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**Capturing the cartel's friends: Cartel  
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# Capturing the cartel's friends: Cartel facilitation and the idea of joint criminal enterprise

Christopher Harding\*

 Cartels; EC law; Joint enterprise; Penalties

*The recent ruling by the Court of First Instance in AC-Treuhand (T-99/04), confirming that a consultancy firm which had facilitated the operation of the Organic Peroxide Cartel thereby infringed Art.81(1) EC, provides some insight into the nature of punishable cartel offending. Now that involvement in business cartels attracts significant sanctions at both a corporate and individual level the basis for such penal liability requires a clear justification. The facilitation of cartels is part of that extra layer of subterfuge which adds to the reprehensible character of the anticompetitive damage arising from cartels, so as to justify penal measures such as large fines and prison terms. A number of recent judgments serve to emphasise that the tough regulation of cartels is as much about dealing with subterfuge and legal defiance as the anticompetitive behaviour in itself. It is also instructive in this context to draw upon the model of the joint criminal enterprise (JCE), as it has been developed in war crimes proceedings, as a way of viewing an anticompetitive cartel as a joint illegal enterprise, which necessarily and significantly includes the role of facilitating actors as well as that of actual price fixers and the like.*

## Cartel delinquency

Embedded somewhere within the broad definition of prohibited anticompetitive conduct under Art.81(1) EC is an area of “hard core” collusive activity commonly referred to as that of a “cartel”. In practice, this is probably now the main form of anticompetitive behaviour which is categorically condemned in official policy and seen as deserving severe sanctions when detected. Interestingly, however, there is still no precise legal definition of the term “cartel” at the EC level, nor an exact legal delineation of the delinquency which underlies hardcore anticompetitive behaviour and which then provides the legal basis for a penal response.<sup>1</sup> There is, of course, a general and *descriptive* sense of such conduct, in terms of a deliberate engagement in certain kinds of activity now well understood to be indefensible as a matter of competition policy—typically price-fixing, market sharing, bid-rigging and the fixing of quotas on production and supply.<sup>2</sup>

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<sup>1</sup> See the earlier discussion of this point by Christopher Harding, “Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy” (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 275.

<sup>2</sup> See for instance the OECD definition in its Recommendation on Effective Action Against Hard Core Cartels (1998): an anti-competitive agreement, concerted practice or arrangement to fix prices, make rigged

In a general way, that is all clear enough, and a hard core cartel is recognisable as such, known when seen, as it were. But in a *normative* sense, there remains some uncertainty regarding the element of delinquency. What is so bad about this conduct that justifies massive fines on companies, and sometimes now prison terms under national law for company executives,<sup>3</sup> and the vituperation<sup>4</sup> of regulators? For the level of condemnation and scale of penalty are now legally impressive. In 2007, for example, a single cartel was fined by the European Commission a total of €992,312,200 and a single company within that cartel a total of €479,669,850.<sup>5</sup> Between 2000 and 2004, the Commission collected a total of €3,697,516,100 in cartel fines; in the period 2005–2008 this total (to date) had risen to €6,018,867,700.<sup>6</sup> Vigorous penal activity is also evident at the national level,<sup>7</sup> where, in addition, criminal convictions and prison terms for individual executives have started to make an appearance, as discussed further below. At the same time, in a more *practical* sense, while there is as yet an insufficiently defined “cartel offence” within the terms of Art.81(1) EC, there is also uncertainty regarding the precise scope of the punishable conduct, and who may be caught within the net of penal condemnation and sanctions. As some of the discussion below will show, there has been some controversy regarding the question of what legally counts as participation within a cartel, such as to justify penal treatment.<sup>8</sup>

This lack of specificity regarding both the delinquent nature and penal scope of cartels is evident when considering some recent legal developments relating to the facilitation of cartel activity, and the extent to which such facilitation is covered by both the prohibition of Art.81(1) EC and by national criminal offences applying to individuals who are involved in the design and implementation of cartel activity. At the same time, some focus on facilitating actions and the element of subterfuge involved in cartels may help in understanding the strength of the condemnation of this kind of anticompetitive behaviour.

### Cartel facilitation

In July 2008, the European Court of First Instance (CFI) confirmed<sup>9</sup> that part of the European Commission’s decision in 2003 on the Organic Peroxide Cartel<sup>10</sup> which applied

bids, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce (Paris: OECD, April 27–28, 1998), C(98)35/Final.

<sup>3</sup>For instance, following conviction for the cartel offence under s.188 of the Enterprise Act in the UK: note the recent sentences imposed in *R. v Whittle, Brammar and Allison*, not yet reported, June 11, 2008 Southwark Crown Court.

<sup>4</sup>e.g. the comment by former EC Commissioner for Competition, Mario Monti, that international cartels were like “cancers on the open-market economy” (Speech/00/295 at the third Nordic Competition Policy Conference, “Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?” (Stockholm: September 11, 2000) [http://ec.europa.eu/competition/speeches/index\\_2000.html](http://ec.europa.eu/competition/speeches/index_2000.html) [Accessed March 13, 2009]).

<sup>5</sup>European Commission, [ec.europa.eu/comm/competition/cartels/statistics](http://ec.europa.eu/comm/competition/cartels/statistics), June 25, 2008 update.

<sup>6</sup>European Commission, [ec.europa.eu/comm/competition/cartels/statistics](http://ec.europa.eu/comm/competition/cartels/statistics), June 25, 2008 update.

<sup>7</sup>For instance, in September 2008, the Netherlands Competition Authority fined five nursing home organisations a total of €7.8 million in respect of a market sharing arrangement: *Global Competition Review*, September 29, 2008.

<sup>8</sup>This is especially evident in the arguments presented in appeals against the amount of fines as calculated by the European Commission.

<sup>9</sup>*AC-Treuhand AG v Commission* (T-99/04) [2008] 5 C.M.L.R. 13.

<sup>10</sup>Decision 2005/439 (*Organic Peroxides*) [2005] OJ L110/44.

to the Swiss consultancy firm AC Treuhand, finding that the firm was in breach of Art.81(1) EC and imposing a fine on the company. The Organic Peroxide Cartel had been in operation between 1971 and 1999 and a number of producers had been fined by the Commission a total of nearly €70 million for engaging in the cartel. In addition, the Commission had also decided that AC Treuhand, which had provided secretariat functions to the cartel from 1993 to 1999, was also thereby in breach of Art.81(1) EC and imposed a fine on the company of €1,000 (the amount was nominal since this was the first time since 1980<sup>11</sup> that an undertaking not involved in the production or distribution of the commodity, but facilitating the cartel's operation had been penalised). Treuhand challenged the legality of the Commission's decision on the ground that the company was not active on the market and so not covered by the prohibition of Art.81(1) EC, and that the Commission had thereby breached the principle of *nullum crimen, nulla poena sine lege*. However, the CFI confirmed that Treuhand's role, though not active in the market of the relevant product, was that of a *passive* "co-perpetrator" within the cartel and so was caught by Art.81 EC. The Court stated in particular that,

"it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel ... Where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery. It thereby engages in a passive form of participation in the infringement."<sup>12</sup>

This provides a statement of the legal basis for what might be termed "facilitator liability", and confirms that the net of liability extends to the cartel's friends as well as members of the cartel itself. The Court emphasised that even "subsidiary, accessory or passive" participation was sufficient to incur some liability for the whole infringement. In that way, the judgment refines the understanding of the concept and scope of the cartel as a prohibited organisation.

It should be noted at this point what more precisely had been the role of this consultancy firm. Large scale business cartels are complex and sophisticated organisations which require careful planning and management. The cartel will be constructed around a sequence of communications and perhaps meetings which naturally have to be covert in nature and managed in a careful way regarding evidence. The Organic Peroxides Cartel called upon expert services for this purpose, first of all using Fides Trust AG, and thereafter Treuhand. Fides and Treuhand organised meetings and supplied logistical assistance. The Commission found that Treuhand played a key role in the operation of the cartel, by organising meetings (often outside EU jurisdiction, in Zurich), producing and carrying out calculations for the so-called "pink" and "red" papers which stated the

<sup>11</sup> In its decision relating to the Italian Cast Glass Cartel (Decision 80/1334 (*Italian Cast Glass Cartel*) [1980] OJ L383/19) the Commission imposed liability for infringing Art.85(1) EC on a consultancy firm. Treuhand asserted that the Commission subsequently "abandoned" its approach on this question. The Court of First Instance did not appear to view the approach as abandoned, but found that a future indictment of a consultancy firm was reasonably foreseeable (*AC-Treuhand* [2008] 5 C.M.L.R. 13 at [147]).

<sup>12</sup> *AC-Treuhand* at [130].

agreed market shares and were kept safely at Treuhand's office, and engaging in such tactics as the reimbursement of travel expenses of individual participants in the meetings, so as to cover the traces of the meetings. Treuhand's role was, therefore, to ensure the effective operation of the cartel, while also working to ensure its secret character, and as such was consciously law-defying.

At a similar time, the recent first-ever convictions and sentences for cartel offending under the UK Enterprise Act<sup>13</sup> have complemented this development in the regulation of cartel facilitation. The criminal proceedings at Southwark Crown Court in June 2008<sup>14</sup> arose from the US investigation and prosecution of three British businessmen for their involvement in the Marine Hoses Cartel. As part of a plea bargain negotiated by the defendants, it was agreed that they would plead guilty to the British cartel offence in order for them to be convicted and serve prison terms in the United Kingdom.<sup>15</sup> There are a number of points of interest in this proceeding (not least that it involved the first convictions for the British cartel offence)<sup>16</sup> but the issue of relevance to the present discussion concerns the role of one of the three defendants in relation to the cartel. The first defendant, Whittle, was not actually representing a producer company participating in the market-sharing and bid-rigging activity, but was described as the cartel co-ordinator, which activity he carried out through his own consulting company. This conviction therefore works in parallel, at an individual level, with the confirmation of Treuhand's infringement of Art.81(1) EC at the corporate level, and so reinforces the expansive concept of cartel offending as including facilitating activities.

Again, it would be useful to explain further the role of cartel co-ordinator on the part of this particular defendant. The main role of Whittle's company, PW Consulting Oil and Marine Ltd, was the implementation of the cartel agreement through the organisation of meetings, reports and sham contract bids, all of which were essential for the operation of the cartel. The substance of this "cartel co-ordination" is summed up in the following extract from the judgment:

"This was a full-time job. The cartel was run as it had to be with meticulous attention to detail. Code names were used, clandestine meetings were organised and held, agreements were reached, both in relation to the market share and for the bogus contract bids. All of this was illustrated and monitored by monthly reports. There was a formally agreed decision-making process by which the successful company would be nominated as the champion for that contract. There were rules for compliance. The parties communicated through the use of code names when they or their companies became more concerned about compliance and they disguised their contract with one another and with [Whittle] through the use of email accounts that ... had no

<sup>13</sup> Enterprise Act 2002 s.188 Ch.40.

<sup>14</sup> *R. v Whittle, Brammar and Allison*, not yet reported, June 10, 2008.

<sup>15</sup> The plea bargain included agreed prison terms of 20–30 months, which could be served in the UK on the basis of pleading guilty and conviction for the UK cartel offence, but also an undertaking to return to the US and complete prison terms there if the UK sentences proved to be shorter than those agreed to in the plea bargain. See OFT Press Release, "Three imprisoned in first OFT criminal prosecution for bid-rigging" (June 11, 2008).

<sup>16</sup> The offence has been in force for four years and the first trial has been awaited with interest to examine the way in which the requirement of dishonesty would be dealt with. However, this was not a trial as such and so the matter remains to be tested (probably in the forthcoming trial of four BA defendants, referred to below).

connection with the companies they represented . . . All of the bid documentation had to be prepared . . . this was indeed a labour intensive exercise, time consuming and highly sophisticated.”<sup>17</sup>

Once more, what may be noted about this form of conduct is that it formed a substantial activity in its own right which was essential to the working of the cartel—that it contributed not only to the realisation of the cartel’s substantive objectives but also an important part of the cover-up operation. This point is stressed since it helps to convey an idea of what is delinquent and morally objectionable in cartel behaviour: that it is not only a matter of anticompetitive damage (what may be thought of as the substantive predicate offending) but also a matter of deliberate planning of something known to be illegal and with a strong element of sophisticated subterfuge. Both of these elements of offending were some time ago captured in the well-know Sherman Act formulation of this kind of offending conduct, as a criminal offence under US law, as a *conspiracy* in restraint of trade or commerce.

Such recent judgments provide, therefore, a useful clarification of the nature and extent of cartel offending, at both the corporate and the individual level. They serve notice that the offensive conduct does not simply comprise actions such as fixing prices or sharing markets, what might be termed specific anticompetitive strategies. The term cartel in itself refers to an organisation, and it is that aspect of organisation and subterfuge that is both necessary for the realisation of anticompetitive aims but also supplies an element of delinquency over and above the anticompetitive strategy in itself. In that last sense, the concept of the anticompetitive business cartel bears comparison with the concept of the joint criminal enterprise which has been used in recent years in relation to crimes against humanity and war crimes,<sup>18</sup> as a means of ensuring that liability extends to facilitating and master-minding parties. The inclusion of cartel facilitators within the definition of competition infringement and offending has therefore two points of significance which deserve some further comment: first, the way in which this development enlightens the current sense of delinquency (and now criminality) attaching to such conduct; and secondly, the legal implications of including acts of facilitation within the definition of infringement or offence, which effectively imports the concept of joint criminal enterprise into cartel regulation.

### **The extent of delinquency: why are cartelists like criminals?**

The application of sanctions to anticompetitive cartels and their intended deterrent effect now comprise a significant body of legal activity. Many of the arguments and appeals relating to the European Commission’s decisions against companies found to be involved in cartels now relate to the imposition of fines and the justification for the size of these now very substantial penalties.<sup>19</sup> At the same time, the European model of cartel control

<sup>17</sup> *R. v Whittle*, not yet reported, per Geoffrey Rivlin J. The judge addressed the defendant in passing a three year prison sentence, stating: “You were deeply involved in all this dishonesty; indeed it formed the basis of your whole working life . . . You were the co-ordinator, and you did that job very efficiently.”

<sup>18</sup> See Corwin D. Edwards, *Control of Cartels and Monopolies: an International Comparison* (Oceana Publications, 1967) and *Norris v United States of America* (2008) UKHL 16.

<sup>19</sup> See the discussion in Christopher Harding and Alun Gibbs, “Why Go to Court in Europe? An Analysis of Cartel Appeals, 1995–2004” (2005) 30 E.L. Rev. 349.

is now replicated at the national level, and investigations and sanctions at that level comprise a significant and inter-related complement to the EC level enforcement. One part of this complementary enforcement is the possibility in some national systems that criminal liability and criminal sanctions may be imposed on individuals involved in corporate cartel conduct. The whole is tied together by a now clear official rhetoric which condemns business cartels in the strongest terms and casts cartel activity as highly delinquent conduct which merits criminalisation: hence the resort to massive corporate fines and to prison terms for individual executives. But such prosecutorial and judicial practice needs to be reflected in the legal definition of the infringement, and this is the argument underlying Treuhand's invocation of the principle *nullum crimen, nulla poena sine lege* in *AC-Treuhand*, the idea that there must be a clear legal basis for prohibition, liability and sanctioning. While the Court of First Instance's judgment is convincing enough on the firm's contribution to the operation of the cartel, there may be more substance in the objection that the legal delineation of *punishable* cartel conduct is in need of greater specificity and definition.

What, then, is the punishable part of an infringement of Art.81 EC? First, it is clear that many infringements of that provision are not such as to deserve a penalty. The power to impose penalties is laid down in Arts 23 and 24 of Council Regulation 1/2003,<sup>20</sup> most of the detail of which covers specific procedural "offences" such as supplying incorrect or misleading information, or failing to comply with commitments and decisions. In substantive terms Art.23(2) simply refers to an intentional or negligent infringement of Art.81 EC, while Art.23(3) states that the gravity and duration of the infringement should be taken into account in fixing the amount of any fine. Thus, in legislative terms, there is little more than a broad sense that "serious" infringements are the punishable violations. A fuller sense of what is comprised in such punishable violations (or Art.81 EC "offences") can be gained from the Commission's Guidelines on the method of setting fines<sup>21</sup> and the "sentencing practice" or case law of the Commission, the Court of First Instance and the Court of Justice.<sup>22</sup> But it should be noted that such legal sources for definition of the offending conduct constitute an exercise in working backwards from discussion of an appropriate penalty, rather than any a priori definition, and are the result of incremental and often judicial specification. In this way, a kind of "cartel offence" could be constructed for instance from the reference in para.23 of the Commission's Guidelines on the method of setting fines to horizontal price-fixing, market-sharing and output limitation agreements, which are usually secret, and by their very nature among the most harmful restrictions of competition, and heavily fined as a matter of policy. But such ex post facto patchworking still lacks the degree of specificity<sup>23</sup> usually required for offence definition in systems of criminal law.

Something more specific may be quarried from judicial statements and analysis emerging from appeals against Commission decisions in cartel cases, in particular from the idea

<sup>20</sup> Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L1/1.

<sup>21</sup> Guidelines on the method of setting fines pursuant to Art.23(2)(a) of Regulation 1/2003 [2006] OJ C210/2.

<sup>22</sup> See the summary in Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford University Press, 2003), pp.242 et seq.

<sup>23</sup> On specificity as a principle, see Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), pp.145–147.



of the “cartel as a whole”, encapsulating what is essentially being penalised in this area of anticompetitive activity. This concept suggests that it is not simply a matter of anti-competitive objective (for instance, to fix prices) but also the supporting infrastructure of plans, meetings and implementing measures. A good example is provided by the Commission’s description of what was being strongly condemned and penalised in the case of the *Pre-Insulated Pipes Cartel*,

“an infrastructure of regular meetings and ... a continuing process of business diplomacy aimed at reconciling [the companies’] respective interests. For the purpose of forming and carrying out their scheme, the participants did things which they had advised 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 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.”<sup>24</sup>

This sense of a continuing joint enterprise has also been referred to by the Court of First Instance as, “an integrated set of schemes constituting a single infringement”.<sup>25</sup> Such analysis leads back to the very idea of the cartel as a kind of illegal enterprise and to the notion that it is involvement *in the cartel* which is viewed as offensive as much as specific anticompetitive objectives.

It is important to emphasise the element of deliberate and carefully planned organisation in this context, as something which contributes to the sense of delinquency. Fifty years ago, outside of North America, such business cartels, while they may have been regarded as requiring regulation, were not seen as reprehensible or delinquent arrangements.<sup>26</sup> As the regulation of cartels as a matter of competition policy within the EC became so much firmer during the 1960s and 1970s, and their condemnation became categorical, so too the persistent engagement in such activities became so much more a matter of legal defiance and furtive operation.<sup>27</sup> The outcome was a “spiral of delinquency”, whereby illicit planning and secretive implementation added a further layer of illegal activity. Business cartels became a matter of anticompetitive strategy *plus* collusive obstruction of justice, and it was then the latter, as much as or indeed more than the former, which may be seen as providing a significant justification for penal treatment and any criminalisation.

However, the cartel, as distinct from its specific anticompetitive goals, remains insufficiently articulated as an object of penalty. The idea is there implicitly in some of the wording employed in Art.81 EC (“concerted practice”) and was developed further in the concept of the “cartel as a whole”. When individual participation in a cartel was

<sup>24</sup> Decision (IV/35.691/E-4—*Pre-Insulated Pipe Cartel*) [1999] OJ L24/1, 51.

<sup>25</sup> *Rhône-Poulenc SA v Commission* (T-1/89, etc.) [1991] E.C.R. II-867 at [1074-5] (judgment on the Polypropylene Cartel appeal).

<sup>26</sup> See in particular the survey contained in Edwards, *Control of Cartels and Monopolies: an International Comparison*, 1967. Interestingly, also, the recent analysis by the House of Lords in *Norris* (2008) UKHL 16, stated that secret price fixing (prior to 2003) did not qualify as the common law offence of conspiracy to defraud, since it lacked dishonesty or other comparable “aggravating” features.

<sup>27</sup> For an overview, see Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, 2003, Ch.4.

criminalised in the UK Enterprise Act, there was an attempt to capture this additional layer of “delinquency” by inserting the requirement of dishonesty into s.188 of the legislation. But, arguably, dishonesty is not the most appropriate concept for purposes of conveying the sense of wrongdoing involved in deliberate, contumacious, furtive and obstructive conduct that is now regarded as characteristic of “hard core” cartels.<sup>28</sup> But it is precisely this kind of furtive planning and organisation that was assigned to AC Treuhand to facilitate the operation of the Organic Peroxide Cartel and to PW Consulting Oil and Marine to aid the Marine Hoses Cartel. Moreover, it is instructive to note that, in the latest stage of the Norris extradition saga<sup>29</sup> within the United Kingdom, the US Department of Justice has now switched its attention to obstruction of justice charges for purposes of finding sufficient double criminality to match under English law the seriousness of the Sherman Act offence within the United States. American prosecutors have argued that the alleged cartel was involved in cover-up activities, by establishing a task force to destroy or conceal incriminating documentary evidence, and preparing scripts to be used by any employees facing questions from investigators. So far, the British Magistrates Court has ruled that,

“even though the price-fixing charge has gone, the remaining obstruction charges are not only distinct and substantial offences, they are ones of such gravity that standing alone they merit prosecution”.<sup>30</sup>

This ruling serves to bring the obstruction to justice element to the fore, illuminating what is especially delinquent in a cartel operation—the cover-up as much as (or even more than?) the anticompetitive motive.

Treuhand, Whittle and Norris each performed an essential facilitating role in relation to their respective cartels. These recent court rulings recognise the significance of that role, but also usefully affirm something of the appropriate delinquency, criminality and penalty of cartel conduct. Or, the matter may be phrased more graphically: that there may be some doubt as to whether a price fixer should go to prison, but less reservation in imprisoning a facilitator who engages in obstructive subterfuge. The persisting problem regarding the penalisation and criminalisation of anticompetitive conduct in itself arises from a change in economic theory rather than one in public perception. The House of Lords’ judgment in *Norris* harked back to earlier economic theory and policy, which saw some virtue (for instance, preventing the lowering of wages, or unemployment) in restraints of trade, and could interpret anticompetitive action as the acceptable promotion of own business interests rather than the malicious injury of other parties.<sup>31</sup> But economic theory at the start of the 21st century is much more conscious of the effect of companies’ pricing decisions on the welfare of consumers. Cartel criminalisation across jurisdictions is still in search of a commonly agreed element of criminality: sometimes anticompetitive behaviour in

<sup>28</sup> Again, see the House of Lords judgment in *Norris* (2008) UKHL 16.

<sup>29</sup> Ian Norris, former Chief Executive of Morgan Crucible, was the subject of an extradition request by the Department of Justice, to stand trial in Pennsylvania in connection with his involvement in the Carbon Products Cartel. The first extradition attempt failed when the House of Lords ruled earlier in 2008 that conspiracy to defraud would not have applied to price fixing activities at the time of the cartel’s operation (*Norris* (2008) UKHL 16). The Enterprise Act offence could not be called in aid since the operation of the cartel pre-dated the enactment of the cartel offence in the UK.

<sup>30</sup> District Judge Nicholas Evans, sitting in City of Westminster Magistrates Courts, July 25, 2008.

<sup>31</sup> *Norris* (2008) UKHL 16 at [17].

itself will suffice, sometimes something more, such as dishonesty, is required. Shifting the focus of delinquency to cartel subterfuge may help in this search for a widely and commonly accepted sense of serious wrongdoing.

### **What counts as participation in the cartel: the cartel as joint criminal enterprise**

The Court of First Instance has confirmed that it is some kind of knowing involvement in the “cartel as a whole” which provides the basis for liability under Art.81(1) EC, and liability for fines under reg.1 of Regulation 1/2003. As seen above, the Court has also confirmed in *Treuhand* that a “passive” facilitating role (as distinct from an “active” anticompetitive producer role) is covered by that liability. This raises the question of different roles within the cartel and how far the web of connected activity may extend for purposes of liability. It is at this point that the analogy with the concept of joint criminal enterprise becomes instructive. On closer examination, the analogy is striking, since the legal contexts at first sight seem very different, yet the vocabulary, concepts and definitions of offending participation are similar.<sup>32</sup>

The idea of joint criminal enterprise (JCE) has been developed in particular by the International Criminal Tribunal for the Former Yugoslavia (ICTY) but has a clearly analogous application in relation to a range of serious criminal activity arising in an organisational context, from war crimes and crimes against humanity to organised crime and terrorism.<sup>33</sup> The concept has started to make an appearance in a range of jurisdictions, such as that of the International Criminal Court (in Art.25 of the Court’s Statute), the Special Court for Sierra Leone, the Special Panel for Serious Crimes in East Timor, and the US military commissions.<sup>34</sup> In broad terms, it serves the prosecution of significant connected actors who do not “get their hands dirty” but direct or facilitate the predicate offending of operatives within an organisational context. Thus, it is a device which captures the participation of and imposes liability on criminal mastermind and “godfather” figures, and a range of facilitators of criminal activity (corrupt police, politicians, financiers or officials; suppliers of equipment or logistical support; advisers; guards and getaway drivers). The role of such actors is essential but indirect, and thus less easily proven; hence the value of a device which first defines a criminal enterprise and then assigns liability to specified forms of participation in such enterprise. The analogy with the instances of cartel facilitation discussed above should therefore be clear.

<sup>32</sup>Consider for instance some of the language used by the CFI in *Treuhand* [2008] 5 C.M.L.R. 13 at [130]: “The Commission must prove that the undertaking intended ... to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk.” This is conceptually very close to the JCE.

<sup>33</sup>For discussion of the development of the JCE (sometimes also referred to as a “common purpose, design, or plan”), see Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), pp.181–189; Allison Marston Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law” (2005) *California Law Review* 75; Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan Publishing, 2007), Ch.10.

<sup>34</sup>For an overview of these developments, see Danner and Martinez, “Guilty Associations” (2005) *California Law Review* 75.

But the use of the JCE concept brings risks as well as advantages. One obvious risk is the temptation to make an enterprise overly inclusive and cast the net of liability too widely (notorious examples have been membership of the Nazi party, or the category of ‘enemy combatant’ for purposes of the US military commissions<sup>35</sup>). A related risk concerns the role within the enterprise, and the possibility that this may be tenuous or insufficiently proximate to the core activity and objectives of the enterprise. For example, should liability extend to a passive “turning away”, such as that of a person who stands by in a crowd and does not come forward to prevent an act of violence, or decides not to act as a whistle-blower within a company? Therefore, in a technical and legal sense, it is necessary to have, first, a clear and acceptably delineated scope of the enterprise in question, and secondly, a clear and acceptably defined participatory role within the enterprise. Clearly, these two issues are interrelated, and may be brought together in a legal test of significant participation in relation to achieving the essential goals of the enterprise.<sup>36</sup>

In the context of anticompetitive business cartels, the cartel as an enterprise is likely to be in its nature relatively well defined. There may be problems of evidence in practice (for instance, concerning the duration of the cartel and its exact membership at particular points in time<sup>37</sup>), but usually the goals, scope and structure of cartels are clear and typical. In fact, the business cartel is a quintessentially typical unlawful organisation or enterprise.<sup>38</sup> However, more care may be required in specifying the kinds of participation in cartel activity that may justifiably ground liability for an infringement of Art.81 EC, or a national level criminal offence. The roles carried out by AC-Treuhand<sup>39</sup> and the other defendants referred to above would seem clear enough in terms of their significance for the cartel and that is an important point to be taken on board now by legal advisers: that such contribution to the organisation and operation of the cartel, though provided by parties described as “consultants”, will be easily sufficient for both Art.81 EC and any criminal liability. But it is possible to envisage cases involving a less direct connection and more marginal role, in which a test of significant relation, or “definite and decisive causal link”, may be less easily applied.

One issue, for example, at both the corporate and individual level, may be that of the potential liability of senior actors within corporate structures. If the actual level of collusion is that of marketing managers rather than the highest level of management,

<sup>35</sup> See for instance the discussion in Cassese, *International Criminal Law*, 2003, and Danner and Martinez, “Guilty Associations” (2005) *California Law Review* 75.

<sup>36</sup> As argued, for instance, by Danner and Martinez, “Guilty Associations” (2005) *California Law Review* 75 and Harding, *Criminal Enterprise*, 2007. As Danner and Martinez comment in relation to the ICTY defendant Tadić (who was present at a homicidal ethnic cleansing incident), “holding Tadić liable, however, for all the crimes visited on Bosnian Muslims in the early 1990s would seem patently unjust”, though it would be less so for Slobodan Milosevic (Danner and Martinez, “Guilty Associations” (2005) *California Law Review* 75, 150).

<sup>37</sup> These are often the issues contested in appeals against fines.

<sup>38</sup> See the definition of “structured association” in the 1998 EU Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [1998] OJ L351/1 Art.1.

<sup>39</sup> The CFI commented for instance, in relation to *Treuhand*, that the company had actively contributed to the implementation of the cartel and that there was a sufficiently definite and decisive causal link, “between its activity and the restriction of competition on the organic peroxides market” (*AC-Treuhand* [2008] 5 C.M.L.R. 13 at [154]).

or that of a subsidiary rather than a parent company, to what extent should those at the higher level (whether corporate or human) be seen as implicated in the anticompetitive activity and be held legally liable? Would the answer differ according to whether the actors in question are human or corporate—would human and corporate roles (for instance as a CEO, or parent company) be viewed differently in this context and for this purpose? Two recent cases illustrate this aspect of cartel involvement.

First, the human/corporate person relationship was at issue in the *BA/Virgin* price-fixing case dealt with by the UK Office of Fair Trading (OFT) in 2007.<sup>40</sup> BA and Virgin Atlantic colluded on fuel surcharges (a levy imposed on passengers to cover the rising cost of oil), and investigations and fines followed Virgin's decision to apply for leniency. The price fixing had been arranged at the sales and marketing level by a small group of sales and communications managers, some of whom are now facing criminal prosecution in the United Kingdom for their involvement in the cartel.<sup>41</sup> As a company BA has stressed that the cartel arrangement was "deeply regrettable" and contrary to the company's own guidelines, and appears to be quite happy with the imminent criminal prosecution of the individuals responsible for the surcharge collusion.<sup>42</sup> There has been no serious questioning of the parallel responsibility of the human and corporate actors in this case and imposition of sanctions on both, and this illustrates the way in which the cartel is a kind of joint enterprise involving different forms of participation. The individual executives were in one sense the predicate offenders, but they acted through and for the company, and indeed the infringement could only be committed by the company, whose market role was essential for purposes of achieving the anti-competitive goals.

The complexities of corporate participation in a cartel are nicely revealed by considering the involvement of the Shell Company in the Dutch Road Bitumen Cartel, dealt with by the European Commission in 2006.<sup>43</sup> The company is a huge conglomerate with a complex and changing corporate structure, and it was necessary for the Commission to identify precisely the extent of the corporate involvement in the cartel, for purposes of imposing liability and sanctions on particular companies within Shell's overall corporate structure. In this case the actual collusive agreements were arranged by an employee of Shell Nederland Verkoopmaatschappij BV. The latter was completely owned by Shell Nederland BV, one of the main group holding companies within Shell, and that company was in turn jointly controlled by the two ultimate parent companies within the Shell group. Each member company of the group has representation on the board of one of the two ultimate parent companies. Considering this evidence of decision-making and policy-making interconnection, the Commission decided that,

"the argument that Shell has not found evidence that apart from the employee who participated in the cartel meeting anyone else within the Shell group was aware of

<sup>40</sup> OFT Press Release 113/07 (August 1, 2007).

<sup>41</sup> OFT Press Release 93/08. Charges are being brought against four individuals: the former head of sales for the company, head of sales for UK and Ireland, marketing director, and head of communications. These four are on a list of 10 former and current BA executives identified by the US Department of Justice for possible extradition and prosecution for offence under The Sherman Act in the US.

<sup>42</sup> The Chief Executive of BA has stated that he would be happy for full details of the case to emerge in court because, "people deserve to know what happened". For public relations purposes the company clearly wishes to distance itself from the cartel.

<sup>43</sup> Decision 2007/534 (*Dutch Road Bitumen*) [2007] OJ L106/40.

the alleged infringement, does not exclude the other entities in the Shell group from part of the undertaking that committed the infringement and may be held liable for that infringement”.<sup>44</sup>

This decision again confirms a wider extent of corporate participation, even in cases where the company in itself or senior levels of management may have been unaware of the collusion taking place. It may be that the legal basis for such decisions and rulings on participation require some fuller and more explicit working out. But it is likely that any more developed justification would rely on some theory of joint enterprise, requiring an examination of the role of different actors, entities or legal persons within a large and complex organisation or corporate structure. In cartel cases involving companies, one likely argument may be that referred to above: that, even if the corporate person is unaware of an individual’s behaviour, the corporate personality remains an essential site for the realisation of the individual’s actions—the individual acts *for* and *through* the company and indeed would not be engaging in that behaviour if the company did not exist. Both individual and company are necessary participants in the cartel, although they may be regarded as having different roles in that illegal enterprise.

The JCE is therefore a useful model to bear in mind when exploring the legal implications of participation and involvement in cartel activity. It is likely that more questions of this kind will arise as the enforcement of rules against cartels (whether in relation to individuals or corporate persons) gathers pace. Some of these issues may prove complex and ethically challenging, as has been demonstrated already when employing the concept of the JCE in the context of war crime prosecution, and further argument concerning the role, proximity, awareness and degree of foresight of certain actors within cartels may be anticipated.

## Conclusion

Recent judicial decisions at both European and national level have confirmed the liability of corporate and individual actors who facilitate the operation of anti-competitive business cartels. In the first place, this serves to illuminate the sense of delinquency and criminality now attached to such conduct, as involving a significant element of subterfuge in addition to an anti-competitive intent, but the former needs to be more explicitly enunciated in legal policy. Secondly, facilitator liability also suggests an analogy between the concepts of the cartel and the joint criminal enterprise, and the latter concept may usefully inform the ongoing legal exploration of cartel liability, especially to the extent that such liability comes to be seen as a matter of various kinds of participation in an agreed illegal enterprise.

<sup>44</sup> *Dutch Road Bitumen* at [214].