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| <b>Institution:</b> University of East Anglia                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                  |                                              |
| <b>Unit of Assessment:</b> 18 - Law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                  |                                              |
| <b>Title of case study:</b> Demonstrating the need for greater public awareness of cartel behaviour in order for cartel laws to be enforceable                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                  |                                              |
| <b>Period when the underpinning research was undertaken:</b> 2007 - 2017                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                  |                                              |
| <b>Details of staff conducting the underpinning research from the submitting unit:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                  |                                              |
| <b>Name(s):</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <b>Role(s) (e.g. job title):</b> | <b>Period(s) employed by submitting HEI:</b> |
| Andreas Stephan                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Professor of Law (from 2013)     | 2007 – to present                            |
| <b>Period when the claimed impact occurred:</b> 2014 - 2018                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                  |                                              |
| <b>Is this case study continued from a case study submitted in 2014?</b> No                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                  |                                              |
| <b>1. Summary of the impact</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                  |                                              |
| <p>Cartels are where businesses agree to artificially raise prices, to eliminate competition between them and enjoy the profits of a monopolist. Their economic harm is such that a single cartel can attract a corporate fine in excess of EUR1,000,000,000 and individuals in the UK can face up to five years in prison. In spite of these penalties, the rewards of a cartel often offset the risk of punishment, particularly as it is difficult to prove their existence in a court of law.</p> <p>Research at UEA found that, while there is a popular understanding that cartels are harmful, a criminal offence is unenforceable without greater popular understanding of their behaviour, and that a lack of moral opprobrium risks perceived misuse of criminal law. The initial impact of this research was to avert a miscarriage of justice at the only cartel criminal trial to be contested before a jury in the UK. It has since gone on to influence the development of policy in this area by guiding the work of competition authorities around the world, helping to improve competition advocacy and awareness internationally.</p> <p>Specific groups who benefit from the impact are the defendants in the criminal trial, the policymakers whose decisions were influenced by the research and the wider beneficiaries of better policy, including businesses and consumers.</p> |                                  |                                              |
| <b>2. Underpinning research</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                  |                                              |
| <p>Cartels can be hugely damaging to an economy by raising prices and suppressing the output of key products and services (from milk and bread to concrete and chemicals). Cartels in just 16 global markets affected USD55,000,000,000 in sales and raised prices by up to 50% (OECD Policy Brief, May 2002). Consumers are usually unaware of the causes of price rises and restrictions in supply, because cartels go to great lengths to hide their activities and the loss to any individual consumer is often invisible to them. Public opinions of cartels are crucial to how the law is applied by the courts (e.g., a jury deciding if actions were dishonest), and to individuals and businesses' ability to understand and comply with the law. UEA's research was the first to empirically examine public understanding of cartels for the benefit of law enforcement, and consists of two strands:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                  |                                              |
| <b>Strand 1 – Empirical survey work on public attitudes to price fixing (R1 and R4)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                  |                                              |
| <p>Two survey projects were carried out (one in the UK in 2007 and a second in the UK, Germany, Italy and USA in 2014). The survey design and piloting were completed by Stephan at UEA, and the fieldwork was conducted by YouGov and its partner survey providers, using online panel based sampling of 1,300 (2007) and 2,400 people in each country (2014), that was then weighted according to key demographic information including age, social background, education, geographic location, newspaper readership etc. The results showed that members of the public expect businesses to compete, they understand that cartels are harmful and agree they should be punished (with broad uniformity across jurisdictions). Yet few feel the behaviour should attract a prison sentence and therefore be treated as crime. These surveys were the first attempt to gauge</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                  |                                              |

public attitudes to this important area of law enforcement. The conclusion was that there was not sufficient public understanding and condemnation of cartels for severe sanctions to be enforceable and effective in changing behaviour.

### Strand 2 – Doctrinal research on the UK’s Criminal Cartel Offence (R2 and R3)

A critical and comprehensive study of case law, legislation, policy documents, Hansard and related literature showed that the UK’s criminal cartel offence suffered from a fundamental problem of legitimacy. The conceptual innovation here relates to the issue of overcriminalisation and the proposition that the act of criminalising is meaningless unless the mischief it relates to attracts popular moral opprobrium. This is captured by the requirement that a jury be satisfied the defendant behaved *dishonestly*. The research argued that a lack of public awareness and competition advocacy meant juries were unlikely to understand cartel prosecutions and accept they were dishonest or amounted to crime (jury nullification). It also showed that practical problems such as competition authorities’ inexperience in managing a criminal investigation (the cartel enforcement process otherwise consists of administrative sanctions) and the impact of leniency (which provides immunity to the first firm to come forward and for its employees), meant that a criminal cartel offence was likely unworkable.

### 3. References to the research

#### R1. Survey of Public Attitudes to Price Fixing and Cartel Enforcement in Britain

**A, Stephan**

*Competition Law Review*, **2008**, Volume 5, No.1, pp.123-145. DOI: 10.2139/ssrn.993407

Evidence of Quality: This was the first empirical study of its kind. *Competition Law Review* is a peer reviewed journal run by the Competition Law Scholars Forum (CLaSF). It is available via open access: <https://clasf.org/browse-the-complrev/>. The paper was available in working paper form from May 2007:

<http://competitionpolicy.ac.uk/documents/8158338/8256114/CCP+Working+Paper+07-12.pdf>

Cited by 29 outputs, including Oxford Journal of Legal Studies (Whelan 2013) and British Journal of Criminology (Parker 2012).

#### R2. How Dishonesty Killed the Cartel Offence

**A, Stephan**

*Criminal Law Review*, **2011**, Vol 6, pp 446-455.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1866284](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866284)

Evidence of Quality: The *Criminal Law Review* is the leading peer reviewed legal journal for outputs relating to criminal law in the UK and is published by Sweet & Maxwell. ISSN: 0011-135X.

Cited by 20 outputs.

#### R3. Four Key Challenges to the Successful Criminalisation of Cartel Laws

**A, Stephan**

*Journal of Antitrust Enforcement*, **2014**, 2(2): 305-332. DOI: 10.1093/jaenfo/jnu004

Evidence of Quality: The *Journal of Antitrust Enforcement* is a peer reviewed journal that publishes significant outputs from competition law scholars around the world. The journal is published by Oxford University Press. ISSN: 2050-0696/0688. The output is 11,750 words.

#### R4. An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation

**A, Stephan**

*Legal Studies*, **2017**, 34(4), pp. 621-646. DOI: 10.1111/lest.12165

Evidence of Quality: *Legal Studies* is a peer reviewed journal and is one of the UK’s leading generalist law journals. It is the official journal of The Society of Legal Scholars and is published by Wiley. ISSN: 1748-121X. The output is 13,300 words.

#### 4. Details of the impact

##### Background

The UK's criminal cartel offence, under the Enterprise Act 2002, hinged on whether a jury were satisfied that the defendant had acted *dishonestly* by the standards of reasonable and honest people. UEA research raised doubts as to whether most ordinary people thought cartels were dishonest at all (R1).

##### Helping avert a miscarriage of justice

The case of *R v Dean and Stringer* (2015) was the first and only time the UK's cartel offence has been argued before a jury. The defendant was on legal aid and was represented by an excellent team of solicitors and barristers who had no knowledge or experience of competition law. Having come across Professor Stephan's research on public attitudes and the cartel offence through an internet search, they contacted UEA to assist the defendant. At no point had the defendant thought his actions were dishonest and in fact his motivation had been to save jobs and improve safety standards. The decision to prosecute him was questionable given that his former employer had benefited from immunity under the Competition and Market Authority's leniency programme. All employees of this firm received guarantees of no prosecution, except for the defendant because he had recently become self-employed and therefore was no longer an employee of the firm. As the testimonials from members of the legal team confirm [S1-2], the research (R1, 2 and 3) helped shape the defence focus squarely on whether the actions were dishonest (rather than disputing any of the evidence presented). The lead barrister for the defendant notes:

*the "research played an instrumental role in shaping Mr Dean's defence and guiding the cross-examination of witnesses, ultimately contributing to his acquittal and averting a miscarriage of justice" [S1].*

The second barrister for the defendant noted:

*it "proved crucial... by helping us identify the issues central to the principle of dishonesty and how it would be understood by the jury" [S1].*

The lead solicitor for the defendant notes that the research:

*"helped us understand how the requirement of 'dishonesty' would be argued by the Crown" [S2].*

The jury acquitted the defendant (and his co-defendant) in June 2015, preventing an outcome that few members of the public would support.

##### Influencing the continued evolution of policy in the UK

In November 2015, the CMA's Senior Director (Cartels and Criminal Group) Stephen Blake gave a speech [S3] in which he said the fact the jury was not persuaded in the abovementioned criminal trial "serves to underline the difficulties with proving dishonesty in cartel cases". He added that the case supported the decision to reform the offence (in 2014, when the requirement of dishonesty was replaced with a series of carve-outs and defences), and made extensive reference to UEA's 2014 survey study (R4) in acknowledging that public perceptions of cartels may not reflect their treatment as a criminal matter. In February 2016, a National Audit Office report was published on the UK's Competition Regime [S4]. This report highlighted the low levels of awareness that cartels were illegal, citing R4, and identifying the need to have greater information dissemination. This confirmed and adopted a key recommendation of R4. The CMA responded by conducting further research of its own into competition law awareness (for example the 2018 report by ICM, *Competition Law Research 2018*) and by diversifying their approach to cartel detection, launching a public awareness campaign in 2017 that included the introduction of a GBP100,000 reward to whistle-blowers (CMA Press Release, 20 March 2017). The CMA have also become more cautious in their use of the criminal cartel offence and are favouring alternative sanctions such as director disqualifications. In February 2019, the CMA Chair, Lord Tyrie, wrote to the Department of Business, suggesting that "primary responsibility for criminal prosecutions may sit more naturally with an agency that routinely brings criminal prosecutions, such as the Serious Fraud

Office” (Letter of 21 February 2019).

### Informing the work of competition agencies across the world

Professor Stephan was approached by government agencies in five countries, some of whom undertook similar public surveys to R4 within their jurisdictions (for example the 2018 IFOP survey conducted for the French *Autorite de la concurrence*) [S5]. -The study was cited in speeches given in November 2015 by Brent Snyder (Deputy Assistant Attorney General for Criminal Enforcement, US Department of Justice) and Katharina Krauss (Head of Unit, Special Unit for Combating Cartels, Bundeskartellamt – Federal Cartel Office of Germany) [S6]. Mr Snyder also made reference to it in a later interview, where he used the findings to highlight the need for greater outreach activities in the US [S6]. It was also cited in a discussion paper drafted by the OECD, which noted “survey research in a range of countries suggests there is weak grass roots agreement with the notion that price fixers should be treated as criminals” [S7].

Stephan was nominated by the Competition and Markets Authority as one of the UK’s Non-Governmental advisors to the International Competition Network (ICN). This is a global body that allows competition regulators from over 100 countries to exchange best practice and facilitate capacity building. Stephan’s previous work on public attitudes resulted in him being invited, in 2014, to lead a study for the ICN’s Advocacy Working Group on Competition Culture. He designed and coordinated a survey of 48 national competition authorities (in collaboration with a team of civil servants from three different regulators) aimed at helping competition regulators understand the impact of competition culture on competition enforcement. The findings of the 41 page report Stephan was primarily responsible for drafting [S8], suggested that much could be learned about how to better engage with Government departments, the judiciary the business community, members of the public and the media, with a view to educating and informing their support for tackling cartels and other forms of anticompetitive behaviour. The ICN announced that

*“A major benefit to newer agencies is that the report may be referred to for guidance on how to approach a wide range of constituents including politicians, government officials, journalists, business associations, the judiciary, the antitrust legal community and academics” [S8].*

A later ICN report on *Explaining the Benefits of Competition to Businesses* (2017) drew on the finding of [S8] that an understanding of competition rules “help to exclude anticompetitive behaviour from the acceptable business strategies” [S9]. Reference was also made to the report by an Italian competition authority official’s contribution to an UNCTAD roundtable event in 2016, where he identified it as a “project aimed at promoting compliance to competition law” [S10]. The report was published in 2015 and is being used as a guide by ICN members, to help them improve advocacy and public awareness.

The cumulative impact is a greater awareness among policy makers around the world, that public education and advocacy is essential for punitive laws against cartels (and competition laws more generally) to be enforceable and effective. Before Stephan’s work, the extent to which this was necessary was largely unknown.

### 5. Sources to corroborate the impact

- S1. Letters from the defendant’s barristers, 26 June 2015
- S2. Letter from the barrister at Stevens Solicitors & Advocates of 25 Nov 2015
- S3. Speech by the Senior Director, Cartel and Criminal Group, Competition and Markets Authority (UK) – on the evolution of the UK criminal cartel regime (13 November 2015, Stockholm), accessed on 08/12/2020.
- S4. National Audit Office Report: The UK Competition Regime (5 February 2016), p27, accessed on 08/12/2020.
- S5. ‘Public Opinion on Cartels and Competition Policy in France: Analysis and Implications’ (2019) *World Competition Law and Economics Review* 42(3), pp. 335-353, Emmanuel

Combe & Constance Monnier-Schlumberger, accessed on 08/12/2020.

- S6.** Speeches by Deputy Assistant Attorney General for Criminal Enforcement, (US Department of Justice) and Katharina Krauss (Head of Unit, Special Unit for Combating Cartels, Bundeskartellamt – Federal Cartel Office of at Swedish Competition Authority event. Also interview with Snyder in Cartel Capers Blog (July 2017). Both were accessed on 08/12/2020.
- S7.** OECD Discussion paper prepared for Session IV of their 15<sup>th</sup> Global Forum on Competition DAF/COMP/GF(2016) (1-2 December 2016), accessed on 08/12/2020.
- S8.** ICN, *Competition Culture Project Report* (2015). Accessed on 08/12/2020. Contribution noted in footnote 1.
- S9.** ICN, *Explaining the Benefits of Competition to Businesses* (2017), accessed on 08/12/2020.
- S10.** Director of International Affairs, Italian Competition and Market Authority (Autorità Garante della Concorrenza e del Mercato), Contribution to United Nations Conference on Trade and Development (UNCTAD) Round Table on Strengthening private sector capacity for competition compliance. Intergovernmental Group of Experts on Competition Law and Policy, Fifteenth Session (19-21 October 2016), accessed on 08/12/2020.