Why managers form cartels and why it is hard to stop them

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Abstract: This paper looks at the main drivers behind a manager's decision to engage in cartel activity and the challenges of addressing them. Managers generally form cartels for three reasons: (i) ignorance of the law, or at least of its full application and consequences; (ii) crises or the fear of bankruptcy / loss of employment; and (iii) arrogance or a wilful disregard of the law. It is argued that weak popular understanding of cartels and the challenges of ensuring personal consequences for those who form them (whether state sanctions or internal corporate disciplinary tools), means the current approach to cartel enforcement requires further development.

Introduction

Although reference is often made to the 'rogue trader', the vast majority of cartels we know about involve more than just a small handful of individuals. We can usually identify the individuals who form a cartel, or those directly involved in cartel meetings and other activities aimed at its coordination. They will typically be supported by others within the firm who are either complicit, know it is occurring or are actively turning a blind eye to it. In extreme cases, there can be a culture of collusion throughout the firm and the industry, and this is especially so where cartels have governed the relevant market for many years. Yet even before modern cartel enforcement became more effectively used in the 1990s and fines reached very significant levels from 2000 onwards, cartels have always been characterised by clandestine activities. They are not organised using the institutional structures and procedures of the firm and great efforts are usually made to hide their activities from the authorities, from customers and often also from others within the same organisation. We can only assume that the ratcheting up of enforcement has simply made these efforts to hide cartelisation more sophisticated.

We do not know whether detected cartels are representative of what may be going on in the wider economy. They may simply represent the tip of the iceberg, or those cartels that failed because of distrust or poor management. Neither do we know with any degree of certainty, how deterrent enhancing cartel enforcement is. Are markets genuinely more compliant with competition rules, or have they just become more sophisticated at avoiding detection and resorting to less risky strategies, such as more sophisticated forms of communication and the reaching of tacitly collusive outcomes? Yet we do know enough from the enforcement cases of the last 20 years to get a good sense of why managers choose to enter into cartels, regardless of whether the cartels were successful or not.

This paper sets out three key drivers of a manager's decision to engage in cartel activity. These are: (i) ignorance of the law, or at least of its full meaning, application and consequences; (ii) the existence of crisis within the industry or fear of bankruptcy or loss of employment; and (iii) arrogance or a wilful disregard of the law. It then goes on to discuss why neither the current approach to cartel enforcement, nor the company's efforts to prevent such behaviour may adequately address these issues.

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1. Why do managers engage in cartel conduct?

According to both the law and the economics literature on cartels, the key motivation for cartel behaviour is profits over and above those expected under competition. While this is clearly a driver of cartel behaviour, the individual motivations of managers for forming and maintaining cartel behaviour is more complicated in the real world. In particular, there appears to be little if any evidence that they undertake any kind of weighing of likely costs vs likely benefits of the cartel before creating it. This is in part because of the lack of full and accurate information about those costs (for example, what is the probability of being caught?), but also the particular circumstances that surround that decision. Such a cost-benefit analysis also risks circumventing the issue of moral wrongfulness and the individual's perceptions of cartel conduct (although arguably that simply informs the calculation of costs and benefits). From what we know about detected cartels, it is possible to identify three key drivers of the decision to form the cartel: ignorance, crisis and arrogance.

Ignorance

The level of ignorance of competition rules should not be overlooked or underestimated. A 2018 survey by the UK's Competition and Markets Authority (CMA) of 1200 companies revealed that only 25% of them had a good knowledge of competition rules and 16% claimed to have never heard of them.[2] Importantly, the survey also showed that firms' understanding of competition rules was limited, and two thirds of respondents had a poor awareness of the penalties for non-compliance with those rules.

Readers of this paper may be unconvinced that cartelists are truly ignorant of the law and they will very often be right. It would be very odd – especially now – for an industry to be cartelised with everyone involved honestly believing that the activity is lawful and legitimate. For one thing, if that were the case, individuals would not go to such lengths to hide their behaviour. The problem is that ignorance relates not only to whether managers have knowledge of competition law at all, but also their perception of the law and the consequences of breaching it. The first problem is that while they may understand that bid-rigging or price-fixing amounts to fraud or theft, they may not realise that customer sharing or other cartel activities are treated as equivalent.

A good example of this is the practice of *cover pricing*, where a firm bidding for a procurement tender, contacts a competitor seeking a credible losing bid (or a 'cover price'). Their motivation for doing this is typically that they want to participate in the process but not win the contract. This can be important to whether that firm will be invited to bid on future contracts. The anti-competitive effects of cover pricing can vary. If there are only two prospective bidders, it can be very harmful, but where the bidders are a lot less concentrated the effects are less obvious. When a large investigation was completed into construction in the UK in 2009, many in the industry and their

[2] *Competition law research 2018*, A report by ICM on behalf of the Competition and Markets Authority (2018) available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf (accessed 3 August 2020). See also, *UK businesses' understanding of Competition Law* A report prepared for CMA by IFF Research (26 March 2015), Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf (accessed 3 August 2020).

lawyers (who usually were not competition law practitioners) were genuinely surprised that this activity was treated as hard core conduct.[3]

The fact cartelists hide their activities shows their awareness that it is wrong, but it speaks little of *how* wrong they believe it is or their understanding of the consequences. We now have a good body of literature covering public attitudes to cartels across at least six jurisdictions. These show that while most members of the public recognise that cartels are harmful, a significant number do not know whether it is illegal and there appears to be limited public appetite for cartel conduct to be treated as a crime.[4] The lack of awareness can also affect other key stakeholders as well, such as the media and members of the judiciary.[5] This means that many do not see an obvious comparison or equivalence between cartels and theft or fraud, as many competition authorities like to portray. There simply is not the level of moral opprobrium attached to cartel behaviour yet.

Studies like these are important because they highlight the need for continued public education and advocacy work by competition authorities. These activities will help strengthen the sense of moral wrongfulness managers attach to such behaviour. It is also important, as significant sanctions (whether corporate fines or those aimed specifically at individuals) will be of limited effectiveness if they are not known to prospective wrongdoers.

Crisis

One of the most common reasons for the formation of a cartel is the onset of crisis within the industry and the fear of bankruptcy or loss of employment. The problem is that the downturn causes a drop in demand and therefore over-capacity within the market. In economic terms, exit by the least efficient firm in the industry is desirable in this situation. That way the resources involved in that production can be reallocated and used more efficiently elsewhere in the economy where they are needed.[6] The problem is that firms will not necessarily be aware of which firm is the least efficient and therefore likely to exit the market. There may therefore be a tendency to cartelise (thereby compounding the problem of overcapacity) rather than risk competition and bankruptcy. There can be other drivers of this too. For example, it may be that there is the danger of new entry into the market and therefore a collective desire to either prevent that entry or to exert control over that firm through cartel conduct. The crisis or 'fear of bankruptcy' driver can also be self-inflicted, where the company is placing unrealistic performance targets on individuals, whereby the only way for them to make enough money for their positions to be secure, is to not play by the rules.

Crisis can also have a powerful effect on managers' perceptions of cartel conduct. Where an individual fears losing their job or their company, their moral compass will be compromised, as the fear of failure begins to affect decision making. Strategies such as cartelisation, which may be entirely off the table during normal times, can very quickly become viable ways forward. We know this because crisis can lead to some very odd and irrational decision making. For example, the

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[3] See: A Stephan and M Hviid, 'Cover Pricing and the Overreach of 'Object' Liability under Article 101 TFEU' (2015) World Competition 38(4), pp. 507-526, discussing OFT Decision CA98/02/2009, 'Bid rigging in the construction industry in England' 21 September 2009 (Case CE/4327-04)

[4] A Stephan, 'Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA' (2015) CCP Working Paper 15; C. Beaton-Wells and C Platania-Phung, 'Anti-Cartel Advocacy – How Has the ACCC Fared?' (2011) Sydney Law Review, 33, 735; E Combe and C Monnier, 'Public Opinion on Cartels and Competition Policy in France: Analysis and Implications' (2019) World Competition 42, 335.

[5] See for example, the International Competition Network (ICN) Advocacy Working Group, *Competition Culture Report* (2015). Available: http://competitionpolicy.ac.uk/documents/8158338/9254690/ICN_Competition_Culture_Project.pdf/9ea6b364-07af-4b32-bf91-0dc1c976d525 (accessed 3 August 2020).

[6] A Stephan, 'Price Fixing in Crisis: Implications of an Economic Downturn for Cartels and Enforcement' (2012) World Competition 35(3), pp. 511-528.

Carbonless Paper cartel was formed despite the inevitable decline of the industry in the face of new copying technology. For the most part, the cartel was wholly unsuccessful, but it did slow down the speed with which prices were dropping the industry.[7] In the *Auction Houses* cartel, the Chief Exectuive Officer of Christie's is said to have reacted to the price fixing arrangement with Sotheby's by saying, "This seems unnecessary…. Sotheby's and Christie's always follow each other's commission increases anyway. We can raise commissions without having to put our reputation at risk".[8] The two firms in the industry were essentially a duopoly, but the pressures and fear of the crisis in the art market at the time motivated them to form a hard core cartel, even though one might argue it was entirely unnecessary and irrational to do so.

Crisis can also affect the perceptions of those around the managers, who often assist the administration or the implementation of the agreement. For example, at the UK criminal trial of two individuals accused of price fixing in the market for Galvanised Steel Tanks in 2015, sales staff for one of the companies gave evidence describing one of the defendants as a "hero" for trying to save jobs.[9] The period immediately preceding the alleged behaviour in that market was characterised by very tight margins and fear of bankruptcy.

The idea that cartel behaviour may be associated with less moral wrongfulness, because of the perceived honourable intentions of managers, is not helped by the actions of governments during times of general economic crisis. In April and March 2020, competition authorities including the CMA and the European Commission published statements reassuring competitors that they would not take action against coordination undertaken to ensure the supply and fair disruption of essential scarce products and services.[10] Ormosi and Stephan argue that this reassurance or temporary softening of competition enforcement is entirely unnecessary and may cause more harm than good.[11] For the purposes of the present discussion, any softening of cartel laws or enforcement in response to crisis serves to reinforce the idea that the normal rules should not apply, and that coordination between competitors can be an effective way of dealing with a short-term crisis. It therefore further erodes the sense of moral wrongfulness associated with cartels.

Arrogance

There are instances of cartel behaviour where individuals appear to have a good understanding of the law and there is no obvious crisis, meaning that the main driver may have been arrogance. We should also refer back at this point to the profit incentive and the weighing of likely costs and benefits. In that context, we might describe these managers as 'rational profit seeking individuals'. Yet arrogance is a fitting label to unlawful conduct that individials knowingly engage in, either because they do not think they will be caught or because they do not care. This category of behaviour is not specific to breaches of competition law and can be seen in other forms of white-collar crime too. It is also more common where the conduct is widely known and unchallenged within the firm or has become a normalised way of doing business. An example of this outside of competition law is the Enron scandal of the early 2000s. The extent, scope and level of involvement in wrongdoing within Enron, coupled with the sense everyone had that the company was too big or

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[7] Commission decision of 20 December 2001 – *Carbonless Paper*. OJ L 115, 21.4.2004

[8] C Mason, *The Art of The Steal* (Pentuin 2004), p 123.

[9] R v Dean and Stringer (2015) Southward Crown Court, unreported.

[10] European Commission, 'Antitrust rules and coronavirus' 28 April 2020; 'CMA approach to business cooperation in response to COVID-19' 25 March 2020, CMA 118.

[11] P Ormosi and A Stephan, 'The dangers of allowing greater coordination between competitors during the COVID-19 crisis' (2020) Journal of Antitrust Enforcement, 8(2), pp. 299-301.

important to fail or face the consequences of those actions, was truly breath taking and will go down in history as one of the greatest ever failures in corporate compliance.[12]

In cartel cases, the arrogance of managers can be seen in a lot of the evidence unearthed by competition authorities. It is probably epitomised most in the covert recording of Lysine cartel meetings by the FBI in the 1990s. The individuals involved not only mocked competition authorities and joked about being in disguise, but their now infamous exchanges included the phrase "our customers are our enemies".[13] The more recent libor manipulation scandal equally demonstrates the extraordinary confidence with which some managers are able to consistently break the rules. One might argue that libor setting was a morally ambiguous space, where banks were essentially incentivised to report a lending rate that influenced libor in a way that was to their advantage. But what is extraordinary in libor is the chat room exchanges between traders which largely trivialised the market manipulation that was being propagated. "Just give the cash desk a Mars bar and they'll set whatever you want", is what one Citigroup trader is alleged to have said.[14]

As already stated in this paper, it is very difficult to identify cartels where there is genuinely a 'rogue trader' who is responsible for the breach of the law, in an otherwise compliant company. It is more usual for groups of individuals who are either encouraged or tacitly enabled to engage in such behaviour by more senior managers. One of the reasons it is hard to identify rogue behaviour is that competition law enforcement is such that a company cannot avoid or significantly lessen its liability just by identifying that it was an individual employee who went rogue. Indeed, competition authority decisions rarely name individual employees and instead describe the actions of the firm. But firms under investigation do sometimes attempt to distance themselves from the behaviour of a rogue group of employees. For instance, in appeals following the *Bitumen* (2006) cartel decision in Europe, Shell claimed that the subsidiary subject to the infringement decision disregarded the parent company's compliance policy and training.[15] This was rejected by the court, although they did reduce Shell's fine by 25% on the basis that the Commission had wrongly identified it as the instigator of the infringement. Subsidiary behaviour poses a more general compliance problem for large multinationals, who have to manage diverse sets of risk including competition, anti-bribery and money laundering, across multiple jurisdictions and corporate entities.

There is a broader issue relating to arrogance that is worth identifying and it relates to the culture of cartel meetings themselves. Those who have studied transcripts of covert recordings in detail will know that they tend to be male dominated settings, in which the conversation turns to sport, sex and other topics, as easily as it turns to the business of price fixing. They can also rotate around social activities involving drink and food – especially if the individuals involved already know each other through legitimate interactions, such as trade association activities or meetings facilitated by a regulator. The socialising aspect amounts to bonding and the building of trust in lieu of a legally enforceable agreement. The cartel members are instead relying on a shard sense of camaraderie and comradeship, to ensure the cartel agreement is successfully implemented and that cheating is avoided. These activities coincide with extraordinary lengths to hide the activity, by meeting in neutral locations, using code words and suppressing all records of the meetings and communications, and by planning cartel restrictions in such a way as to avoid raising suspicions among buyers.[16]

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[12] See generally: B McLean and P Elkind, 'The Smartest Guys in the room: The Amazing Rise and Scandalous Fall of Enron' (Penguin 2004).

[13] See: J Lieber, *Rats in the Grain: The Dirty Tricks of Archer Daniels Midland, the supermarket to the world* (Basic Books 2002).

[14] BBC News, 'Libor rates could be changed for a Mars bar, court hears' (8 July 2015).

[15] Judgement of the General Court of 27 September 2012, Shell Petroleum NV and others v European Commission. Case T-343/06 ECLI:EU:T:2012:478, at 62-63

[16] A Stephan, 'See no evil: cartels and the limits of antitrust compliance programmes' (2010) The Company Lawyer 31(8), pp. 3-11.

2. Why is it hard to stop managers from engaging in cartel behaviour?

Competition law relies on two sources of control for the behaviour of managers. The first is public enforcement by competition authorities and the courts. The second is the internal compliance efforts of the employer. Corporate sanctions operate by inflicting pain on the business, thereby incentivising it to take compliance seriously and prevent a cartel infringement from being formed in the first place. While individual sanctions (including prison, personal fines, and director disqualification) exert pain directly on the manager that have the effect of punishment and deterrence. In principle, these sanctions come with secondary effects too. Punishment for breaching the law should have significant negative reputational effects for both the business and the managers responsible, including future career prospects. There is also the prospect of damages in private actions. In reality, the reputational effects vary depending on the firm and the market. For example, reputation is significantly more sensitive for a consumer facing business, than those operating up stream who largely sell to a small number of other companies. There is also the problem that the very characteristics that make a cartel possible (high concentration, high barriers to entry, a product with few substitutes) mean that customers usually have little choice but to continue buying from the former cartel members, regardless of how much their opinion of them has deteriorated.

Lack of effective personal sanctions

The exponential increase in corporate antitrust fines since the turn of the century, is meant to reflect the harmful nature of cartels and have a punitive effect. In principle, high fines send out a clear signal to businesses that competition law compliance should be taken seriously and that there are severe consequences to failed compliance. Higher fines also serve to make the leniency programme more effective, by increasing the difference between the immunity prize and the sanction a cartel member will face if they are not the first to report an infringement. Although this incentive has arguably been eroded by the greater threat of follow-on actions in Europe and the increasing use of the European Commission's settlement notice (which has the effect of discounting all fines, in addition to any discounts for cooperation through leniency).[17]

Yet there is some doubt as to whether even very high corporate fines pose an effective deterrence to managers. If we refer back to our three drivers of cartels for a moment, it is clear that sanctions will have little deterrent effect on managers who have incomplete understanding of competition law or of the sanctions that can be imposed. Or, as in the case of cover pricing, they may wrongly conclude that their actions fall outside of the prohibition and therefore will not attract any punishment. Clearly, education and advocacy are what are primarily needed to deal with this group.

Where the motivation is chiefly to deal with a crisis, the threat of corporate fines may be equally ineffective; why worry about the danger of the business being fined, when your fear is that it will go bankrupt anyway? These managers may simply feel they have got nothing to lose. Finally, what of the arrogant managers who are confident they will not be caught? Well studies in crime and related disciplines tend to suggest that the likelihood of getting caught may be more important in deterring deliberate breaches of the law, than simply increasing the sanction.[18] These managers may also be emboldened by the fact it is usually only the employer that is vicariously liable for their actions and

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[17] A Stephan and Ali Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age; The Leniency Religion* (Hart Publishing) 2015; A Stephan, 'Does the EU's Drive for Private Enforcement of Competition Law have a Coherent Purpose? (2018) 37(1) *University of Queensland Law Journal* 153.

[18] E.g. A Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba?' (2008) CCP Working Paper 08-19

also by the fact they may very well have moved on to another firm, or retired by the time the cartel is detected and the lengthy process of enforcement is complete. This might not be until 5-10 years after the initial efforts to enter the cartel are made.

There is a very strong argument that individual sanctions are needed to deal with both the crisis and arrogance drivers. Personal consequences coupled with a sense that there is a credible threat of being caught could drastically change the outlook and decision making of these individuals. In particular, the threat of incarceration is likely to significantly reduce both any fears of bankruptcy / loss of employment and the feeling that the punishment is too remote to trouble arrogant managers.[19]

The problem is that individual sanctions are not imposed in most jurisdictions. While the criminalisation of cartel conduct has been a significantly spreading movement internationally over the last 20 years, there have still been very limited instances of successful prosecutions outside of the US. The US success mainly comes down to the use of plea bargains in lieu of a full criminal trial (which essentially allow the prosecutor and defendants to settle the case and agree the sentence) and also by the fact both the undertaking and the individuals are subject to a criminal process.[20] Most jurisdictions follow a system of enforcement more similar to that of the EU, where undertakings are subject to a civil or administrative procedure, under which a competition authority has the power to imposed fines directly on firms involved in cartels. Attempts at hybrid systems, as in the UK, have proven unsuccessful because criminal cases are unpredictable, time consuming and hugely costly as compared to civil proceedings. They have also faced the danger of jury nullification – where a jury fails to convict cartelists – not because the prosecution has failed to demonstrate that an offence has been committed – but because they are simply unwilling to accept that the conduct should amount to a crime.[21] This is reflected in the survey findings discussed earlier in this paper. The most promising use of individual sanctions has been personal fines (not necessarily imposed under a criminal process) and also the use of Director Disqualification, but neither of these are thought to be as effective as a criminal conviction.[22]

Challenges to corporate compliance

Corporate compliance represents the second line of defence against managers who form cartels, but there are problems here too. First the assumption that businesses tend to be rule following bodies that want to comply with the law appears accurate in principle, but the case law on cartels contains extensive evidence of directors encouraging, being implicit in, or at the very least turning a blind eye to cartel arrangements. When businesses break the law as organisations, they tend to ensure the illegality is kept outside the institutional framework of the firm to the greatest extent possible. In these instances where there is a culture of cartelisation in the firm and the industry, the infringement is so systemic that it is not particularly helpful to try and identify which individuals were primarily responsible. If the cartel has operated for many years and it has simply become an accepted way of doing business, then this exercise becomes impossible anyway.

For the purposes of this chapter, let us assume that cartels are operated by small groups of individuals within organisations where there is a genuine corporate commitment to complying with competition law. An effective compliance programme can be very successful at educating individuals

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[19] Ibid.

[20] A Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) *Journal of Antitrust Enforcement* 2(2): 333-362.

[21] Ibid

[22] For an up to date discussion of Director Disqualification in the UK, see P Whelan, 'The Emerging Contribution of Director Disqualification in UK Competition Law' in A MacCulloch, B Rodger and P Whlean (eds), *The UK Competition Regime: A Twenty-Year Perspective,* (OUP 2021).

within the firm and creating systems for reporting potential breaches of the law. This would certainly help reduce the first driver identified (ignorance). It can also go some way to reducing the danger of the second (crisis), where clear signals are sent from the CEO downwards, that cartelisation is not an acceptable strategy under any circumstances.

The most challenging aspect of corporate compliance is dealing appropriately with managers who have ignored the compliance and chosen to deliberately break the rules. This will include some who fall into the 'crisis' category and most who fall under 'arrogance'. Assuming it can genuinely be said that these individuals went against compliance training and company policy, the instinct to reprimand or fire the individual can quickly run counter to the businesses' immediate concern, which will be to maximise any benefit available under the leniency programme. Acting swiftly could make the difference between getting immunity, or a 50% discount in fine, or only a much smaller reduction if other members of the cartel are already cooperating with the competition authority. Limiting liability and exposure on capital markets will also likely be shareholders' primary concern at this stage. In order to ensure the leniency application is successful (especially if you are a multinational dealing with multiple leniency filings in many jurisdictions), you will require as much information about the infringement as possible. Given the secretive nature of cartel arrangements and the great care they take to cover their footprints, the most effective way of getting this information is by enlisting the cooperation of the manager(s) responsible. This means those individuals, perversely, may hold some of the cards. In return for cooperating they may demand assurances that their employment, pension and benefits are protected, and that the firm will pay for legal representation if they are subject to personal sanctions.[23] This paradox is often cited privately by in-house counsel as common in leniency scenarios.

A further challenge is balancing the need to discipline clearly delinquent behaviour by managers, with creating a reporting culture that encourages employees to come forward when they have any concerns about potential breaches by those around them. The problem is the instinctive dislike that many in society have towards the act of informing on others. Many consider it dishonest and feel it reflects poor character.[24] Indeed, the experience of the whistle-blower can be far more miserable than that of the cartelist. The reader is reminded of the criminal trial discussed earlier in which those alleged to have engaged in cartel behaviour were described as "heroes" by sales staff. That hero status may simply be enhanced if those individuals also help the firm secure immunity from fines. For example, in a 2014 interview an anonymous Japanese car parts executive claimed to have been incentivised by his firm to plead guilty to a US antitrust charge. The employer is alleged to have promised to support the individual for the rest of his life in return for agreeing to serving prison time in the US. It is inferred that the employer did this to negotiate a considerably lower corporate fine under the US plea bargain. [25]

The problem is that the cartelist – even if acting alone or in a highly clandestine manner – will typically feel what they are doing is ultimately in the employer's interests, especially if the potential profits of the infringement are significant enough to exceed any likely corporate fine. Contrast this with someone who reports the behaviour of others or, even worse, goes outside the business to report what they know to the authorities. Those individuals have typically found it difficult to seek employment elsewhere for example.[26] One way of lessening any stigma attached to internal reporting, is to build a no-blame culture, to the greatest extent possible.

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[23] See P Whelan, *The Criminalization of European Cartel Enforcement* (OUP 2014) p133;

[24] A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) The Competition Law Review 5(1), pp. 123-145.

[25] Hans Greimel, *Confessions of a price fixer* (16 November 2014) Automotive News.

[26] A Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Detection Tool? In T Cheng, B Ong and S Marco Colino, *Cartels in Asia* (Kluwer 2015).

Concluding remarks

The findings of this article should not be taken to suggest that cartel enforcement is not worthwhile or that cartels cannot be significantly deterred. In the last ten years we have seen a steady drop in the number of cartels uncovered and an increasingly sophisticated approach by the European Commission and other authorities when dealing with evidence. It is now quite unusual to see the sorts of brazen behaviour that were had by members of the Lysine cartel, for example. What we do not know is whether there are fewer cartels out there because they have been deterred, or that they have simply become more sophisticated and harder to detect. It is notable, for example, that competition authorities have become over reliant on cases that involve leniency, possibly at the cost of a credible threat of detection without it.[27] Yet enforcement has undoubtedly raised the profile of cartel enforcement and resulted in many industries making very significant efforts to comply with the law and prevent recidivism. One must also remember that all enforcement makes life harder for cartels and the greater the challenges and risks they face in communicating, reaching agreement and ensuring the cartel is adhered to, the less the likely damaging impact on markets.

This paper has shown how the fight against cartels still faces significant obstacles and challenges. The identification of three key drivers of the decision to form a cartel helps us understand the motivation of managers forming cartels and how we might resolve them. Ignorance is still a very significant problem and authorities must not assume that high fines will automatically have an educative effect or that knowledge of them will be disseminated beyond a fairly small group of competition people and general in-house counsel. It is also clear that the punitive sanctions imposed on cartels are not yet reflected in popular perceptions. So continued advocacy and education is very important to promoting deterrence, compliance and ensuring that cartels are viewed with an appropriate level of moral opprobrium.

The second issue, crisis, is also very challenging and can drive otherwise law-abiding managers into adopting illegal strategies like cartelisation, in an attempt to avert bankruptcy and job losses. These individuals might be seen as heroes within their respective businesses or industries and any softer perception of cartels in crisis is not helped by competition authorities relaxing enforcement during periods of wider economic crisis. Businesses need to be particularly careful to ensure that the crisis driving cartelisation is not self-inflicted – for example where unrealistic sales targets are set or where employees' job security is very closely linked to challenging short-term performance indicators.

The third, arrogance, is compounded by the remote nature of enforcement and the fact it typically results in only punishment for the firm. Both crisis and arrogance need to be dealt with through a combination of public enforcement and internal compliance efforts. There is a real need for further development of individual sanctions that are coordinated across jurisdictions and that ensure that punishment is dealt out where it is possible to identify individuals who were solely or primarily responsible for the cartel conduct. This is especially important given the extent to which businesses have typically failed to prevent cartel conduct internally, even though the existence of the conduct was widely known or largely ignored. It is also important given that it may not always be possible for a business to discipline an individual manager internally, or where the decision to form the cartel was more collective and involved a larger group or an entire subsidiary. Thankfully, corporate compliance does appear to be moving in the right direction and there is now a greater awareness of the need to take competition law seriously.

[27] Stephan and Nikpay (n 17)