ARE CARTELS THE SUPREME EVIL OF ANTITRUST?

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It is an often repeated assertion that cartels and collusive conduct are, in the words of Justice Scalia (speaking on behalf of the U.S. Supreme Court), "the supreme evil of antitrust."[1] Supreme evil sounds pretty bad. Almost supervillain bad.

And, of course, the U.S. Supreme Court is not alone in the view that cartels are the supreme antitrust evil. Thomas Barnett, speaking as the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, in 2006, noted that the U.S. Supreme Court accurately labeled cartels as "the supreme evil of antitrust" and noted that the "fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities properly regard cartel behaviour as *per se* illegal and a "hard core" violation of competition laws."[2]

This is not just an American view. Perhaps the most successful U.S. antitrust export has been the fight against cartels. While most jurisdictions have not adopted a purely criminal approach to anti-cartel enforcement, there is broad international agreement that anti-cartel enforcement is critical. The Bundeskartellamt identifies hardcore cartels as those involving price or quota and customer and territorial allocation:

> The Bundeskartellamt has always given high priority to the prosecution and punishment of illegal agreements, especially price and quota cartels and customer or territorial allocation agreements (hardcore cartels).[3]

The Swedish Competition Authority's "Fighting Cartels – Why and How" publication[4] refers to cartels in similarly powerful language. It notes that "[f]ighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community."[5] As well, the publication remarks that "the perpetrators of these [price fixing, bid rigging and market allocation] conspiracies are, quite literally, stealing money from the pockets of businesses and consumers."[6]

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[1] Verizon Communications Inc. v. Law Office of Curtis V. Trinko, 540 U.S. 398, 408 (2004).
[2] Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model, Presented at the Fordham Competition Law Inst.'s Annual Conference on Int'l Antitrust Law and Policy (Sept. 14, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.
[3] BUNDESKARTELLAMT, EFFECTIVE CARTEL PROSECUTION: BENEFITS FOR THE ECONOMY AND CONSUMERS 5 (Dec. 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brochure%20-%20Effective%20cartel%20prosecution.pdf?__blob=publicationFile&v=12.
[4] Mario Monti, *Why should we be concerned with cartels and collusive behaviour?*, *in* KONKURRENSVERKET/SWED. COMPETITION AUTH., FIGHTING CARTELS – WHY AND HOW? 14 (Feb. 2001), http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/fighting-cartels.pdf.
[5] Mario Monti, *supra* note 4, at 14 [emphasis added].
[6] James M. Griffin, *An inside look at a cartel at work: Common characteristics of international cartels*, *in* KONKURRENSVERKET/SWED. COMPETITION AUTH., FIGHTING CARTELS – WHY AND HOW? 29 (Feb. 2001), http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/fighting-cartels.pdf.

In a paper titled "Cartel Enforcement Regime of Korea and its Recent Development", the Korean Fair Trade Commission described cartels in Korea as "Public Enemy Number 1" due to their ability to "inflict severe harm to consumers" and categorized this harm to the market economy as "much more serious" than that from monopoly.[7]

In our own country, which was an early adopter of the criminal view of cartels,[8] in the PANS case, Justice Gonthier, speaking on behalf of the Supreme Court of Canada, noted that the prohibition against conspiracies is "the core of the criminal part of the Act" and that "[t]he prohibition of conspiracies in restraint of trade is the epitome of competition law."[9]

More recently, in a case before Canada's Federal Court of Canada, the Chief Justice of the Court wrote:

> Price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy. Buyers in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition. When they purchase products that have been the subject of such an agreement, they are effectively defrauded.[10]

Further, the Canadian Competition Bureau recently noted that "[t]hese types of agreements represent the most egregious forms of anti-competitive conduct and we will continue to put our full weight between eradicating these deceitful practices."[11] As noted, both Canada and the United States have classified price fixing agreements as criminal offences, punishable by significant periods of incarceration, as well as fines.[12]

While the above references, highlighting the serious manner in which enforcement regimes regard hardcore cartel conduct, only refer to a few jurisdictions, that is not for lack of available examples. Indeed, it is hard to find statements to the contrary.

International organizations similarly articulate very high degree of concern with respect to hardcore cartel conduct. On March 25, 1998 the OECD Council adopted a General Recommendation Concerning Effective Action against Hard Core Cartels.[13] The recommendation

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[7] KOREA FAIR TRADE COMM'N, CARTEL ENFORCEMENT REGIME OF KOREA AND ITS RECENT DEVELOPMENT 2 (Feb. 2010), http://ftc.go.kr/www/cmm/fms/FileDown.do?atchFileId=FILE_000000000079628&fileSn=0.
[8] *An Act for the Prevention and Suppression of Combinations formed in the Restraint of Trade* was enacted in 1889 (S.C. 1889, c. 41).
[9] R. v. N.S. Pharmaceutical Soc'y, [1992] 2 S.C.R. 606 (Can.).
[10] Canada v. Maxzone Auto Parts (Can.) Corp., 2012 FC 1117, para. 54 (Can.).
[11] John Pecman, Comm'r of Competition, Can. Competition Auth., Remarks at the 2014 Competition Law Spring Forum (May 21, 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03739.html.
[12] Price fixing offences are punishable by one or both of imprisonment for up to 14 years or a fine of up to $25 million under the Competition Act, R.S.C. 1985, c. C-34 and by one or both of imprisonment for up to 10 years or a fine of up to $100 million for corporations or $1 million for individuals under the Sherman Antitrust Act, 15 U.S.C. § 1 (2012).
[13] OECD, RECOMMENDATION OF THE OECD COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (Mar. 25, 1998), http://www.oecd.org/daf/competition/2350130.pdf.

condemned hardcore cartels as "the most egregious violations of competition law."[14] Since the original adoption of the recommendation, there have been a number of follow-up reports. In the OECD's report in 2003, it noted that:

> In summary, cartels are unambiguously bad. They cause harm amounting to many billions of dollars each year. They interfere with competitive markets and with international trade. They affect both developed and developing countries, and their effect in the latter may be especially pernicious. Their participants operate in secret, knowing that their conduct is unlawful. Their detection and prosecution should be a top priority of governments everywhere.[15]

Similarly, the ICN agrees with the anti-cartel chorus noting that "the heart of antitrust enforcement is the battle against hard core cartels directed at price fixing, bid rigging, market allocation and output restriction."[16]

The reason for concerns about price fixing or similar hardcore cartel activities is not mysterious. They directly and explicitly reduce competition – that is their very purpose. The above-noted Bundeskartellamt publication referenced statistics suggesting a 15% (or more) price increase with respect to the cartelized product.[17] That is clearly not trivial.

The Chief Justice of Canada's Federal Court has observed that cartels create more adverse effects than do theft and fraud.

> Indeed, such agreements have a greater adverse economic impact on society than do theft and fraud. This is because, in addition to leading to a transfer of wealth from victims of the agreement to the participants in the agreement, they also generally result in further detrimental effects on the economy. Such further effects include what is often referred to as the "deadweight loss" to the economy that results when higher prices lead buyers at the margin to switch to less valued substitutes, thereby bringing about a misallocation of resources. This misallocation of resources typically reduces aggregate wealth in the economy by an amount that is equivalent to a significant percentage of the wealth transfer mentioned above.[18]

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[14] *Id* [emphasis added].
[15] OECD, HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD 15 (May 27, 2003), https://read.oecd-ilibrary.org/governance/hard-core-cartels_9789264101258-en.
[16] INT'L COMPETITION NETWORK, CARTEL WORKING GROUP: 2018 – 2021 WORK PLAN (Sept. 2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/WorkPlan2018-21CWG.pdf.
[17] BUNDESKARTELLAMT, EFFECTIVE CARTEL PROSECUTION: BENEFITS FOR THE ECONOMY AND CONSUMERS 15 (Dec. 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brochure%20-%20Effective%20cartel%20prosecution.pdf?__blob=publicationFile&v=12.
[18] Canada v. Maxzone Auto Parts (Can.) Corp., 2012 FC 1117, para. 55 (Can.).

The Swedish Competition Commission's aforementioned "Fighting Cartels – why and how?" publication notes that:

> Cartels differ from most other forms of restrictive agreements and practices by being "naked." They serve to restrict competition without producing any objective countervailing benefits. In contrast, a joint venture between competitors, for example, while restricting competition may at the same time produce efficiencies such as economies of scale or quicker product innovation or development. In these cases a proper analysis requires that the positive and negative effects are balanced against one another. This is not so with cartels. In cartel cases the positive side of the equation is zero. There are simply no countervailing benefits.
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> Cartels, therefore, by their very nature eliminate or restrict competition. Companies participating in a cartel produce less and earn higher profits. Society and consumers pay the bill. Resources are misallocated and consumer welfare is reduced. It is therefore for good reasons that cartels are almost universally condemned. Of all restrictions of competition, cartels contradict most radically the principle of a market economy based on competition, which constitutes the very foundation of the Community. Even those who sometimes criticise competition law as being a form of interventionism into the free play of market forces, accept the prohibition of cartels as inevitable. Indeed, there is nowadays a consensus that, using the words of Professor Lipsky, "no economy that claims to be free can exist without effective deterrence of cartels."[19]

As noted above, studies show that the price of products subject to cartelization may be increased 15 percent – or perhaps even more.[20]

Not only do cartels damage consumers, businesses and the economy, the reason that they are condemned as unequivocally problematic and, in some jurisdictions, criminal, is that they lack redeeming features. A merger between two firms eliminates price (and all other forms of) competition much more efficiently and permanently than a cartel between them – but it creates at least the hope of beneficial efficiencies in the form of scale and scope economies. Still, it is a

[19] Monti, *supra* note 4, at 15.
[20] OECD, HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 COUNCIL RECOMMENDATION (2005) at 25, https://www.oecd.org/daf/competition/cartels/35863307.pdf.

striking contrast – prison jump-suits for cartelists whose activities may have an effect for a few years, versus the cover of Newsweek for big merger partners.

However, let us leave aside merger considerations to explore one of the key issues of our time – innovation. At least in our own country it is hard to escape peons to innovation as the road to economic salvation. In Canada, Prime Minister Justin Trudeau declared in his address to the 2016 World Economic Forum:

> Today, we are gathered here to contemplate whether we are in the early stages of a fourth industrial revolution. What a breathtaking possibility that is. Steam power changed the world utterly. So did electricity and more recently, computers. And now we may be on the cusp of change equal in magnitude and far swifter in pace. New technology is always dazzling, but we don't want technology simply because it is dazzling—we want it, create it and support it because it improves people's lives.[21]

Indeed, the very name of the Canadian federal Ministry that oversees the Competition Bureau was changed upon the election of the Trudeau government, from Industry Canada to the Ministry of Innovation, Science and Economic Development Canada (ISED).

In its 2017 Budget, the Government of Canada proposed "to establish Innovation Canada, a new platform led by Innovation, Science and Economic Development Canada that will coordinate and simplify the support available to Canada's innovators."[22] The Budget planned to support Canada's innovators by having Innovation Canada "Lead the creation of Canada's economic growth strategies" and "Initiate a whole-of-government review of business innovation programs."[23]

The Canadian Competition Bureau is fully on board with the innovation agenda. In its 2018-2019 Annual Plan, the Competition Bureau noted that "[f]ocusing on innovation is critical because that's what spurs businesses to be more efficient and productive. Innovation drives economic growth and provides consumers with better products and services. Competition fuels that innovation."[24]

But the recognition of the importance of innovation in competition policy is not new. In 1976, as part of the preparation for Canada's then new *Competition Act*, the government published the "Dynamic Change Report", the title of which reflects the importance of innovation. It spoke to the key role of dynamic efficiency in advancing the economy.[25] In the preamble of the discussion draft

[21] Justin Trudeau, Address by the Right Honourable Justin Trudeau, Prime Minister of Canada to the World Economic Forum (Jan. 20, 2016), https://pm.gc.ca/eng/news/2016/01/20/canadian-opportunity-address-right-honourable-justin-trudeau-prime-minister-canada.
[22] DEP'T OF FINANCE CAN., BUDGET 2017 (Mar. 22, 2017), https://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf.
[23] *Id*.
[24] COMPETITION BUREAU CAN., 2018-2019 ANNUAL PLAN: BUILDING TRUST TO ADVANCE COMPETITION IN THE MARKETPLACE (May 3, 2018), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04356.html.
[25] LAWRENCE A. SKEOCH AND BRUCE C. MACDONALD, DYNAMIC CHANGE AND ACCOUNTABILITY IN A CANADIAN MARKET ECONOMY (Dep't. of Consumer and Corporate Affairs, 1976).

for the legislation, for instance, the authors set out their vision of the main public policy purpose at hand:

> Whereas a central purpose of Canadian public policy is to promote the national interest and the interest of all Canadians by providing an economic environment fully conducive to the reduction of the real costs of providing goods and services, by expanding opportunities relating to both domestic and export markets, and by encouraging innovation in technology and organization;
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> And whereas one of the basic conditions requisite to the achievement of these ends is the creation and maintenance of a flexible, adaptable and dynamic Canadian economy, making it necessary to promote conditions which will stimulate and facilitate the movement of talents and resources in response to market incentives…[26]

This has been recognized in jurisprudence as well. In its 2016 *Toronto Real Estate Board* decision, which was upheld on appeal, the Canadian Competition Tribunal noted that "[t]he very essence of competition involves finding new and innovative ways to make one's products more attractive to one's customers."[27] The Tribunal also added:

> In turn, the competitive prices, non-price offerings and innovations that result from that process of rivalry generally serve to increase aggregate economic welfare in an economy, the economy's international competitiveness and the median standard of living of people in the economy. This is particularly true of the innovations that result from the competitive process.[28]
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> …
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> The Tribunal embraces the classical definition of dynamic competition offered by Joseph Schumpeter, who defined competition as a dynamic process wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers. Schumpeter added that, in this process, the basic instrument that allows firms to be ahead of their competitors is the introduction of informational asymmetries which result primarily from innovation. A framework for antitrust analysis that favors dynamic

[26] *Id.* at 42.
[27] Comm'r of Competition v. Toronto Real Estate Bd., 2016 Comp. Trib. 7, para. 299 (Can.).
[28] *Id.* at para. 463.

> competition over static competition "puts less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities" (J Gregory Sidack & David J Teece, "Dynamic Competition in Antitrust Law" (2009) 5:4 *J Competition L & Economics* 581 at 581).[29]

This recognition is not unique to Canada. Rachel Brandenburger, the then special advisor to the US DOJ's International Antirust Division, noted in a 2011 speech:

> Innovation drives human progress and economic growth. Indeed, modern economics teaches us that technological change is the primary driver of economic growth. The U.S. Department of Commerce reported in 2010 that technological innovation is linked to three-quarters of the United States' growth rate since the end of World War II.1 As the Report states, examples of innovations that contribute to growth "are so numerous and diverse as to be beyond cataloguing."[30]

The Bundeskartellamnt, in its publication titled "Innovations – challenges for competition law practice", notes:

> Innovations are a key engine of economic development and a major driver of growth, employment and prosperity in a national economy. They are often associated with trail-blazing discoveries, such as the invention of the steam engine, which essentially triggered the industrialisation process. Today there is much debate about disruptive innovations in the digital economy. One of many examples is the introduction of automated driving. Apart from such radical changes, other developments with less impact can also be of significance, e.g. improvements to existing products or production processes.[31]

Similarly, the US Federal Trade Commission began its 2003 report titled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" with the statement that:

> Innovation benefits consumers through the development of new and improved goods, services, and processes. An economy's capacity

[29] *Id.* at para. 618.
[30] Rachel Brandenburger, Special Advisor, Int'l Antitrust Div., U.S. Dep't of Justice, Remarks at the 2nd BRICS Int'l Competition Conference: Promoting Innovation Through Competition (Sept. 22, 2011), https://www.justice.gov/atr/file/518336/download.
[31] BUNDESKARTELLAMT, INNOVATIONS – CHALLENGES FOR COMPETITION LAW PRACTICE (Nov. 2017), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_II.pdf?__blob=publicationFile&v=3.

> for invention and innovation helps drive its economic growth and the degree to which standards of living increase. Technological breakthroughs such as automobiles, airplanes, the personal computer, the Internet, television, telephones, and modern pharmaceuticals illustrate the power of innovation to increase prosperity and improve the quality of our lives.[32]

In the same vein, the OECD states in the preface to its report titled "OECD Science, Technology and Innovation Outlook 2018":

> Innovation enables countries to be more competitive, more adaptable to change and to support higher living standards. It provides the foundation for new businesses and new jobs and helps address pressing social and global challenges, such as health, climate change, and food and energy security.[33]

Like with respect to our review of support for anti-cartel enforcement, the above review of statements outlining the importance of innovation in competitive markets – and in competition policy – is by no means comprehensive. Statements as to the importance of innovation generally, and in relation to competition policy, are ubiquitous. There can be no doubt that innovation is of critical importance to competition policy, or that this is widely recognized.

Anti-competitive conduct which impairs innovation is damaging to the economy. As Canada's former Commissioner of Competition noted in a 2018 speech:

> But competition and innovation can be stifled in at least two ways. First, by private anti-competitive behaviour, and second, by overly restrictive government regulations. Let's think of these as "roadblocks" on the path to innovation. This is where the Bureau comes in. The Bureau's role is to clear these "roadblocks", where possible, through a combination of enforcement and advocacy tools.
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> The Bureau plays a unique role in this regard. Government can take all of the measures that it wants to grow innovative firms, but if those firms cannot compete because of anti-competitive conduct or overly restrictive regulations, then the desired outcome will not be achieved.

[32] FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (Oct. 2003), https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf.
[33] OECD, OECD SCIENCE, TECHNOLOGY AND INNOVATION OUTLOOK 2018, 3 (Nov. 19, 2018), https://read.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-innovation-outlook-2018_sti_in_outlook-2018-en.

> We enforce the Competition Act to stop anti-competitive behaviour; the kind of behaviour that we know is innovation-stifling. This behaviour can take a number of different forms.
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> For example, it can be when incumbents abuse their dominant position to prevent an innovative start-up from entering the marketplace. It can also be cartel behaviour—when businesses collude, the pressure to innovate disappears.
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> Similarly, when companies make fraudulent claims, legitimate innovators suffer. The merger of two rivals may also reduce competition and diminish the drive to innovate within an entire industry. [34]

In the context of the European Commission's decision finding the *Dow/DuPont* merger to be anticompetitive, the Commission highlighted:

> The Commission therefore concludes that the likely reduction of innovation effort by the merged entity as compared with the Parties pre-Transaction would have a significant impact on effective innovation competition, not only at the level of the innovation spaces where the Parties currently overlap but also at the industry level.
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> The Commission considers that the immediate significant harm to innovation competition which would result in a decreased in innovative products being introduced in the downstream markets, would significantly harm consumers on markets where these products would compete in the future, including markets where one or both of the Parties are not currently present, as a result of reduction of variety as well as product market competition.[35]

Similarly, Rachel Brandenburger noted the following in her above-referenced 2011 speech:

> Competition laws play an important role in the innovation process by protecting the innovation incentives created by market competition. U.S. competition (or in our parlance, antitrust) laws foster and preserve a competitive marketplace by preventing

[34] John Pecman, Comm'r of Competition, Can. Competition Auth., Growing the economy: the integral relationship between competition and innovation, Remarks at the Vancouver Policy Roundtable (Jan. 18, 2018), https://www.canada.ca/en/competition-bureau/news/2018/01/growing_the_new_economytheintegralrelationshipbetweencompetition.html.
[35] Case M.7932 – Dow/DuPont, Eur. Comm'n (Mar. 27, 2017), http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf.

> anticompetitive conduct that impedes the competitive process, hinders innovation incentives, and harms consumers.
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> …
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> It is relevant to today's discussion to note that when enforcing our competition laws, we seek to discourage anticompetitive activities that will harm innovation. [36]

As well, the Bundeskartellamt provides:

> Similar innovation-based theories of harm can also play a key role in abuse proceedings. A prominent example of this is the European Commission's Microsoft tying case: Microsoft's tying of the Internet.[37]

The importance of innovative efficiency has been widely recognized academically as well. Professor Jospeh F. Brodley noted in his 1987 paper titled "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress":

> *Importance*. Of the three types of efficiencies, innovation efficiency provides the greatest enhancement of social wealth, followed by production efficiency, with allocative efficiency-the main focus of current enforcement efforts-ranking last. Innovation efficiency or technological progress is the single most important factor in the growth of real output in the United States and the rest of the industrialized world. Indeed, studies have shown that over the forty-year period from the late 1920s to the late 1960s, at least half of the gain in United States output was due solely to technological and scientific progress. Increased capital intensity, by contrast, was responsible for only twelve percent of the gain in real output. Moreover, the international competitiveness of United States industry is vitally dependent on continued technological progress. Congress recognized the importance of innovation efficiency in the recently enacted National Cooperative Research Act of 1984. In that statute, adopted by near-unanimous majorities in both Houses of Congress, the historic treble damage remedy for persons injured by antitrust law violations was modified to facilitate joint ventures in research and development-a clear recognition of the priority to be accorded innovation efficiency. Thus, an antitrust policy that failed

[36] Brandenburger, *supra* note 30.
[37] Bundeskartellamt, *supra* note 31.

> to emphasize innovation efficiency would both ignore this legislative priority and miss the largest single source of social wealth enhancement.[38]

Similarly, Melissa A. Schilling, a professor at the NYU Stern School of Business added the following in her paper titled "Towards Dynamic Efficiency: Innovation and its Implications for Antitrust":

> Innovation is one of the most powerful drivers of increased human welfare available to us. Innovation enables the development of new products, the improvement of processes, and the creation and improvement of social institutions. Innovation has yielded a wider range of goods and services to be delivered to people worldwide. It has made the production of food and other necessities more efficient, yielded medical treatments that improve health conditions, and enabled people to travel to and communicate with almost every part of the world.
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> …
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> There is widespread consensus that the goal of antitrust laws are to promote economic welfare. Given the contribution of innovation to economic welfare, it should be clear that antitrust laws must pursue *dynamic efficiency*, that is, an appropriate balance between short-run static efficiencies such as reducing costs and maximizing consumer surplus (*productive efficiency* and *allocative efficiency*) with longer-term efficiencies that arise from innovation.[39]

As is apparent from the above-noted references and cases, although the approach to innovation in competition policy is not uniform across jurisdictions, there is a broad recognition of its importance. But – and we come her to the nub of the issue – how important is it? What is worse, price fixing cartels, or stifling innovation? How do we compare the issues? What does more damage to the economy? Which can be more effectively fought through competition policy means?

This brings us to the key point which is the subject of debate. Is it worse to cartelize, raise prices and reduce surplus, or, is it worse to use anti-competitive means to stifle innovation? Is a 15% rise in price, with no actual or potential offsetting efficiency benefits, better or worse than action by a dominant firm which may stifle innovation by its rivals (maybe preventing paradigm

[38] Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress,* 62 N.Y.U. L. REV. 1020, 1026 (1987).
[39] Melissa A. Schilling, *Towards Dynamic Efficiency: Innovation and its Implications for Antitrust,* 60(3) ANTITRUST BULL. 191, 191-2 (2015).

changes/maybe preventing incremental improvements), but which may have legitimate business justifications? How do we deal with the uncertainty surrounding the outcomes?

Dynamic inefficiency may well be worse for the economy than static allocative inefficiency. But, cartels are always bad, whereas actions by dominant firms are frequently pro-competitive. They will very rarely stifle dynamic competition, but when they do the losses may be huge. We do not have a theory which tells us with confidence where we should focus most of our antitrust energy. Are cartels really the supreme evil, given the harm they do with no redeeming or possibly redeeming features? Or, is stifling innovation, although the conduct may often have legitimate business justifications, and although the innovation it may stifle is always uncertain and often marginal, worse? What is the ultimate evil, and where should our enforcement efforts be primarily directed?