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**ANTI-CARTEL REGULATION : THE INTERESTS AND OBJECTIVES OF
ENFORCEMENT**

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This is a reflection on the way in which the enforcement of a particular area of competition law and policy has evolved over a period of some 40 years and a comparison of the dynamic of enforcement as a process in itself with the objectives and interest inherent in substantive law and policy. It considers the way in which enforcement may become an objective in itself, creating its own professional interest and culture, to the extent of becoming in socio-economic terms a distinct enterprise or even 'industry'.

This kind of reflection is prompted by observation of a number of recent enforcement trends in the field of competition regulation, such as the official encouragement of private claims in relation to anti-competitive conduct, and the development of leniency programmes and moves towards criminalisation in the sphere of anti-cartel regulation. Attempts to elucidate and account for such trends suggest that they may be predominantly top-down phenomena, led in particular by regulatory agencies. Globally such agencies have increased in number, and size and resources, and their increasingly strong sense of own identity is evident for instance in the European Competition Network established by the European Commission. An associated trigger for reflection is the amount of legal activity which is now generated by the business of competition enforcement, especially in the context of anti-cartel regulation, which may be regarded as the 'sharp end' of such enforcement. As enforcement activity has produced increasingly sophisticated and resource-intensive processes of investigation, hearing and appeal, it is interesting to reflect on the generation of legal work and on the relationship between the regulatory and legal professions in this area.

Finally, it is then worthwhile to enquire critically into the outcome of these developments in terms of costs and benefits. We start with a view of what competition policy and law is designed to achieve and who is thought to benefit from the regulation of competition. At the same time it may be asked, looking more specifically at the 'enforcement enterprise', who gains from that end-of-process activity : markets and the economy, the general public (as consumers or small traders for example), or the professional actors (regulators and lawyers) who are thought to serve these more fundamental interest ?

Cartel regulation : objectives and goals

1. Objectives of competition policy - e.g. Gerber's List :
 - Protection of economic freedom (e.g. of consumers, small traders)
 - Social ideals (e.g. power structure, social reconstruction)
 - Justice
 - Economic policy (e.g. counteracting inflation, promoting growth)
2. Objectives of the enforcement of the regulation of cartels – may be different ?
Securing compliance with legal rules may become an end in itself, especially when the method of enforcement shifts from a more consensual to a more confrontational approach. This is a fairly obvious point to make about systems of criminal law, but may now be worth emphasising in relation to this sector of competition law.

A history of enforcement (European context)

A Phase One (1960s, 1970s) : the removal of cartels

1. discovery and proof
2. prohibition

Insufficient ? More cartels revealed. New cartels appear afterwards. And cartels go underground and are more difficult to detect and regulate.

B Phase Two (1980s, early 1990s) : the deterrence of cartels

Necessary to use

1. strong investigation (new sub-set of enforcement objectives, e.g. sufficiency of evidence, fair process)
2. penal measures (new sub-set of enforcement objectives, e.g. appropriate level of retribution, effective deterrent sanctions)

Anti-cartel law is turning into criminal law, and cartelists appear less as anti-competitive actors and more as delinquent rule-breakers (criminals).

C Phase Three (later 1990 onwards) : enforcement in crisis

Delinquency outstrips resources :

1. More and more cartels uncovered (via dawn raids, leniency)
2. Clogging up of resources (more careful investigations, appeals)

Thus : deterrence is unobtainable, but clear-up of cartels creates an illusion of success

Movement then towards **settlement bargains** (advantageous to both sides), and a 'business deal' model replaces the 'crime control' model - hence, close relation between regulators and defence lawyers (common interest in a 'clear-up' which costs the least for both sides).

And everybody is happy or thinks so (public, politicians, regulators, companies)

An epistemology of enforcement

Shifting legal categories, types of process and fields of discourse and academic interest.

From competition law (viewed as an area of economic or commercial law, where discussion may be dominated by legal practitioners, business actors and economists) to criminal and basic rights law (where discussion is dominated by criminal justice practitioners, prosecutorial regulators and criminologists)

A politics of enforcement

Conflicting interpretations :

RHETORIC OF STRONG ACTION

Clear-up (leniency works)

Zero tolerance (big fines, prison terms, civil claims)

Done fairly (procedural rigour, rights culture, appeals)

REALITY

Just the tip of the iceberg

They don't work or are not usable

Good income for lawyers

Result : the cartel-busting industry

Who pays ?

Who wins ?

And return to the original question : to what extent does this now extensive and resource-intensive enforcement activity contribute to achieving the main goals of competition policy ?