements as such could constitute the infringement. Turning then to the Commission's material evidence of collusion (documents, meetings and telex communications), the Court appeared to reach an *impasse* with the Commission. The Court asked whether this evidence could be used to prove the case against each member of the alleged cartel individually. The Commission obstinately refused to answer that point directly, asserting that the material evidence was relevant to the cartel *as a whole* and 'merely substantiated the evidence based on parallel conduct'.²² This is altogether a somewhat perplexing episode since the Commission had in effect substantiated its case against

²⁰ Commission, *Fourteenth Report on Competition Policy*, (1985), point 56 (at pp. 57-58).

²¹ [1993] ECR I-1503 et seq., quotation at p. 1547. Elsewhere he described the Commission's position as having the 'consistency of mercury' (p. 1503).

²² *Ibid.*, at p. 1600.

individual participation,²³ but the Court appeared to dismiss this evidence summarily. It is not easy to make sense of the dialogue throughout the whole proceeding, but it does appear that the Commission's determination to press for an infringement on the strength of circumstantial evidence provoked the Court into ruling out what would subsequently be termed a 'cartel as a whole' conviction. The result was that the Commission eventually lost what should have been a clear case for the prosecution and that the real problem, with hindsight, was not so much the oligopoly and parallel pricing issue, but the inability to specify and agree on the precise nature of the offending conduct.²⁴

The significance of this imbroglio in the *Wood Pulp* proceedings for present purposes lies in its demonstration of the need for a clearer sense of the degree of offending conduct justifying a penal response under Article 81. The absence of a more precise offence definition bedevilled the whole range of argument in *Wood Pulp*. The forging of the European cartel offence had become a matter of legal necessity.

4.2 Constructing the offence: specific elements

Returning to the point made above that a business cartel is an organisationally complex phenomenon, the legal challenge then is to extract from that complex body of activity an idea of the essentially *offensive* conduct. In particular, a way has to be found of ordering *collective action* and *individual participation* within a single framework of conduct. The Commission's bold stroke in *Wood Pulp* had failed to achieve that end by not stating prosecuting objectives with sufficient precision and at the same time raising concerns about fair treatment.

In fact, the high profile of the *Wood Pulp* proceedings may create a somewhat misleading impression of legal meandering at that time at the European level, since matters were not as untidy as the arguments in that litigation might have suggested. With the benefit of hindsight, *Wood Pulp* may be seen as a diversion occasioned by the Commission's gamble on an easier route to cartel convictions. Harding and Joshua summarised the episode in the following terms:

The Commission had been over-ambitious in the method of its prosecution of the *Wood Pulp Cartel*. On the one hand, it attempted to indict the whole

²³ The Commission had supplied tables containing full details of each individual manifestation of the alleged collusion: Reply to the Third Supplementary Question, [1993] ECR I-1426-7.

²⁴ This may appear at first a surprising conclusion in the context of much of the commentary on the *Wood Pulp* case, which made much of the oligopoly issue and use of expert evidence as a major legal setback for the Commission; see, e.g., G. Van Gerven and E. Navarro Varona, *loc. cit.* This may obscure the fact that the Commission had a strong case, which came to grief through a miscalculation in legal strategy.

cartel by focusing on the system of price announcements as catch-all evidence of group collusion. On the other hand, it also tried to penalize more specific infringements *within* the cartel network, using very much the same evidence. In this way the Commission fell foul, unsurprisingly, of double jeopardy rules and a suspicion of 'recycling' evidence for multiple charges. A preferable approach would probably have been for the Commission to have alleged one grand overall design to stabilize prices which had been furthered in different ways by different participants without necessarily having been in actual contact with each other.²⁵

Yet progress had already been made in the direction of forging an acceptable concept of cartel offending, a fact rather obscured by the *Wood Pulp* adventure. Many of the Commission's successful cartel prosecutions during the 1980s had in fact been presented as cases against a network of activity rather than against discrete anti-competitive actions on the market, emphasising the fact of collusive design rather than specific restrictive conduct. What was emerging from such cases was a charge of individual participation²⁶ in a collective enterprise of planning and implementing anti-competitive objectives. This approach succeeded in integrating both elements of on the one hand (a) individual and collective participation and on the other hand of (b) programmatic and specific activities: what would eventually be termed the 'cartel as a whole'. This way of framing the charge was approved by the Court of First Instance in its 1991 judgment dealing with the appeal against the Commission's decision on the *Polypropylene Cartel*.²⁷ The Court agreed that:

In view of their identical purpose, the various concerted practices followed and agreements concluded formed part of schemes of regular meetings, target price-fixing and quota fixing. Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would be thus artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part – over a period of years – in an integrated set of schemes constituting a

²⁵ C. Harding and J. Joshua, *Regulating Cartels in Europe*, note 2 above, at p. 160.

²⁶ It should be remembered that companies are each 'charged' individually and penalised individually for their cartel activities, and the cartel is not itself the subject, but rather the object, of legal proceedings.

²⁷ Cases 1/89 etc, *Rhône-Poulenc v Commission* [1991] ECR II-867.

single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.²⁸

This statement therefore set the scene for treating cart I activity as a holistic event: a bundle of meetings, plans, and communications moving e towards a commonly agreed anti-competitive goal. In this way, the cartel as an enterprise involving a programme of activity, *is the offence*. But it is an offence committed simultaneously by a number of individual companies and while in a more generic sense they commit the same offence, the extent of their participation may differ, quantitatively and qualitatively, and for that reason their individual liability to censure and penalty may vary. There are therefore two levels of liability:

- a. a *generic* or *joint* liability in respect of participation in the cartel – this may be seen as equivalent to *criminal* liability;
- b. an *individual* or *specific* liability to penalties dependent upon the nature and extent of that member's actual participation – thus, in effect a *penal* liability.

In this way, an important feature of conspiracy is taken into account: that any conspiracy requires the collusion of two or more parties, but the role of the members of any conspiracy may not be the same in terms of moral or legal culpability. To join in the first place is to make the collusion possible and attracts a 'cardinal' liability (to employ sentencing vocabulary), but the more precise or 'ordinal' liability is measured by the degree of involvement.

The casting of the cartel offence in these terms has been approved by the Court of First Instance.²⁹ It has confirmed that the offence resides in the cartel as a whole, entailing a primary liability arising from participation in principle, irrespective of the extent of that participation. The Court has stated that:

An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings organised over several years, was part of an

²⁸ [1991] ECR II-1074-5. The argument was also concerned with the distinction between the terms 'agreement' and 'concerted practice' as they appear in the text of Article 81(1). The Court avoided a dogmatic approach on this question, confirming the Commission's view that the infringement could collectively comprise both agreements and concerted practices and that it was not necessary to charge the two distinctly.

²⁹ Cases T-305/94 etc, *LVM and others v Commission* [1999] ECR II-931.

overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel.³⁰

The Court explained that this was not to impute any kind of collective or vicarious responsibility³¹ – it is an individual responsibility arising from a willingness to join the plot, no matter how that may work out individually for that party deciding to participate. Taking this approach, the seriousness of the ‘cardinal’ offence should also be based on an evaluation of the cartel as a whole: its anti-competitive damage, duration, devices and collective attitude. But ultimately, any penalties are to be applied individually, and that requires a consideration of the involvement of each member individually, in terms for instance of organisational role and commitment (ringleader? passive follower?) and actual support over time. Such prosecutorial strategy was explained by the Commission in another case in the following terms:

The proper approach ... is to demonstrate the existence, the operation and salient features of the cartel as a whole and then to determine (a) whether there is credible and persuasive proof to link each individual producer to the common scheme and (b) for what period each producer participated.³²

In summary, therefore, the offence charged is firstly that of being implicated in the planning and operation of the cartel. But, in terms of more precise liability and in particular the application of penalties, account needs to be taken of the nature of each member’s participation. The latter takes into account the internal reality of business cartels, as described revealingly in the following description from the Commission’s decision relating to the *Pre-Insulated Pipes Cartel*:

The participants had set up an infrastructure of regular meetings and were involved in a continuing process of business diplomacy aimed at reconciling their respective interests. For the purpose of forming and carrying out their scheme, the participants did things which they had devised and agreed to do, including (but not limited to) participating in meetings to discuss prices, sales quotas and project-sharing; agreeing during those meetings to charge particular prices and to increase and maintain prices; drafting, agreeing and distributing model price-lists to be used for co-ordinating

³⁰ [1999] ECR II-1146.

³¹ *Ibid.*, at p. 1145. On the modern rejection of collective criminal liability, see Cassese, *International Criminal Law*, note 18 above, at pp. 136-139: ‘The principle of individual autonomy ... is firmly rooted in modern criminal law’ (at p. 137). This aspect of the subject is discussed further below.

³² *Cartonboard Cartel*, OJ 1994, L 243/1 at p. 38. This statement however does imply that individual liability is simply a matter of the length of time a particular party was involved, whereas in practice it is also (and significantly) a matter of attitude and organisational role.

pricing; exchanging information on sales volumes, market size and market shares so as to set up a quota system; and agreeing a sales quota system. The discussions may have involved a shifting constellation of alliances, even threats of reprisal or hostile action.³³

That is a fair description of the cartel as a whole, and once there is evidence to link a company with that network of activity (though not necessarily every aspect of it) there is a basic liability. The more exact liability will then depend on proof of the actual extent of involvement. As the Commission further explained in that decision:

The infringement consisted of a complex of agreements and concerted practices in which each undertaking played its part. It is not alleged that each ... participated in each and every aspect of the anti-competitive arrangements set out or did so for the whole duration of the infringement.³⁴

From this case it may be seen that the individual participation and hence liability to penalties is commonly worked out by reference to certain main criteria: the economic capacity of the company to cause damage to competition; the duration of its adherence to the common scheme; and aggravating or extenuating circumstances of participation (such as being the ringleader on the one hand, or an unwilling and coerced member on the other hand).³⁵

What is being described here is in one sense little more than the familiar stuff of criminal law, but since it has not been formally presented by the Commission or the Community Courts as criminal law, that fact may not be so evident. In terms of substantive criminal law, the 'offence' is one of participation in a collective action. The second level of liability described above is, in criminal law terminology, the location of an individual instance of offending on a sentencing tariff. From a criminal law rather than a competition law perspective, that is what is happening in such European cartel cases. But there are some interesting jurisprudential consequences of this process of offence construction to be considered further.

³³ *Pre-Insulated Pipes*, OJ 1999, L 24/1, at p. 51.

³⁴ *Ibid.*, at p. 55.

³⁵ *Ibid.*, pp. 61-62.

5. THE EUROPEAN CARTEL OFFENCE: PROBLEMATICAL FEATURES

5.1. Cartel activity as conspiracy: independent or inchoate offending?

The cartel offence, both in its European form and more common form, therefore appears to be, in general terms, an offence of conspiracy. In the context of English criminal law, this would render it an inchoate or preparatory kind of offence,³⁶ like attempts and incitement, something done *en route* to the commission of a further 'substantive' offence. However, it would seem that on closer examination the European version of the offence (like, to some extent, its American counterpart under the Sherman Act³⁷) is not conceived as inchoate, but as a full offence in its own right. There would seem to be a significant difference of emphasis as between the English criminal law of conspiracy and the EC cartel infringement. In the former case, the emphasis is upon the planned further criminal offence, and the conspiracy is clearly then an ancillary offence, and one with an arguable justification. As Ashworth has commented:

An individual who has declared an intent to steal certain property has committed no offence; two or more individuals who agree to do the same thing may be convicted of a conspiracy to steal. How strong are the justifications?³⁸

However, as a matter of wider principle it is not necessary to view conspiracy as being only ancillary and inchoate in this way; it may be invested with an independent element of offensiveness, as may be seen from the American model of the offence. The US Supreme Court has analysed the concept of criminal conspiracy in the following terms:

³⁶ One of the reasons for casting the new cartel offence under English law (Section 188 of the Enterprise Act 2002) as a 'dishonest agreement' rather than a conspiracy was that the latter would have to have been an inchoate offence preparatory to committing a further criminal offence. The anti-competitive objective would not have been criminal in itself. Importing the concept of dishonesty may bring further problems, however – see the discussion in C. Harding and J. Joshua, 'Breaking Up the Hard Core: the Prospects for the New Cartel Offence', *loc. cit.*, p. 933.

³⁷ As was noted in a standard text on American criminal law: '... Conspiracy cannot be viewed solely as an inchoate crime. If it were, then it would hardly make sense to say that it "is an offence of a grave character ..." ... Nor would it be sensible to allow punishment for both the conspiracy and its criminal object. The other function of conspiracy is as a sanction against group activity.' (W.R. LaFare and A.W. Scott, *Handbook on Criminal Law* (St Paul 1972), p. 460.

³⁸ A. Ashworth, *Principles of Criminal Law* (4th ed. Oxford 2003), at pp. 458-459. Ashworth provides a useful overall discussion of the cogency of the English offence of conspiracy as an inchoate offence, *ibid.*, at p. 455-464.

A conspiracy is a partnership in crime ... It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *US v Rabinowich* 238 US 78: 'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offence of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterised by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.'³⁹

This analysis supplies an independent sense of criminality to the activity of planning, plotting and agreement, which then provides a more convincing ethical basis for the offence than that which may be found in the English inchoate version of the offence. As Dennis has also concluded:

It is the element of a plot, something which can arise only from the agreement of two or more persons, which is then the essential difference between an agreement to commit a crime and the resolve or preparation of an individual acting alone to achieve the same crime ... what cannot be present in the case of an individual are the elements of mutual support and encouragement amongst the conspirators, and the sense of obligation arising out of the mutual promises which constitute their contract. Indeed, one variation of this view of conspiracy would be to say that every conspiracy involves a voluntary replacement of the obligation to obey the law by an obligation to another to break the law.⁴⁰

Such arguments are useful for understanding the idea of cartel offending as it has emerged in the European context, in which the element of collusion is also significant in supplying the sense of offending conduct, itself distinct as a morally impugnable act from the anti-competitive objectives of the colluding parties. Indeed, this kind of analysis could be usefully and more explicitly employed by the Commission and Community Courts in explaining and justifying the sanctions used in cartel cases.

³⁹ *Pinkerton v US* (1945) 328 US 640, 644.

⁴⁰ I.H. Dennis, 'The Rationale of Criminal Conspiracy', 93 *Law Quarterly Review* (1977) p. 39, at p. 52. Cf this view of the nature of conspiracy with the analysis of the business cartel as a 'private treaty regime', presented by C. Harding and J. Joshua, *Regulating Cartels In Europe*, note 1 above, at p. 25.

5.2. The precise definition of the cartel offence: the principle of specificity

The need for a more precise definition of the European cartel infringement has already been discussed in some detail above. Amongst other things, the process of offence definition has served an underlying idea of justice, sometimes termed the principle of specificity. In the words of Cassese:

Criminal rules must be as specific and detailed as possible so as to clearly indicate to their addressees the conduct prohibited, namely, both the objective elements of the crime and the requisite *mens rea*. The principle is aimed at ensuring that all those who may fall under the prohibitions of the law know in advance which specific behaviour is allowed and which conduct is instead proscribed.⁴¹

It has been argued above that specificity in this sense was only properly satisfied in the context of the European cartel infringement when the nature of the offending conduct as the 'cartel as a whole' had been clarified by the Commission and the Court of First Instance. Thus it may now be claimed, for purposes of giving legal advice, that companies could be directed to the EC case law for a sufficiently clear idea of the offending conduct which should be avoided. What remains intriguing, however, is the fact that arguments relating to specificity were not pressed more forcefully during the earlier period when the offending conduct was not so well defined. This is surprising in view of the fact that companies were regularly alleging a range of procedural violations and infringements of their rights of defence, sometimes with little real prospect of success, in appeals against Commission cartel decisions. Admittedly, the principle of specificity has been usually invoked in the context of criminal proceedings, and action taken under Article 81 is not of course a criminal procedure as such. On the other hand, that has not prevented the use of argument by analogy on other points relating to defence rights. Even in the *Wood Pulp* litigation, where (as already indicated in the discussion above) the real problem for the Commission was its lack of specificity, this issue arose more from the inquisitorial process involving the Court and the Commission rather than from the adversarial arguments as between the parties. In the adversarial context, cartel appellants appear to have had only an incidental awareness of the potential of this kind of argument, mainly by sometimes reaping the benefit of evidential argument, to the effect that the Commission had not specifically proven the duration of or participation in infringements.

But from the perspective of defending parties, this may well be an opportunity that has passed into history.

⁴¹ Antonio Cassese, *International Criminal Law*, note 18 above, at p. 145.

5.3. Individual responsibility for collective action

Another distinctive feature of the cartel offence resides in the fact that it comprises both a collective and an individual participation. Collusion is by definition a group activity, but in the final analysis responsibility lies with each individual participant in relation to that person's willingness and decision to join the group. As a result, it appears that, while the cartel is the subject of prosecution, each of the individual participants comprise a number of subjects of punishment.

This characteristic of the cartel infringement has been exploited in legal argument. For instance, there have been attempts to impugn the Commission's case in cartel proceedings and in particular its reliance on the concept of the 'cartel as a whole', as an infringement of the 'universally recognised principle' of personal responsibility (or, conversely, the prohibition of collective responsibility).⁴² The Court of First Instance rejected this argument, referring to the Commission's imposition of liability on individual companies on the basis of their awareness of and willingness to participate in the cartel as a whole.⁴³ One way of understanding this conclusion is to present the argument in terms of the criminal law vocabulary of *actus reus* and *mens rea*. A crucial part of the *actus reus* of the infringement is the collusion as manifested in 'the cartel as a whole' – the meetings, communications, and activities comprising the planning and concluding of agreements. The *actus reus* – or, at least, this essential part of it – is a collective activity. But the *mens rea* is individually located in the awareness and willingness of each participant to participate. This view of the *mens rea* is clearly articulated in that part of the Court's judgment in *LVM* which states that responsibility is based on the fact that an undertaking knew, or must have known, that the collusion in which it participated ... was part of an overall plan ... and that the overall plan included all the constituent elements of a cartel.⁴⁴

Issues of personal and collective responsibility may be thus clarified in this way, at the same time illuminating the logic of collusive offending. There must be a collective activity (*actus reus*), but that activity depends upon each members' willingness to participate, the latter (*mens rea*) residing in a knowledge of and intention to contribute to the conspiracy.

⁴² For instance, the argument presented by Elf Atochem, BASF, ICI and others in Case T-305/94 etc, *LVM and others v Commission* [1999] II-ECR, at p. 1144.

⁴³ *Ibid.*, at pp. 1145-1146.

⁴⁴ *Ibid.*, at p. 1156.

5.4. The personality and identity of the offender

A further characteristic of cartel infringements arises from the factual basis of business collusion: that this is at one level an activity of corporate business actors, but is more specifically perpetrated by individual human actors who are employees or representatives of these companies. Theoretically, it is then possible to talk in terms of both corporate and individual (or personal) responsibility co-existing at one and the same time. This presents in principle, therefore, a choice of legal strategy – to take action against the corporate person, the individual employee or representative, or both. In exercising this choice, there are implications for both principles of justice (double jeopardy questions), and issues of penalty (forms of penalty).

Up to a point, this issue is simplified for purposes of European Community law on account of its limited terms of reference. Article 81 refers to the activities of ‘undertakings’ (*usually* companies or other types of corporate person), and the range of ‘administrative’ penalties at the Commission’s disposal does not include human-target measures such as imprisonment. There is arguably, then, no legal basis for taking action on the basis of Article 81 against individuals acting for their companies in cartel negotiations.⁴⁵

But it is worth noting that there are other approaches elsewhere. Under US antitrust law, sanctions may be and are increasingly frequently applied to both companies and their executives in relation to criminal violations of the Sherman Act: a corporate fine, plus a fine and/or a prison term for the individual.⁴⁶ Recently, for example, in proceedings relating to the Monochloroacetic Acid (MCAA) Cartel in the San Francisco District Court, a French executive with Elf Atochem received a 90 day prison sentence and a fine of \$50,000 for his role in organising a market sharing conspiracy, while the company had already been subject to a \$5 million fine.⁴⁷ This is just one among a number of recent instances of both a company and its executives being charged as co-conspirators, each committing the same offence under Section 1 of the Sherman Act.⁴⁸ The American approach, employing the offence of conspiracy, thus treats different types of legal person as co-defendants, committing together the same offence. In this way, the separation of legal personality navigates a way around any

⁴⁵ Article 81 refers to ‘agreements between undertakings’, which would in practice have to be the companies as the *legal persons* entering into agreements or participating in concerted practices.

⁴⁶ For a recent overview, see C. J. MacAvoy and K. W. Donnelly, ‘Trends in US government antitrust enforcement’, Ch. 2 in *The Antitrust Review of the Americas 2002 (Global Competition Review, special report, 2002)*.

⁴⁷ Department of Justice press release, 7 August 2002, <<http://www.usdoj.gov>>. A 90 day prison term couple with a fine of \$50,000 appears to be the present norm for individual penalties.

⁴⁸ See C.J. MacAvoy and K.W. Donnelly, *loc. cit.*

charge of double jeopardy. In effect, therefore, within the cartel companies conspire with each other, while at the same time, within each company individual executives conspire with the company.

But under UK law (and also under UK law plus EC law) there is a different approach. Offending conduct and sanctions are both differentiated. An 'administrative' infringement and fine may be applicable to the company under Section 16 of the Competition Act 1998 and/or under Article 81 of the EC Treaty. Also now, under Section 188 of the Enterprise Act 2002, individual executives may be guilty of the 'cartel offence' by dishonestly entering into an agreement to form a cartel contrary to the competition rules, and thereby risk a prison term.⁴⁹ Again, double jeopardy is circumnavigated, but this time by allocating different species of offending conduct to the different legal persons.

Although both US and UK law thus achieve, in different ways, a bifurcation of responsibility and penalties, there remain however some unresolved questions in terms of criminal jurisprudence. Both approaches rest on the assumption that responsibility for cartel behaviour may be divided, either by separating legal personality or by carving distinct offences out of the overall cartel activity. Both exploit the organisational complexity of cartels, in terms of their participating actors, and in terms of their range of activity. Yet the cogency and justification for doing so is not completely without question. Is the 'cartel as a whole' justifiably divided in these ways for purposes of law enforcement? Underlying this question are more fundamental questions of personality and responsibility: who should most appropriately be considered responsible for the cartel – individuals, companies, or both? This is not to assert that the outcomes in any of these jurisdictions (US, UK or EC) are wrong or insupportable; rather, that they may be contestable. The fact that there are different legal outcomes in terms of responsibility and penalty, or different legal routes to these outcomes, reveals the underlying uncertainty of basic jurisprudential argument.

Indeed, the discussion at this point reaches the edge of murky philosophical water regarding the possibility of two separate identities, one human and one corporate, in relation to legal liability for the same act. This would present a problem for example for conventional legal analysis under English criminal law. Any proposal to separate the 'mind' of a company from that of its component human actors would probably encounter objections embedded in the empirical tradition of 'methodological individualism' characteristic of English criminal law.⁵⁰ This point is made by Simester and Sullivan,

⁴⁹ For a fuller discussion, see Harding and Joshua, note 1 above, at pp. 260-266. See also the OFT Consultation Paper, 'Powers for investigating criminal cartels', April 2003 <<http://www.of.gov.uk>>.

⁵⁰ For a characteristic exposition, see H L A Hart, *Definition and Theory in Jurisprudence*, (Clarendon Press, 1950, at p. 21.

when they say that states of mind such as intent, dishonesty and recklessness:

would not be captured by posing questions relating to general corporate performance. Attributing intentionality and other states of mind to a company directly, without any mediation through the intentions and states of mind of persons connected with it, would require full adoption of the view that companies are, sufficient unto themselves, moral agents or 'intelligent machines'. This seems an unlikely prospect ... one may assert that companies, in terms of their activities and planning, depend on human agency and are not, in terms of conduct or states of mind, some form of non-human sentient creature.⁵¹

Or, to put the matter precisely, in the words of a leading British judge:

a reference to the company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, only the applicable rules. To say that a company cannot do something, means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as the act of the company.⁵²

Under such an approach, if the corporate act depends upon attribution from a human act, then the two actors are one and the same and considerations of double jeopardy might come to the fore.

However, to return to the main line of argument: as stated above, the present position regarding the European cartel offence is in this respect relatively straightforward, as a matter of corporate liability and administrative penalty. But the fact that the EC legal position now 'cohabits' with different (i.e. criminal law) positions under some Member States' law suggests that some interesting legal questions may be lurking for the not too distant future.

6. CONCLUSION

In these times when participation in an anti-competitive business cartel has become, not just something which is legally prohibited, but also under an increasing number of jurisdictions, a criminal activity, it is important to note that there is now a firm

⁵¹ A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed. Oxford 2003), pp. 261-262.

⁵² Lord Hoffmann, for the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995) 2 AC, 500, at pp. 506-507.

legal sense of *offending* cartel conduct as a matter of EC law. It has become possible to talk about a defined 'offence' (though still technically termed an 'infringement') at the European level, comprising participation in a 'cartel as a whole' in the sense employed by the European Commission and Community Courts. This European 'offence' thus takes its place within the range of 'cartel offences' which now exist in a number of jurisdictions, such as the long-established conspiracy offence under Section 1 of the Sherman Act in the US, and the new cartel offence provided for in the recent Enterprise Act in the UK. But, as may be seen from the discussion above, there are differences in the more precise legal definition and jurisprudential character of these various cartel offences. In a comparative perspective, the European version of the offence has some distinctive (though not unique) features: most importantly, it attaches to corporate actors, it is administrative rather than criminal, and it would appear to be a full, not just inchoate offence. It is important to take on board these characteristics of offending conduct now being prosecuted via the application of the EC competition rules, in order to appreciate both its place in the global scheme and also any interaction with the application of analogous rules in other jurisdictions.