Competition Authorities: Prosecutorial & Non-Prosecutorial Systems and the Fight Against Cartels

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Before we get started:
2 Questions

• Broadly, what are the implications of institutional design-decision making functions on the fight against cartels?

• In particular, how does institutional design impact the criminalization of cartels?
1. Introduction
   • Institutional Characteristics
   • Results of Benchmarking Decision Making Functions

2. Institutional Design and Implications on Fighting Against Cartels
   • Prosecution & Leniency
   • Adjudication
   • Sanctions

3. Conclusion
Introduction

**GLOBAL TRANSFORMATION OF COMPETITION SYSTEMS**

- **Increasing** number of competition systems worldwide
  - By 1950 < 5
  - By 1975 < 15
  - By 1990 < 30
  - Today: Approximately 121
  - By 2020: 130

- **Diversity**/Experimentation in Design

- **Vacuum**-limited analysis of institutional characteristics
Introduction
Institutional Characteristics

- Governance
- Architecture
- Policy Duties
- Policy Making Agents
- Portfolio of Policy Instruments
- Accountability
- Independence
- Competition (+) Authority
- Decision Making Functions

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Decision-Making Functions

- How decisions are made within the agencies to ascertain judicial fairness

- Important to enhance the legitimacy of NCAs

- Two models:
  - Non-Prosecutorial (Aggregated, Bundled)
    - Spain, EC, FTC
  - Prosecutorial (Disaggregated, Unbundled)
    - Chile, South Africa
Decision-Making Functions

Aggregated Vs. Disaggregated

- Disaggregated
- Aggregated
- N/A
Decision-Making Functions

Single Body v. Different Bodies

- Single Body
- Separate Bodies
- N/A
- N/R
Competition Systems & Criminal Sanctions

Possibility to Seek Criminal Sanctions for Cartelization

- Yes
- No
- N/A
Institutional Design and Implications on Fighting Against Cartels

- Success of a policy that criminally punishes cartelists depends on
  - Long-term investments in NCAs
  - Increased Transparency
    - External review of public officials’ actions
    - Enhanced cooperation between different bodies

- Civil Law Jurisdictions
  - Defer some of their autonomy to the state’s prosecutorial bodies

- Decision-making Function
  - Gain reputational recognition and deference from the prosecutorial bodies
Institutional Design and Implications on Fighting Against Cartels

1. Adjudication

2. Leniency

3. Sanctions
Adjudication

• How the NCAs resolutions and judicial decisions could impact the institutional design and vice versa?

• Judges and juries- not warrant criminal punishment

• Misalignment of thought processes-may impact the interpretation of competition legislation
Adjudication

Example:

- Judge acts upon the perception that criminal punishment is not appropriate
- Power to interpret broad statutory commands—alter substantive liability standards for cartels
- Increased difficulty for prosecutors to prevail when bringing criminal antitrust claims, and even other administrative claims
Adjudication

• Institutional Must-do
  • Advocacy
    • Narrow institutional commands
      • Educational programs with judges, from judges to judges
  • Broad institutional commands
    • Persuade external constituencies (legislators, business officials)
Prosecution & Leniency

• How can leniency programs be optimized in those jurisdictions where cartelists are criminally prosecuted?
  • Criminal enforcement, slow and incremental path
    • Inversely affect the efficacy of leniency programs
Prosecution & Leniency

- Institutional Must-do
  - Ensure minimum coordination between competition authorities and prosecutorial bodies
  - Amend relevant legislation to ensure that leniency related decisions are binding upon the criminal prosecutors
  - Investigate in educational programs to create a culture of competition, including the judiciary branch
Sanctions

• What type of remedy should be applied to which kind of violation or circumstance?

• Lack of transparency and clarity
  • leads to confusion not only from the plaintiff viewpoint & from the institutional perspective
  • E.g. DoJ and the Judge mandate is to ensure that sanctions are sufficient to accomplish remedial and deterrence goals.
Sanctions

• Institutional Must-do
  • Implement norms that clearly delimit the acts that could elicit criminal prosecution from administrative sanctions
    • Aggregated Systems
      • Avoid parallel investigations
    • Disaggregated Systems
      • Easier to coordinate
Conclusion

• Changes in the institutional arrangements shape actors & activities in the Competition community

• If we are serious about criminally sanctioning antitrust wrongdoers:
  • Persuade external constituencies to respect an enforcement norm that deems certain antitrust violations to be worthy of criminal condemnation
  • Convince courts that wrongdoers deserve conviction
  • Delimit the category of offences that will elicit criminal prosecution
  • Ensure sanctions are sufficient to accomplish remedial and deterrence goals
Thank You!

mlopezgaldos@law.gwu.edu