The Value of Policy Diversification in Cartel Detection and Deterrence

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*Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels*

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Context

• Leniency Revolution Since Early 1990s
  – US reforms and broad global adoption
  – Visible increase in cases, punishments
• Issue: Utility of Other Detection Devices?
Agenda

• Designing an Anti-Cartel Program: Options
• Why “Screens” Are Difficult to Apply
• Why Diversification Is Important
• Suggestions for Next Steps
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How to Build an Anti-Cartel Program?

• Establish Categorical Prohibitions?
• Broaden Evidence that Proves Agreement?
• **Increase Likelihood of Detection**?
• Increase Likelihood of Prosecution?
• Improve Adjudication Mechanism?
• Raise Sanctions?
• Note: Interdependence
Obstacles to Diversification

• Perception that Previous Experiments with Screens Have Been Largely Unsuccessful
  – DOJ/FTC experience in 1970s with crude screening techniques
  – Establishing effective “but for” criteria
• Agency Leadership Incentives
  – Leniency: visible, measurable results
  – Screens: more speculative, long-term outlays
• Burdens on Poorly Funded Agencies

Case for Policy Diversification

• Enforcement/Collusion Arms Race Since 1889
• Business Managers: Adaptable, Ingenious
  – Substantial incentives to succeed
  – Demonstrated capacity to learn and adjust
• Historical Lesson: Countermeasures Arise to Cope with Enforcement Innovations
Larger Context

• How to Invest Resources to Address Cartels?
  – Adjust the law enforcement mechanism
    • E.g., improve tools for detection
  – Advocate adjustments to policies that facilitate collusion
    • E.g., Publicly-imposed barriers to entry

Next Steps: Substantive Measures

• Predictive Factors Derived from Past Cases
  – Recurring cartel behaviors
• Adaptation of Models Used to Calculate Damages
Next Steps: Who Does It

• Better Funded Competition Agencies
• Cooperation with Universities and Other Research Centers
• Regional Initiatives

Final Thoughts

• Importance of Continued R&D Investments
• Recall that Leniency Was Product of Policy Innovation and Risk-Taking
  – Merged theory (prisoner’s dilemma) and practice
  – Anne Bingaman reforms faced internal opposition
• Policy Environment Is Dynamic and Requires Ongoing Innovation and Adaptation by Public Authorities