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Control of Cartels and Other Anti-competitive Agreements

Richard Whish
Professor of Law, King's College London[1]

1. INTRODUCTION

A system of competition law which is intended to protect the process of competition will typically be concerned with three issues: firstly, anti-competitive agreements that have the object or effect of preventing, restricting or distorting competition; secondly, abusive behaviour by a monopolist firm or by a dominant firm with significant market power that could be harmful to consumer welfare; and thirdly, mergers that would reduce (or which have reduced) rivalry between firms in the market, again with detrimental consequences for consumer welfare. A further feature of some, but by no means all, systems of competition law is the establishment of a 'competition advocacy' role for competition authorities, whereby they keep under review and, where appropriate, comment upon restrictions of competition for which the State is responsible, for example through legislation, regulation or the provision of state aid: these are often referred to as 'public restrictions'. This essay is concerned with the first of these issues, the control of anti-competitive agreements. In particular it will discuss the prohibition of 'hard-core' horizontal agreements, often referred to as cartels, although it will also consider the extent to which vertical agreements may also present a threat to consumer welfare. In section 2 the widespread condemnation of cartel agreements will be noted. Section 3 discusses the important lead that the OECD has taken in the fight against cartels. Some legal points about anti-cartel legislation and judicial practice will be noted in section 4, while section 5 provides details of recent cartel cases from a number of jurisdictions around the world. Section 6 considers some of the contemporary issues facing competition authorities in their fight against cartels. Section 7 notes in passing that not all horizontal agreements between competitors are necessarily to be condemned.

[1] I would like to acknowledge the helpful comments of Margaret Bloom, Visiting Professor, King's College London and the invaluable assistance of my research assistant at the Centre of European Law, King's College London, Dimitris Mourkas, in the preparation of this essay.

Section 8, which briefly discusses the extent to which vertical agreements are a source of competition law concern, is followed by some concluding comments.

2. WIDESPREAD CONSENSUS THAT CARTELS SHOULD BE PROHIBITED

There are at least 100 systems of competition law in the world today. Some of these laws date back more than a century: for example the US enacted the Sherman Act in 1890. The competition rules of the European Union were adopted by the Treaty of Rome of 1957, the same year as the German Act against Unfair Restraints of Competition. Competition law in the United Kingdom began with the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. The first competition law in Japan was the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade of 1947. Since the beginning of the 1990s, the number of systems of competition law has proliferated. Competition law will now be found in all six continents, and in all kinds of economy – large, small, continental, island, advanced, developing, industrial, trading, agricultural, liberal and post-communist. Important recent statutes are the Indian Competition Act of 2002 and the Singaporean and Vietnamese Acts of 2004. Not surprisingly, these laws differ in various respects: however, if there is one feature that unites them it is that they all condemn 'hard-core' cartel agreements, even if they may differ in the ways in which such agreements may be prosecuted and punished.

There are many complex issues that arise in systems of competition law: for example the extent to which the unilateral conduct of firms with market power should be controlled; the price which a competitor or customer should pay for access to an 'essential facility' such as a gas pipeline or a seaport; the relationship between intellectual property law and competition law; the extent to which mergers should be prohibited, or transactions modified, because of potential harm to competition. These are subjects that have kept policy-makers, competition authorities and scholars occupied for many years and have led to the publication of literally thousands of articles, consultations, green papers, white papers, decisions and judgments. These are often matters of the greatest complexity, and they have great intellectual fascination. However it is important not to lose sight of a very simple fact about competition policy, which is that the most obvious target of any system of law must be agreements between independent firms that are restrictive of competition. The hum-drum cartel that fixes

the price of cement, or air fares, or insurance premiums does not provoke the same kind of debate as predatory pricing, tying and bundling; and yet cartels are the most obviously harmful anti-competitive practice known to competition law, and should be the prime target of competition authorities.

Writing in 1776, Adam Smith famously remarked in *The Wealth of Nations*, that:-

> 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices'.

Evidence suggests that the tendency of competitors to meet in smoke-filled rooms – or perhaps now smoke-free chat-rooms – is just as strong today as it was in the eighteenth century: cartels appear to be alive and kicking throughout the world. The phenomenon described by Smith was not a new discovery in 1776: cartels were recognized – and prohibited – in the days of the Eastern Roman Empire (Byzantium). The Constitution of Zeno of 483 AD punished price fixing in relation to clothes, fishes, sea urchins and other goods with perpetual exile, usually to Britain. There is no reciprocal provision in Britain today, as exile to Rome for infringing competition law would be unlikely to have a sufficient deterrent effect on the average British sales director. Adam Smith's comment was prescient: cartels have thrived through the centuries, often with implicit or even explicit support from Governments. Even the adoption of competition laws with tough sanctions has not been sufficient to suppress cartel activity, as is demonstrated by the number of prosecutions that have been brought in recent years: some important examples of cartel cases from around the world in the last couple of years are provided in section 5 below. There is a very real sense today among the world's competition authorities that, if competition law is about one thing above all, it is the detection and punishment of hard-core cartels.

In the European Union Mario Monti, the former Commissioner for Competition, once described cartels as 'cancers on the open market economy'[2] , and the Supreme Court in the US has referred to cartels as 'the supreme evil of antitrust'[3]. In the US, in particular, it is customary to hear cartels described as 'nothing other than theft'. Hew Pate, formerly the Assistant Attorney General with responsibility for competition law and policy at the Department of Justice, has said that:-

> **'**Especially for countries that have taken up antitrust enforcement relatively recently, there can be no sounder way to develop a strong competition culture than to place primary emphasis on cartel enforcement. Consumers will benefit. Businesses that rely upon commodity inputs will benefit. Taxpayers and governments will benefit when bid-rigging is curtailed. And unlike other more subtle or controversial areas of competition law, there is no danger here that government intervention might have anti-competitive effects'[4].

These are simple, but striking, statements. The mysteries of some aspects of competition policy should never be allowed to obscure the most simple fact of all: that competitors are meant to compete with one another for the business of their customers, and not to cooperate with one another to distort the process of competition. The electorate in a democracy votes for the party that it prefers; the customer in a market votes by choosing from a range of competitors on the basis of price, quality and standard of service. Suppliers must not commit a fraud on their electorate by artificially restricting choice to their own collective advantage.

3. THE POSITION OF THE OECD IN RELATION TO CARTELS

The OECD has been at the forefront of policy in relation to cartels. This in itself reflects an obvious but important point, that cartels are often international in nature, whereas for the most part systems of competition law are purely national in scope. The rules of the European

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2 See www.europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/00/295&format=HTML&aged=0&language=EN&TguiLanguage=en.

3 See *Verizon Communications Inc. v Law Offices of Curtis V. Trinko*, www.supremecourtus.gov/opinions/03pdf/02-682.pdf.

4 See www.usdoj.gov/atr/public/speeches/206428.htm.

Union are an important exception, since they apply throughout the 25 Member States as well as three additional Contracting States of the European Economic Area. International business phenomena such as cartels necessitate an international response, and the OECD is in an important position to give a lead in this respect.

In 1998 the OECD adopted a *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* in which it called upon its member countries to ensure that their laws 'effectively halt and deter hard-core cartels', and invited non-member countries to associate themselves with the *Recommendation* and to implement it. In particular the *Recommendation* said that countries should provide for effective sanctions of a kind and at a level to deter firms and individuals from participating in such cartels as well as effective enforcement procedures to detect and remedy hard-core cartels. The *Recommendation* defined a hard-core cartel as:-

> 'an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by 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'[5].

Subsequently the OECD has published a number of further documents which are of particular interest to the issue of cartel enforcement. In its 2001 *Report on Leniency Programmes to Fight Hard Core Cartels*[6] the OECD discussed the need to penetrate the cloak of secrecy that surrounds hard-core cartels, and the contribution that the encouragement of whistleblowers can make to this need. It noted that the seriousness of the penalties, including the risk of personal liability, can be a powerful motivating factor in encouraging whistleblowing or leniency applications. It considered the procedures that are required for an effective and fair leniency programme, and noted the need for strong protection against unauthorised disclosure of information provided by leniency applicants. Whistleblowing and leniency applications are discussed later in this book[7].

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5 See webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35.
6 See www.oecd.org/dataoecd/49/16/2474442.pdf.
7 See the chapter by Crampton and Reynolds.

In its 2002 *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*[8] the OECD noted that the worldwide economic harm from cartels is very substantial, though hard to quantify: it was estimated that 16 large cartel cases investigated in the US may have caused harm in excess of $US 55 billion. Firms go to great lengths to keep cartel agreements secret, and are in some cases explicit in their contempt for the competitive process. The principal purpose of sanctions in cartel cases is deterrence. Strong sanctions against enterprises and individuals increase the effectiveness of leniency programmes. The Report also noted that, although there is a move towards the imposition of larger penalties for infringement of anti-cartel legislation, sanctions have yet to reach the optimal level for deterrence.

In *Hard Core Cartels: Recent Progress and Challenges Ahead*, published in 2003[9], the OECD examined the harm that arises from cartels: whilst acknowledging how difficult it is to quantify such harm, it found that it amounted to billions of dollars world-wide each year. It also reviewed recent progress in the fight against cartels, which it found to be significant: new laws had been passed, sanctions had been increased and most countries were now aggressively prosecuting cartels. However the OECD was of the view that more still needed to be done in relation to sanctions which, in its view, were still not severe enough; and it also stressed the need for greater international cooperation in combating cartels which, as noted earlier, often transcend national boundaries.

In its 2005 *Third Report on the Implementation of the 1998 Recommendation*[10] the OECD focussed on four topics: progress in fighting cartels; public awareness of the harm caused by cartels; effective sanctions, in particular against individuals; and international cooperation in cartel cases. The report again noted that there had been considerable progress, but nevertheless concluded that much remains to be done. In particular more countries should expand their awareness programmes, and should work more extensively with procurement officials in an effort to fight bid rigging. The Report also found that countries should seek opportunities to further increase corporate fines, and that they should consider introducing sanctions against individuals, including criminal sanctions. The Report identified opportunities to enhance international cooperation in cartel investigations, and highlighted in

8 See www.oecd.org/dataoecd/16/20/2081831.pdf.
9 See www.oecd.org/publications/e-book/2403011E.pdf.
10 See www.oecd.org/dataoecd/58/1/35863307.pdf.

particular the OECD's *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*[11].

4. ANTI-CARTEL LEGISLATION AND JUDICIAL PRACTICE

There is a high degree of consensus as to the types of horizontal agreements that should be treated as hard-core cartels. The OECD definition has been given above. Chapter III of UNCTAD's Model Law on Competition of 2004[12] suggests that the following agreements should be prohibited:-

(a) Agreements fixing prices or other terms of sale, including in international trade;
(b) Collusive tendering;
(c) Market or customer allocation;
(d) Restraints on production or sale, including by quota;
(e) Concerted refusals to purchase;
(f) Concerted refusals to supply;
(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

If one turns to actual laws forbidding cartels, a typical list of prohibited practices can be found in Article 81(1)(a)-(c) of the EC Treaty, which refers to agreements which:-

'(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply'.

This list is closely reflected in section 34(2) of the Singaporean Competition Act of 2004 and section 3(3) of the Indian Competition Act of 2002, which usefully refers to a further obvious

[11] See www.oecd.org/dataoecd/1/33/35590548.pdf.
[12] See www.r0.unctad.org/en/subsites/cpolicy/docs/Modelaw04.pdf.

cartel practice, that is to say bid rigging and collusive bidding. As one reviews other systems of competition law, it is striking how similar most pieces of legislation are in the examples that are given of prohibited horizontal agreements.

Of course the crucial issue is how effectively these provisions are applied in practice, and it is also striking to see the extent to which competition authorities and courts around the world have had to grapple with very much the same problems of interpretation of anti-cartel legislation. Obvious points that emerge from the decision-making process are first that a horizontal agreement may restrict competition between the parties to the agreement itself, but also may restrict competition between the parties to the agreement and other operators on the market. It follows that competition law prohibits not only a price-fixing agreement between producers, but also action taken to eliminate third parties from the market: the concerted refusals to deal and the collective denial of access in the UNCTAD Model Law are examples of such behaviour. A second point is that systems of competition law recognise that the expression 'agreement' in this context refers not only to written and legally enforceable agreements. It also applies to informal agreements, 'gentlemen's agreements', oral agreements, and to simple understandings, irrespective of whether they are legally enforceable and of whether there is any enforcement mechanism for infringement. Competition law also applies to so-called 'concerted practices' whereby the parties substitute practical cooperation between themselves for the risks inherent in competition. The activities of trade associations – for example when adopting rules for their members or making recommendations to them – are also covered by the rules against anti-competitive agreements.

A third point is that systems of competition law typically make a distinction between agreements which have as their object the restriction of competition and those that have an anti-competitive effect. This is an important distinction, in particular for competition authorities, whose resources may be limited and which may face considerable difficulties in proving the existence of a cartel. Competition law identifies certain types of agreement as having an anti-competitive object, with the consequence that the competition authority is absolved from the need to demonstrate, for example, that horizontal price fixing produces anti-competitive effects. To that extent the authority's resources can be focussed on proving the existence of the cartel agreement; it is spared the need to prove effects as well. The agreements in the 'object box' typically will be those set out in Article 81(1)(a)-(c) of the EC

Treaty[13]. In US law much the same dichotomy exists between agreements that are '*per se*' illegal under section 1 of the Sherman Act and those that are subjected to a more elaborate analysis under the so-called 'rule of reason'.

A final point that should be made about judicial practice in relation to cartels is that courts have developed the idea that a number of firms can have been party to a single, overall cartel agreement that has lasted for many years, and for which they all bear responsibility. This can be important in practice. It may be that there has been cartelisation of a particular product market for many years, but that the participants in the cartel have fluctuated over time, the geographical extent of it may have changed, and the types of cartel behaviour may have altered. If one were to analyse such a situation as consisting of several discrete cartels, involving different firms, areas and practices, a competition authority may have to launch several investigations; and it might be that some of the illegal practices are so far in the past that rules of limitation prevent an investigation altogether. On the other hand, if such a situation can be regarded as a single overall agreement that has been continuously in existence only one investigation will be needed and it is much less likely that a limitation problem will arise. The law in the EC is explicit that the European Commission may proceed against a single overall agreement in this way[14].

5. RECENT ACTION AGAINST CARTELS

The commitment of competition authorities around the world to the detection and prohibition of cartels is demonstrated by the number of cases that have been decided in recent years, in many of which the sanctions imposed have been very significant: some of the most important and interesting ones are described in Box A.

BOX A

Argentina

[13] Such agreements may, nevertheless, be permitted if the parties can demonstrate an 'efficiency defence' under Article 81(3) EC: see further section 6 below.

[14] See Whish *Competition Law* (5th edition, 2003, Oxford University Press), pp. 96-97.

In July 2005 five cement companies were prosecuted in Argentina for a cartel that lasted for 18 years, from 1981 to 1999. The companies agreed on a market division that was closely monitored by their trade association. The respondents were fined $US 107 million, the largest antitrust fine in the nation's history[15].

Australia

On 7 April 2004 the Federal Court ordered fines of $Australian 14 million against ABB Power Transmission Pty Ltd and ABB Transmission and Distribution Ltd for their involvement in power transformer and distribution transformer cartels. The total penalties in this case amounted to $Australian 35,045,000, a record for Australian competition law. Company executives involved in the cartel were fined just over $Australian 1,000,000 million[16].

Brazil

In 2005 CADE, the Brazilian competition authority, found cartels in relation pharmaceuticals, steel and crushed stone. The final level of the fines in these cases is yet to be established, but is likely to be substantial[17].

European Commission

On 30 November 2005 the European Commission imposed fines totalling EURO 290 million on 16 firms for price fixing and sale quotas by geographical area in the industrial bags market[18]. This cartel came to light when British Polythene Industries blew the whistle to the European Commission.

It is perhaps worth noting in passing that, in the calendar year 2001, the European Commission adopted no fewer than 10 decisions on hard-core cartels, in which the fines

15 See www.unctad.org/en/docs/tdrbpconf6d4_en.pdf .
16 See www.accc.gov.au/content/index.phtml/itemId/516066.
17 See www.cade.gov.br/publicacoes/cartilhaeng.asp.
18 See www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1508&format=HTML&aged=0&language=EN&guiLanguage=en.

totalled EUR 1.836 billion: by far the largest amount in any one year. In 2002 the Commission adopted nine decisions, the fines amounting to around EUR 1 billion[19].

France

On 1 December 2005 France's Competition Council imposed fines on three mobile telephone companies, Orange France, SFR and Bouygues Telecom, amounting to EURO 534 million for operating a cartel. The fines on Orange France (EURO 256 million) and SFR (EURO 220 million) are the largest individual fines ever imposed by the Council[20].

Germany

On 23 March 2005 in cartel proceedings against industrial insurers the Bundeskartellamt in Germany imposed fines totalling approximately EURO 130 million against ten industrial insurers and against the directors involved. The cartel law violation had a nation-wide and cross-industry effect on, in particular, the industrial property insurance sector (fire, consequential loss, EC and all-risk insurances, and technical insurances) as well as transport insurance and the buildings/monopoly insurance sector[21].

Japan

On 11 March 2005 the Fair Trade Commission of Japan ordered six manufacturers to pay fines amounting to Japanese Yen 6,776.72 million (that is about $US 60 million) for fixing the prices of cold-rolled stainless steel sheets and steel strips[22].

South Korea

On 25 May 2005 the Fair Trade Commission of South Korea fined KT Corporation a record fine of Korean Won 115.9 billion (about $US 115 million) for price collusion in broadband

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19 For a list of the ten largest fines imposed by the Commission in cartel cases, see http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/454&format=HTML&aged=0&language=en&guiLanguage=en

20 See www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502.

21 See www.bundeskartellamt.de/wEnglisch/News/press/2005_03_23.shtml.

22 See www.jftc.go.jp/e-page/pressreleases/2005/march/050311.html.

Internet and landline telephone services with two smaller rivals, Hanarotelecom and Dacom Corp. This is the largest fine ever imposed in South Korea against a single company[23].

UK

In the UK the Office of Fair Trading has imposed fines totalling £1,418,244, reduced to £1.026.897 due to leniency applications granted in three of the four cases, in the period 2004-2005 on firms involved in collusive tendering for roofing contracts. These cases all came to light as a result of a whistleblower[24].

US

In 2005 Samsung, a South Korean Company, agreed to plead guilty and to pay a criminal fine of $US 300 million for its role in a price-fixing conspiracy in the dynamic random access memory (DRAM) industry. Samsung's fine is the second largest criminal antitrust fine in the history of US antitrust law (the largest was paid by Hoffmann-la Roche in the case of the vitamins cartel[25]). Three companies, including Samsung, and five individuals were charged and fines totalling more than $646 million have resulted from the Department of Justice's ongoing antitrust investigation into price fixing in the DRAM industry[26].

6. CURRENT ISSUES

As suggested earlier in this essay, there is very little debate today as to whether hard-core cartels should be illegal: there is widespread agreement that they should be. Rather the important policy questions are:-

- what sanctions are necessary in order to deter firms from entering into cartel agreements in the first place, and should sanctions be available against individuals as well as companies?

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23 See www.ftc.go.kr/data/hwp/kftcnews(2005july).doc.

24 See, most recently, *Roofing Contracts in Western Central Scotland*, www.oft.gov.uk/News/Press+releases/2005/126-05.htm.

25 For a list of all US cases in which a fine of $10 million or more has been imposed, see www.usdoj.gov/atr/public/criminal/212091.htm .

26 See www.usdoj.gov/atr/public/press_releases/2005/212002.htm.

- what additional tools are needed to assist competition authorities in detecting and prohibiting cartels?
- to what extent can 'whistleblowing' or 'leniency' programmes assist in the detection of cartels?
- Should competition authorities go so far as to give rewards to informants that provide information about anti-competitive behaviour?
- what should be done to stamp out international cartels that have effects in many different countries, given that national laws apply only to harms that occur within the national jurisdiction, and that some countries do not have anti-cartel laws at all?

(A) Sanctions

As noted earlier the OECD has repeatedly pointed out the need for effective sanctions to deter cartel behaviour, and has broached the subject of whether countries should introduce provisions directed at individuals as well as firms. The cases cited in section 5 above demonstrate that the level of penalties being imposed on firms is now substantial, and it can be anticipated that this trend will continue. The interesting development to watch for in the years ahead will be to see whether more countries pursue the idea of introducing criminal sanctions against individuals and, more specifically, whether those sanctions include imprisonment as well as the imposition of fines. Several countries – for example Canada, France, Germany (for collusive tendering), Ireland, Japan, Korea, Mexico, Norway, the Slovak Republic and the US – already provide for criminal sanctions, including in some cases terms of imprisonment, to be imposed on individuals where they bear responsibility for the operation of hard-core cartels. As a deterrent there is no question that in the US, for example, being in prison rather than with the family on Thanksgiving Day is going to have a greater deterrent effect than the imposition of a corporate fine, no matter how large that fine might be. There are no criminal sanctions under EC law. However the UK Enterprise Act 2002 introduces two provisions designed to encourage individuals to ensure compliance with competition law. First, section 188 of the Act establishes the 'cartel offence', the commission of which can lead, on indictment, to a term of imprisonment of up to five years and/or an unlimited fine[27]. Secondly, section 194 of the Act introduces the possibility of company

[27] It is also possible that some cartel activity might be criminal at common law in the UK, for example as a conspiracy to defraud.

directors being disbarred from office for a period of up to 15 years where they know, or ought to have known, that their company was guilty of an infringement of EC or UK competition law. These important provisions attempt to address the problem that the imposition of fines – even very substantial ones – on companies may not have a sufficiently deterrent effect, especially where the cost of the fines is simply transferred to customers through higher prices; and that if a fine is so large that it results in the insolvency and liquidation of a company, this will result in the loss of a competitor from the market, a somewhat perverse achievement for a system of competition law. The criminal sanction is a very important feature of US law on cartels: there have been many high-profile cases in recent years in which senior executives of major companies have had to serve terms of imprisonment. Since May 1999 more than 107 individuals have served, or are serving, prison sentences in cases prosecuted by the Antitrust Division of the Department of Justice; several of these individuals were foreign[28].

The deterrent effect of competition law may be increased further if the victims of cartel behaviour can seek redress through the courts for the economic harm that they have suffered. Private enforcement is a very important part of the system in the US, and the European Commission in December 2005 published a Green Paper that explores the question of whether action should be taken to facilitate more litigation in the civil courts in Europe[29].

(B) Tools

Firms that participate in cartels are usually fully aware of the unlawfulness of their conduct. They know, therefore, that they should avoid the creation of incriminating documents that would be discovered by a competition authority when conducting surprise inspections ('dawn raids'). They will often arrange to meet in jurisdictions where they are unlikely to be scrutinized by competition authorities and they may use code-names and resort to other practices to avoid detection. It follows that competition authorities may find it very difficult to compile evidence that will satisfy a court to the required standard of proof that there has been illegal behaviour. For this reason a lot of thought has been given to the question of what

[28] See speech by Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement at the DoJ, 16 November 2005, www.usdoj.gov/atr/public/speeches/213247.htm.

[29] See Green Paper on *Damages Actions for breach of the EC antitrust rules,* available at www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf.

additional tools are needed to enable competition authorities to operate effectively. Without doubt the adoption of whistleblowing and leniency programmes has been immensely important in this respect: most cases in the US and the EU in recent years have originated in a whistleblower approaching the Department of Justice or the European Commission. This is discussed briefly in the following section and more extensively later in this book.

In the Netherlands the Dutch Competition Authority launched a major initiative to bring an end to cartels in the construction sector by encouraging firms to admit their involvement and to seek leniency; the Dutch Government leant its support to the campaign. In its report for 2004 the Authority reported that 481 companies had decided to 'come clean' and to notify their illegal behaviour to it[30]. In the UK the OFT launched, in November 2005, a 'Come Clean on Cartels Month', in which it urged businesses, and in particular small and medium sized enterprises, to make a clean break with any anti-competitive agreements they may be involved in[31]. The advantage of initiatives such as this is that media attention, peer pressure and the threat of sanctions may lead firms to acknowledge the unlawfulness of their behaviour and to come to terms with the risks that they run by participating in cartel activity. The Dutch example is a striking illustration of what a campaign of this kind can achieve.

A serious problem that faces competition authorities is the difficulty of obtaining evidence: this, of course, is why the whistleblower has such an important role to play, as it may be able to provide an authority with richly informative data about meetings, contacts, the participants in the cartel and the range of practices covered. It is vital that competition authorities should be given the powers of investigation needed to track down evidence of sufficient quality to satisfy the standard of proof set by the law. At the very least authorities need the power to request information and to conduct unannounced 'dawn raids', including, where appropriate of people's homes. It is also important that information stored electronically can be retrieved, which means that competition authorities must have staff, or access to individuals, with the necessary skills to achieve this. Further tools may also be needed, however, if the system of law is to be fully effective. This is why, in some jurisdictions, powers exist to listen to telephone conversations; to maintain surveillance, for example, of office premises in order to

30 See www.nmanet.nl/Images?Annual%20Report.
31 OFT Press Release 206/05, 2 November 2005.

monitor who is attending meetings there; and even to require people to attend meetings of a cartel and to report back to the competition authority of what had taken place[32].

(C) Whistleblowing and leniency

A crucial tool in the detection of cartels has proved to be the policy of encouraging whistleblowers to approach the competition authorities with information about a cartel. Subject to a series of conditions, such as that the whistleblower will cooperate with the investigation of the authority in question and that it was not a ringleader of the cartel, complete immunity will be available from any penalty that might otherwise have been imposed. Amnesty programmes have been implemented in many jurisdictions, and have proved to be highly successful. For example the European Commission received 49 applications for immunity and leniency in 25 different cases in 2004[33]. Whistleblowing and leniency applications are discussed in a later chapter of this book[34].

(D) Incentives and rewards

Under US law the Civil False Claims Act enables a private citizen to bring an action in the name of the US Government claiming fraud by government contractors and other entities that use government funds; the litigant is then able to share in any money received. This legislation was used in the case of a bid-rigging cartel for wastewater treatment projects in Egypt funded by USAID, the first time the legislation had been used to expose a large multinational cartel[35]. In South Korea the Korean Fair Trade Commission has established a reward system for those who report or give information about competition law violations. A 'Reward Review Committee' has been established to ensure a fair and transparent process for determining reward eligibility. The identification of informants is kept confidential[36]. A reward of 66.87 million won (about $US 63,700) was paid in June 2005 to a person who

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32 On the powers to this effect in UK law, see Whish *Competition Law* (5th edition, 2003, Oxford University Press), pp. 392-393.

33 Saarela and Malric-Smith, *Competition Policy Newsletter*, Summer 2005, p 43.

34 See the chapter by Crampton and Reynolds.

35 See speech by Bill Kovacic, www.ftc.gov/speeches/other/030514biicl.htm.

36 See www.ftc.go.kr/data/hwp/rewardsystem.doc.

provided decisive evidence in a welding rod cartel case, the largest reward so far to have been given[37].

(E) Cartels and globalisation

The OECD has pointed out that cartels are an increasingly international phenomenon and that they thwart the gains that should follow from global market liberalisation. In recent years several cartels have come to light which had a genuinely global reach: the vitamins, graphite electrodes, lysine and citric acid cartels are obvious examples of this. In the OECD's view increased cooperation is needed between antitrust authorities to combat such cartels. Formal and informal cooperation between competition authorities has become much more common in recent years, as the recent simultaneous investigations of firms in several jurisdictions thought to have taken part in a cartel in air cargo transportation has demonstrated.

There are many formal cooperation agreements in place between major competition law jurisdictions such as the US, Canada, the EU, Australia and Japan. Such agreements may deal with a range of matters, including the provision of assistance in obtaining evidence located in a foreign jurisdiction, obtaining testimony from witnesses and collecting fines. A particular issue is that national law may contain restrictions on the extent to which sensitive and confidential information may be shared with agencies in other countries, and yet that information may be precisely the kind that competition authorities would wish to exchange. It is likely that there will be amendments to national systems of law that impede the exchange of information of this kind. In the meantime the OECD has published *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*[38].

An additional important feature of the global campaign against cartels is the annual 'anti-cartel enforcement workshop' that brings together cartel investigators and prosecutors from around the world. The first such workshop was held in the autumn of 1999 in the US, attended by representatives of competition authorities from 25 countries, to share learning and experience on how to address the problem of international cartels. Subsequent workshops were held in the UK, Canada, Brazil and Belgium. In 2004 the sixth workshop

37 See www.ftc.go.kr/data/hwp/informant_reward.doc.
38 See www.oecd.org/dataoecd/1/33/35590548.pdf.

took place under the auspices of the International Competition Network (the ICN) in Sydney, Australia. The ICN established a Cartel Working Group at its meeting in Seoul in 2004 in recognition of the need for competition authorities to work more closely together in the fight against international cartels. Two sub-groups were created, one to work on the basic concepts involved in the fight against cartels and the other on the development and refinement of practical enforcement techniques.

As already noted, some systems of competition law include the possibility of custodial sentences being imposed on individuals, and this can be significant in the punishment of international cartels: the US has not hesitated to seek the extradition of individuals in foreign companies whom it considers to have infringed its anti-cartel legislation. Furthermore the Department of Justice in the US has adopted a policy of placing indicted individuals, accused of violating the Sherman Act, on a 'Red Notice' list maintained by INTERPOL, with the result that they might be arrested when attempting to cross a national boundary and extradited to the US for prosecution[39].

7. NOT ALL HORIZONTAL AGREEMENTS ARE 'HARD-CORE'

An important comment that needs to be made about horizontal agreements is that there may be circumstances in which competitors cooperate with one another in a way that delivers economic benefits, not just for themselves, but for consumer welfare as well. Not all horizontal agreements are necessarily bad. Hard-core cartels of the kind described above are always bad for consumer welfare, but other horizontal agreements – for example between pharmaceutical companies to combine their research and development efforts in order to develop new and better drugs, or between two small- or medium-sized businesses to produce products on a joint basis, thereby achieving economies of scale – may be beneficial. The OECD's 1998 *Recommendation*[40] stated that the definition of a hard-core cartel:-

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[39] See speech by Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement at the DoJ, 16 November 2005, www.usdoj.gov/atr/public/speeches/213247.htm.

[40] www.webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35.

> 'does not include agreements, concerted practices, or arrangements that … are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies'.

Chapter 3 of the UNCTAD model law[41] states that:-

> 'Practices falling within paragraph 1 (restrictive agreements or arrangements), when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit'.

The fact that not all horizontal agreements are pernicious explains why, for example, Article 81(3) of the EC Treaty provides that agreements that restrict competition under Article 81(1) may nevertheless be legal. This would be the case where an agreement contributes to an improvement in the production or distribution of goods or in technical or economic progress, provided that various conditions, that consumers get a fair share of the resulting benefit, that the agreement does not contain any restrictions that are dispensable and that the agreement does not substantially eliminate competition, are satisfied. Similarly, under US law it is only 'hard-core' cartels that are *per se* illegal; other horizontal agreements are subject to a so-called 'rule of reason', according to which the pro- and anti-competitive effects of an agreement are balanced against one another in order to determine whether it is illegal. A helpful discussion of issues relevant to the analysis of horizontal cooperation agreements has been published by the European Commission in its *Notice on horizontal cooperation agreements*[42].

8. VERTICAL AGREEMENTS

41 www.r0.unctad.org/en/subsites/cpolicy/docs/Modelaw04.pdf.

42 www.europa.eu.int/comm/competition/index_en.html.

Vertical agreements, that is to say agreements between firms that operate at different levels of the market, may also be harmful to competition, although this is only likely to be the case where one or both of the parties to the agreement have significant market power. Indeed, most vertical agreements increase consumer welfare.

Many systems of competition law prohibit the practice of resale price maintenance, whereby a supplier of products dictates a fixed or minimum price at which they may be resold. Some examples of resale price maintenance cases in recent years will be found in Box B

BOX B

Australia

On 2 September 2005 the Federal Court imposed record penalties of more than $Australian 1 million against weight-loss venture Chaste Corporation and three individuals[43].

Canada

On 19 October 2004 the Competition Bureau of Canada reached a settlement with John Deere Ltd under which more than 8,600 consumers across Canada, who bought a John Deere "100" series lawn-tractor from one of John Deere Ltd's Canadian dealerships between January 1, 2003 and August 31, 2003, will receive a 5% cash rebate as a result of a Competition Bureau price maintenance inquiry. The cost to John Deere Limited for these rebates will total $1.191 million. This resolution is the first time in Canada that a price maintenance investigation has resulted in direct restitution to consumers[44].

Japan

On 13 May 2004 the Japanese Fair Trade Commission issued a recommendation to the Green Group Co Ltd to the effect that it had engaged in resale price maintenance. This effectively

[43] See www.accc.gov.au/content/index.phtml/itemId/706601/fromItemId/2332.
[44] See www.competitionbureau.gc.ca/internet/index.cfm?itemID=248&lg=e.

meant that Green Group had to discontinue its practices, inform its wholesalers, retailers and consumers about the action taken against it and refrain from any similar action in the future[45].

New Zealand

On June 2004 the Auckland High Court ordered dive equipment wholesaler Aquanaut Pty Ltd to pay a $60,000 penalty for its attempts to engage in resale price maintenance. Aquanaut admitted to this and agreed to have a judgment made against it in Court[46].

South Africa

On September 2005 Italtile, a ceramic and tile retailer, agreed to pay a penalty of ZAR2 million following a Competition Commission finding that it had engaged in resale price maintenance by setting selling prices to franchisees[47].

Exclusive dealing agreements may also infringe competition law, for example where a supplier agrees to deal with only one distributor in a particular territory, or where a distributor is required to purchase products exclusively from one supplier, thereby foreclosing access to the market for other suppliers. However agreements of this kind may have pro- as well as anti-competitive effects, and a detailed market analysis is usually needed to determine whether the agreement is unlawful. A further example of a vertical agreement that might be restrictive of competition is one whereby a supplier requires a customer to purchase one product as a condition of acquiring another, often referred to as a 'tie-in' transaction. Again, however, careful analysis is needed to determine whether such agreements actually have anti-competitive effects. Where vertical agreements of this kind are entered into between a dominant firm and a supplier or purchaser, it is possible that this may amount to an abuse of a dominant position on the part of the dominant firm, even it the agreement does not infringe the provisions on anti-competition agreements.

9. CONCLUSION

[45] See www.jftc.go.jp/e-page/pressreleases/2004/may/040521green.html.

[46] See www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/aquanautadmitscomme1.aspx.

[47] See www.business.iafrica.com/news/486880.htm.

Competition authorities around the world are more determined today than they have ever been to eradicate hard-core cartels. Evidence of recent action in this area demonstrates that cartel behaviour is far from uncommon, and it seems that even the possibility of substantial fines is insufficient to deter firms from infringing the law. In the years ahead the debate will be about the additional tools that are needed to make the battle against cartels more effective, and it is likely that more countries will decide that custodial sentences against individuals are, ultimately, the most effective deterrent.