Introduction: Talking About Cartels—The Main Elements of Analysis and Discussion

1. Epistemology: The Control of Cartels as a Subject

One of the most contentious and high-profile aspects of competition law and policy in Europe and beyond in recent years has been the regulation of what are now usually described as cartel violations, typically involving large and powerful corporate producers and traders operating across Europe if not also in a wider international context. Such infringements are usually based on deliberate, highly organized, and covert collaborative efforts to achieve goals such as price fixing, market sharing, and production quotas, designed to maximize profits or at least preserve profit margins in declining markets. There is now little disagreement in terms of competition theory and policy at both international and national levels about the damaging effect of such arrangements on public and consumers' interests, and such cartels have become strongly and consistently condemned in the legal process of regulating and protecting of competition. This therefore can be seen as the 'hard end' of the enforcement of competition policy, calling up more confrontational and repressive methods of regulation yet also presenting considerable challenges to effective enforcement on account of the economic power, sophistication, and determination of the typical participants in such cartels.

Until more recently, the subject of European cartel control received little in the way of distinct treatment in the legal literature on competition matters. Although the topic naturally figured prominently in the major works on competition law, this was usually only as part of a much wider picture of the whole field of competition regulation, much of which

comprised a lower profile, more bureaucratic, and consensual structure of enforcement. Legal commentators on the whole tended not to probe too far beneath the surface of the legal process of control to enquire into the origins and underlying structure of 'antitrust delinquency'.[1]

Moreover, the emphasis in European competition law on the need for market analysis had distracted attention from this core of serious violations, which is less problematical in terms of economic analysis, but raises significant questions of a legal and moral character, which indeed go to the heart of the jurisprudence of attempts at legal regulation of economic activity.

This study will therefore present a distinctive account and analysis of a central issue in the now very important field of competition or antitrust law. The focus of the discussion will be a critical evaluation of the way in which European-level regulation has evolved to deal with the problem of anti-competitive cartels, although it is also necessary to include some consideration of policy and law at the national level, and especially that of the United States. The study will also be distinctive in encouraging a shift from the earlier prevailing perspective in legal literature on competition law. Much of the legal writing on competition law in a European context tended to assume a readership mainly comprising those who are or may be subject to the rules, almost, it might be said, having a mission to advise those whom the rules seek to control. A major object of this work is to provide a different perspective on cartel enforcement, combining an analysis of enforcement practice with a legal theory of corporate behaviour and corporate strategy.

2. Political Economy: The Phenomenon and Concept of the Anti-Competitive Cartel

It is necessary both to define more exactly and to describe more fully the essential subject-matter of this discussion. Anti-competitive cartels may be defined and analysed in economic, legal, and sociological terms. This part of the study will introduce the subject in presenting the main types of cartel, their scope and objectives, how they typically operate, providing some examples of notable cartel-type arrangements. There will therefore be some exposition of the commercial and industrial context of some notorious American, European, and global cartels. There will also be some broader,

[1] The American term 'antitrust' carries a pejorative meaning, and so applies very differently from the neutral European vocabulary of 'competition regulation'.

introductory discussion of the main approaches to economic analysis and legal definition of such activities, with the broad intention of supplying at this stage a profile of the main features and problems presented by such corporate collaboration, especially in a European context.

3. Legal Control: Competition Law as a Model of Regulation

A key aspect of the argument being presented here concerns the methodology of regulation and enforcement in relation to anti-competitive activities. In broad terms, European competition law encompasses two main approaches to regulation: first, a consensual and bureaucratic model dealing with quantitatively the larger part of anti-competitive trading activity; and secondly a more aggressive, confrontational, and repressive model of enforcement in relation to deliberate and highly anti-competitive violations. However, the basic principles relating to competition as enunciated in the main provisions of the EC Treaty, Articles 81 and 82, do not explicitly provide for this significant bifurcation of enforcement but rather suggest a market-analysis oriented approach which is then also reflected in much of the commentary and legal literature. In effect, therefore, a more adversarial and combative system of enforcement (in some senses a quasi-criminal law model) has been grafted onto a 'softer' more administrative culture of regulation, giving rise in turn to legal issues that are not addressed in the original Treaty provision. Thus the issue of the legal character of the Commission's powers of investigation and use of sanctions in relation to major cartels has given rise to a great deal of litigation and debate, linking the subject to that of basic rights protection, intellectually some way removed from the traditional province of the competition lawyer.

The result is a challenging situation for both legal theory and legal practice. Substantive competition law is redolent of economics (market analysis) and private law (activities arising from a variety of contractual arrangements). The procedural aspects and enforcement of competition law are largely matters of regulatory intervention—aspects of public law. The outcome is effectively an uneasy coexistence of two very different legal cultures and also some ambivalence in the judicial control of such enforcement activities.

An important aim of the present study is to provide a more explicit focus on *cartel control* as a distinctive and significant element within the broader

field of competition law, and in turn raise fundamental questions concerning the purposes and role of competition law itself, or at least this part of competition law.

4. Drama: Cartel Control—The Main Actors

Who are the main 'players' on this stage of cartel control? Four main types of actor may be identified:

- the 'offenders' (large corporate actors)
- the 'regulators' (competition authorities)
- the 'referees' (courts of law)
- the 'observers', or the view from outside (commentators, media, and public).

It is also part of the argument in this work that an understanding of this 'sharp end' of European competition regulation requires an appreciation of the position, interests, and interrelation of certain key players in 'antitrust drama'. As stated above, the regulation of cartels has assumed an adversarial and litigious character, so pitting regulators against large corporate actors. Both of these players—regulatory authorities and large international trading companies—operate within particular legal cultures and clearly represent different interests. But, alongside these opponent parties, an important refereeing role is also carried out (with very important results in terms of legal development) by courts and other personnel (for instance, in an EC context, the Court of Justice and Court of First Instance). Within this more confrontational domain of EC competition law, the appellate role of the European Courts has been crucial, and so in turn the composition, background, and self-perception of the members of these tribunals is a relevant issue. Finally, the legal arena is then subject to comment, debate, and analysis by interested observers—whether academic (critical legal literature), official (at both national and EC levels), legal professional, or within the media. This largely 'external' perception of the subject may also eventually contribute to and influence legal development.

It will therefore be part of the method of the study to analyse legal developments by reference to the relationships between these participants in the legal drama of competition regulation. In this way, some insight will be provided into the evolution of a regulatory system: for instance, by examining the way in which the European Courts have tested their own 'refereeing' role; and by considering the impact of procedural arguments (the

outcome of adversarial tactics) on questions of legal substance. It should also be appreciated that the process of legal regulation has its own dynamic—at some stage there emerges a significant profession of regulators and legal and economic advisers, with their own and perhaps distinctive interests and ambitions. It is then enlightening to consider how some of these 'ancillary' players in the legal drama may generate important action in their own right and their own interest. Or, to put the matter another way, the discussion is not simply about cartels, but *the regulation and legal control of cartels*.

5. History: A Twentieth Century Overview of European Cartel Control

This in one sense is the core area of legal discussion of the subject: the body of rules which govern the activities of cartels, both in substantive terms (what is prohibited as anti-competitive) and procedural terms (the legal structure of investigation and decision-making on the part of the regulatory authority). In the EC context the legal basis provided by Article 81 (ex Article 85) of the EC Treaty and Council Regulation 17 has now been supplemented by both secondary legislation and case law, developed over a period of more than thirty years, so that there is now a substantial body of EC 'cartel law'. This centres upon the legal analysis of a number of strongly condemned and well-defined anti-competitive practices typically engaged in by major cartels, and the body of rules relating to evidentiary and enforcement issues arising from their prosecution. A detailed study of the development of this area of EC competition law, from the late 1960s to the present, is in itself instructive legal narrative. But an effective account of the subject also requires some comparative reference to the approach to cartel regulation at the national level, particularly the experience and methodology of US law and the more well-developed European national systems.

It is characteristic of this area of competition law that many of the more enduring and challenging problems arise from procedure rather than substance. By the close of the twentieth century, the seriously anti-competitive nature of cartel activity (for instance, price fixing or market sharing) was beyond argument. Typically, the problem had become one of proving the case, and so, in the instances of major EC litigation, the legal argument has concerned such matters as powers of investigation and sufficiency of

evidence. Consequently, economic argument relating to market analysis has been used in relation to inferences which may be drawn from market circumstances rather than the substantive assessment of actual anti-competitive practices. Cartel law as a legal category is therefore characterized by a relatively small number of big cases centred upon procedural and evidential issues.

After some forty years of European Community case law on the subject, there is now a line of historical development which may be traced: 'exploratory' cases during the 1970s; more full-blooded investigations during the early 1980s; significant legal challenges to and testing of the Commission's competence and powers during the later 1980s and early 1990s; and then a judicial 'recovery' of the Commission's position as a cartel regulator, leading to an engagement with enforcement strategies such as the offer of leniency, the diversification of sanctions, and criminalization of individual involvement. The control of cartels at a European level has in effect become a significant legal laboratory for testing the limits of regulation of commercial activity. As a former Director-General of DG IV (Ehlermann) commented, '…in no other field of law are the limits of judicial protection and due process so frequently tested as in competition cases'.[2] Thus while the general textbook discussion of competition law continues to emphasize the 'market analysis' approach, the more specific area of cartel law has become increasingly dominated by formal and procedural legal argument, to the extent of taking on board the language of human rights violation and sentencing guidelines. It provides an instructive study of the way in which powerful commercial and institutional interests can promote a line of legal development.

6. International Relations: The Global Dimension

Although the European system of regulation is concerned with the impact of cartels on conditions of competition within the geographical territory of the EU, the membership of major international cartels frequently includes companies based in North America, Asia, or elsewhere in the world. This fact gives rise most obviously to problems of jurisdiction, but also in a more practical sense has promoted some measures of cooperation and coordination

[2] Claus-Dieter Ehlermann and Berend Drijber, 'Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality' (1996) 17 *European Competition Law Review* 375 at 375.

with other regulatory authorities and courts. Taking on board the global dimension reveals a range of problems, relating not only to questions of jurisdiction and different legal process, but also to issues arising from different policies of enforcement and differences in legal culture (for instance, the fact that corporate executives may face prison sentences in the US but only occasionally elsewhere, while companies face fines in Europe[3]). Moreover, this international context of enforcement is one within which an increasingly complex array of legal tactics may have to be employed by corporate actors and defence lawyers. There is also an important prospective aspect to this part of the discussion: will the locus of regulation shift from the present main centres, North America and Europe, to some kind of global authority, for instance the World Trade Organization (WTO), as a kind of world cartel police? If so, how quickly, in what way, and with what consequences for existing national and supranational systems of control? At the very least, no one legal system can now wholly disregard this increasingly complex global context.

7. Pathology: Antitrust Delinquency as the Target of Legal Action

The central argument of this study is concerned with a more explicit identification and expression of the objections to the kind of anti-competitive behaviour underlying cartel arrangements at the European level. Unlike many other types of anti-competitive practice, the deliberate and covert character of many cartel arrangements takes the subject into a domain of unambiguous condemnation and resort to repressive sanctions. Motive and instrument are important objects of regulation: deliberate and secretive manoeuvres intended to maximize profit, carried into effect by means of sophisticated and obfuscating measures. Analysis and proof of *collusion or conspiracy* constitute the real meat of the subject, rather than administrative assessments of the relativities within a market.

The core of the thesis is therefore based on a perception of serious anti-competitive behaviour as a largely distinct *genus*, most appropriately characterized as a form of delinquency on account of the degree of 'antitrust awareness', deliberate and furtive collusion, and power and sophistication

[3] Prison terms for individuals now constitute a possibility in some European national systems, as discussed in Chapter XI, but so far few have been imposed.

of the typical participants in European-wide cartels. A resulting question is one of appropriate legal process: whether a fully fledged criminal proceeding (with its attendant level of legal safeguards) is the most appropriate model of regulation, or something juridically different, such as the model of administrative penality used already in a number of European national systems and also, at least in formal terms, in the field of EC competition law at present. But there are further, more specific issues which should also be addressed as part of this wider enquiry. First, the question arises whether in dealing with cartel activity the most appropriate organizing concept is that of conspiracy rather than market circumstances. Secondly, it may be asked how an appropriate balance may be attained between requirements of due process and the risk of strategic manipulation of increasingly complex procedures. Finally, there is the assessment of the effectiveness of sanctions—in particular, comparing the efficacy of 'carrots' (for instance, rewards for breaking ranks and becoming a witness for the prosecution, as laid down in the successful leniency strategies which have appeared since the 1990s, discussed in Chapter VIII below) with that of 'sticks' (for instance, fines, which may be appealed and are of uncertain deterrent impact; or the option, now spreading beyond North America, of prison sentences). Underlying such questions of criminal law are some challenging issues of pathology: where does the delinquency originate and reside—in corporate action, or individual human behaviour? And why is it apparently so resilient in the face of determined efforts of legal control?

Postscript

A useful note for those who need to categorize the subject (for instance, library cataloguers, syllabus designers): classify under—

Competition law and policy
Antitrust
Economic history
European law
Criminal law
Evidence
Criminology
Penal theory
Judicial review
Legal process
Human rights (really?)