CARTEL DETECTION MECHANISMS IN THE EU - EFFECTIVENESS AND EXPORTABILITY

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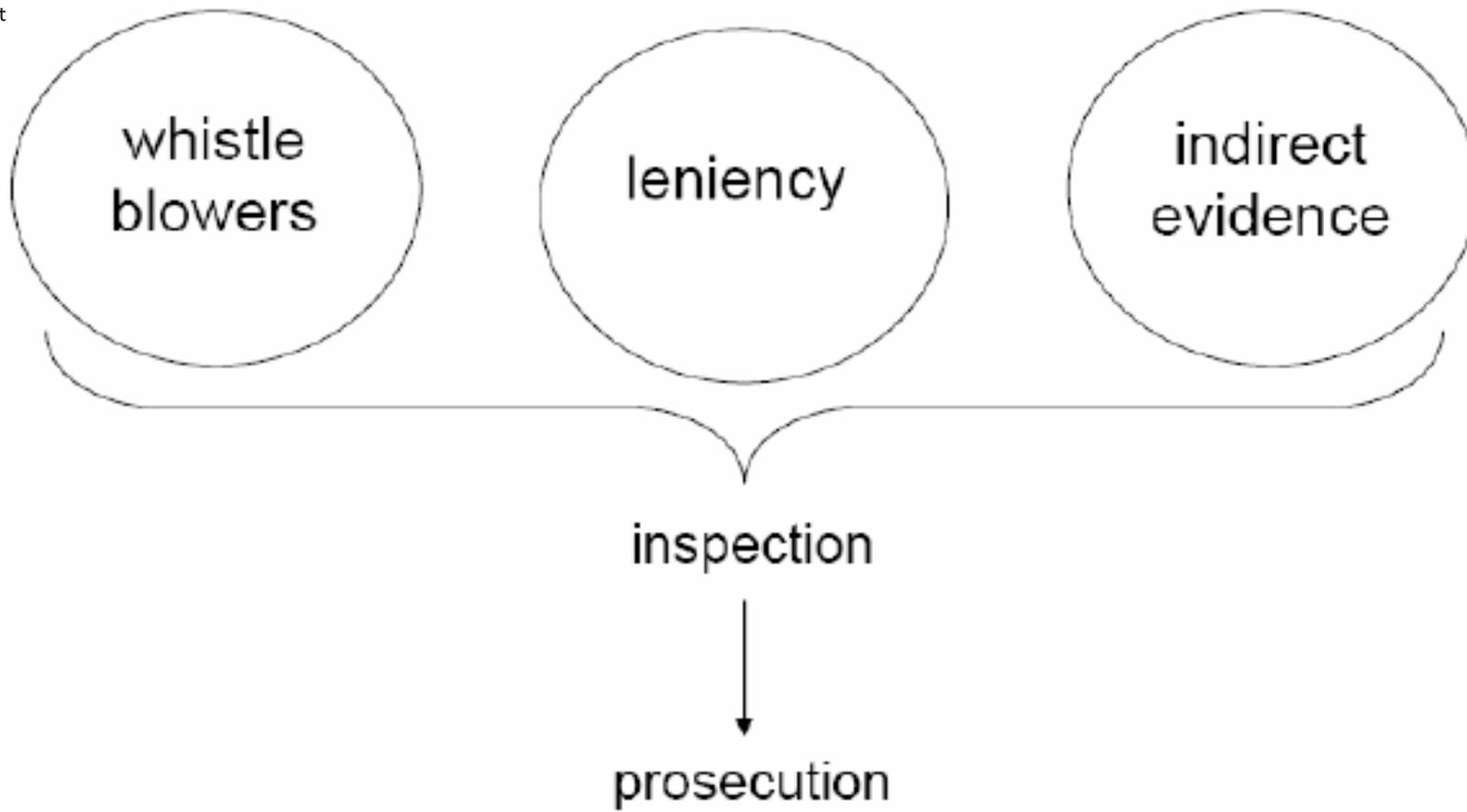
Introduction

- Detection: key deterrent of cartel activity
- No easy task: 'Members of a price-fixing conspiracy go to great lengths to conceal their illegal activities from antitrust enforcers' (Hovenkamp)
- Annual detection probability:
  - US: 13-17% (Bryant and Eckard, 1961-1988)
  - EU: 12.9-13-3% (Combe et al, 1969-2007)

Cartel detection mechanisms

- Principal types:

    - 'Outside' mechanisms: dependent on the enforcer or those affected by the anti-competitive cartel

    - 'Inside' mechanisms: dependent on the members of the cartel

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   whistle        leniency        indirect
   blowers                        evidence

                  inspection

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                  prosecution
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Main cartel detection methods

(Source: Friederiszick and Maier-Rigaud)

'Outside' detection mechanisms

- Use of economic criteria to detect collusion
- Where to look?
  - Structural approaches: identifying markets prone to collusion
  - Conduct approaches: behaviour associated with collusion (parallel prices, stable market shares)
  - Performance approaches: excessive profits

(Rey, OECD)

Problems with outside detection

- High costs
- Requires well resourced authorities with extensive powers of inspection
- Limits of economic theory for cartel detection
- Questionable reliability:
  - feasibility of collusion does not imply actual collusion
  - access to price / accounting data
  - comparable competitive levels
  - Similarities between tacit and explicit collusion
- Immense burden on the competition authorities
- Insufficient proof of cartel activity

'Inside' detection mechanisms

- □ 'Firms know whether they collude; the agencies do not' (Rey)
- □ Rather than having street patrols, trying to convince those engaged in the illegal activity to come forward (McCubbins and Schwartz)
- □ Leniency is the most notable example

Leniency - definition

- 'Corporate amnesty or immunity policy, […] instituted to encourage and persuade firms associated and involved in anti-competitive cartels to reciprocally defect, denouncing and revealing the illegal practices in question to the antitrust authorities' (Sama)

- Effectively:
  - Immunity from penalties/prosecution
  - Reduction in fines

Leniency in the EU

- Article 101 TFEU prohibits cartels

- Fines: up to 10% of total turnover in the preceding business year (1% for procedural breaches)

- First Leniency Notice: 1996

- Current: *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (2006) OJ C298/17

- Rationale: those engaged in cartel conduct may, if they cooperate to the required extent, benefit from a partial or total reduction in the penalty

Full immunity

- First to disclose the existence of an illegal cartel, and its participation in it (para 8)

- Sufficient evidence to enable the Commission to either 'carry out a targeted inspection' (para 8(a)), or 'find an infringement' (para 8(b))

- Corporate statement with 'detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning' (para 9(a))

First to come forward - doubts

- Immunity not granted if there is alredy sufficient evidence to:
  - justify an inspection (para 8(a))
  - establish an infringement (para 8(b))
- Clearer thresholds in the 2006 Notice
  - Full cooperation, 'on a continuous basis and expeditiously' (para 12)
    - providing evidence
    - answering questions and requests promptly
    - not destroying or concealing proof
    - not disclosing its application before a statement of objections has been issued
  - Immediate termination of involvement, unless required to continue
  - Full immunity not applicable to a company which has coerced another to join or stay in the cartel

Reduction in fines

- Granted for evidence with 'added value with respect to the evidence already in the Commission's possession' (para 24)
- Full co-operation and immediate termination required
- 'Added value': 'the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel' (para 25)
- Scale of discounts (para 26):
  - 30–50 per cent reduction to the first undertaking providing significant added value;
  - 20–30 per cent to the second
  - up to 20 per cent for any remaining undertakings

Limits of leniency

- Follow-on civil actions unaffected: companies may still be required to pay damages as determined in national courts
- Lack of harmonization across the EU:
    - applicants advised to apply 'for leniency to all competition authorities which have competence to apply article [101] in the territory which is affected by the infringement and which may be considered well placed to act against the infringement'
    - Towards full convergence? Model Leniency Programme (MLP): 'soft harmonization', with procedural and substantive requirements that all leniency programmes should offer
- Currently, no single application which takes effect in all Member States and the Commission

EU leniency: the future

- Report: Assessment of the State of Convergence (2009)
  - Successful attempts to align national leniency programmes Full convergence has not yet occurred
  - Reflection on benefits of further alignment
- Right to damages v leniency effectiveness: *Pfleiderer* case
  - Competition law does not preclude 'a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement' (ECJ)
  - Threat to effectiveness of leniency?

Problems with leniency

- Ethical issue: rewarding those in breach of the law. Commission: 'the interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices'

- Practical:
  - not in the interest of the parties to disclose the illegal activity
  - impact on future business relations with competitors

Success of leniency in the EU

- Most inspections are triggered by a cartel participant coming forward and confessing

- Between February 2002 and December 2006, 167 leniency applications:
  - 87 full immunity
  - 80 reduction in penalty

- Increase in detection: from 1.46 per year before 1996 to 5 per year after the introduction of the first Leniency Notice

Exportability of leniency: Hong Kong

- Small economy, No 1 financial centre in the world (World Economic Forum Financial Development Index, 2011)
- Takes pride in its free market economy
- Few legislative constraints on business practices
- No competition law currently in place
- HK Competition Bill unveiled in 2010

HK Competition Bill in a nutshell

- Prohibition on restrictive agreements;
- Prohibition on the abuse of a substantial degree of market power;
- Sanctions applied by a Competition Tribunal;
- Exclusions for merger activity and for statutory bodies
- Leniency:
  - Guidelines to be drafted at a later stage
  - Written leniency agreements: risks of disclosure
  - No protection in private enforcement

Problems with leniency in HK

- Principal competition problems: highly concentrated industries (telecoms, supermarkets, real estate, pharmacies)
- Discussing prices among industries is not uncommon
- Difficulties breaking that trust
- 'Outside' mechanisms needed to encourage 'inside' mechanisms
- Reluctance to adopt competition law
- Penalties: up to 10 per cent of local turnover for each year of infringement 3 years maximum

Keys to successful leniency programmes

- Enhancing convergence in the EU

- Outside mechanisms important for new competition regimes (real threat of punishment)

- 'The harder the stick, the sweeter the carrot': dependent on the fear of high pecuniary penalties

- Essential to ensure confidentiality

END

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