

PRICE-FIXING CARTELS IN SMALL OPEN ECONOMIES

**SOURCES OF HARM AND POLICIES
TO DETER**

The General Purpose of Competition/Antitrust Laws Is to Deter

- To deter what?
- *Repeated Crimes of the Same Kind by the Same Violators* (“Specific” Deterrence)
- Also, when punished, *to act as a bad example* for other would-be criminals so they will avoid that crime (“General” Deterrence)
- Should the goal be to deter absolutely or is there an “optimal” degree of crime that takes into account the costs of operating a justice system?

A unique form of industry “regulation”

- Applies to only a very small range of industries
- (1) oligopolies that have a chance of being reasonably competitive; in practice 3 or more sellers in the same market is necessary to avoid high levels of collusion (*multilateral market power*) or
- (2) monopolies like Microsoft and Google that must be trained to *restrain their use of their unilateral market power*
- Markets that are effectively competitive or that are under state price controls are of no interest

Role of import competition

- The U.S. Constitution of 1789 created the world's first free trade zone.
- The creation of the EU, NAFTA, and many other customs unions lowered trade barriers through treaties in the late 20th century.
- The effect was much more price competition in open economies for *tradable goods*.
- However, *non-tradable services* like banking, construction, and distribution unaffected.

The Paradox of Openness

- The dark side of globalization: profits vanished for dominant national producers, so they formed cartels to restore historical profits.
- The rise of Global Cartels in the early 20th century makes customers vulnerable to price injuries through importation.
- Global cartels make monopoly profits in every part of the world they fix prices, but even today, outside of the EU and US, penalties are low.
- The benefits outweigh the costs: CRIME PAYS

The Role of Competition Authorities

- First, develop successful methods for detecting secret price fixing & bid rigging – and educating business & government about it.
- Leniency/Amnesty programs, whistleblower bounties, public education
- Second, find the best, long-lasting remedies.
- Financial penalties must exceed profits made; recidivism penalties should be harsh; criminalization of the competition laws has many advantages.
- Competition works best at “arms length”. In small economies, special attention must be paid to interlocking directors and cross-ownership.

Role of the Private Sector

- Private rights of action are expanding quickly in the EU, but only **single damages** are permitted by law.
- Worse, the legal rules strongly favor defendants: class actions, document discovery, and contingent fees.
- This is unfortunate. In U.S. where “treble damages” allowed, **claimants get only single damages**.
- In EU, if laws says single damages allowed, in practice, I predict recovery will be **50% of compensation**.
- Companies: should institute antitrust training for employees (but, candidly, most not effective)
- Citizens: need help in understanding competition law, assist by complaining to ombudsmen and encouraged to become whistleblowers (with monetary rewards ?).

MY NIGHTMARES ABOUT THE FUTURE OF CARTEL ENFORCEMENT

- Rates of cartel detection rise every year. That must mean **more cartels are being formed**.
- Huge injuries being discovered from new types of cartel: LIBOR/EURIBOR rate-setting.
[my preliminary estimate: \$59 trillion damages]
- **Recidivism** also rising: many hundreds, mostly large multinational manufacturing firms. Maybe 2 or 3 an accident, but 20, 30 is a *disease*.
- In the U.S., which has the most severe cartel penalties, I found 73 out of 75 of the penalties were **suboptimal**. Elsewhere, likely worse.

MY DREAMS ABOUT THE FUTURE OF CARTEL ENFORCEMENT

- Rates of cartel detection rise every year. That might mean **more cartels are being caught**.
- There are 50-80 competition authorities now around the world actively prosecuting cartels.
- Monetary penalties reached \$100 billion in 2012.
- Criminalization under active consideration
- Whistleblower bounties in place & working
- Private rights of action is a popular, market-based solution to increasing penalties.