INDIRECT EVIDENCE IN CARTEL INVESTIGATIONS AND PROSECUTIONS

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To satisfy the burden of proof in the American criminal justice system, prosecutors often rely on direct and indirect evidence, in both ex officio and leniency cases.

Three main topics:
  I. Burden of proof that the DOJ must satisfy
  II. Direct vs. indirect evidence
  III. Interplay of ex officio and leniency cases
I. Burden of Proof

- Burden: DOJ faces the burden of proof
- Standard: proof beyond a reasonable doubt
- Fact-finder: 12-person Jury
  - Unanimous verdict required
Elements of a Criminal Cartel Offense

- An agreement or understanding in unreasonable restraint of trade (a per se illegal agreement);
- The defendant knowingly joined the charged conspiracy;
- The conspiracy was within in the flow of, or substantially affected, interstate and foreign commerce.
Cartel Offense

- Cartel: competitors agree to limit competition among themselves, to try to act like a monopoly
- Section 1 of the Sherman Act’s “contract, combination . . . or conspiracy” requirement
  - Price fixing
  - Output restriction
  - Bid rigging
  - Market allocation (e.g., by territory)
What do need to prove?

- The agreement itself is the crime.
- Do not need:
  - Formal agreement
  - Legally enforceable promise
  - Evidence that the agreement was effective
- Do need:
  - “Meeting of the minds”
  - “Conscious commitment to common scheme”
  - Tacit agreement or understanding: “a wink and a nod”
How to Prove

- Importance of the agreement concept
- It is not the price that is illegal, it is the agreement on a price
- Common defense to cartel accusation:
  - “We did not agree.”
II. Direct vs. Indirect Evidence

Cartel Evidence:

- Direct Evidence
- Indirect (Circumstantial) Evidence
Direct Evidence of a Cartel

• Documents reflecting an agreement
  – E.g., meeting notes, emails

• Recordings reflecting an agreement
  – E.g., phone calls or cartel meetings

• Witness statements
  – E.g., participants (“we agreed”) or parties to conversations
Indirect (Circumstantial) Evidence

- **Principle:** Proof of facts and circumstances from which the existence of an agreement can be inferred
Indirect (Circumstantial) Evidence

- Example: simultaneous price increase by competitors
  - Possible explanation: price-fixing agreement
  - Possible explanation: input price increase
  - Possible explanation: obvious demand increase
  - Possible explanation: regulatory change

- Recall burden of proof: DOJ must prove beyond a reasonable doubt
Fruitful areas for circumstantial evidence:

- “Settling up” terms of the agreement, e.g., payoffs – payments among competitors
- Policing the agreement
- Post-investigation breakdown of the agreement
- Evidence showing consciousness of guilt
Importance of Direct Evidence

Common defense: “we talked, but did not agree.”

- Possible explanation: price-fixing agreement
- Possible explanation: trade association meeting
- Possible explanation: social relationship
- Possible explanation: ruse

Insiders: witnesses who will tell us what happened.
III. Interplay of ex officio and Leniency Cases

Not always an “either/or” scenario:
• Type A Leniency
• ex officio with Type B Leniency
• ex officio without leniency
Sources of Cases

- Complainants not involved in cartel
  - Disgruntled employees
  - Customers & citizens
    - Complaint line/website
  - Competitors
  - Purchasing officials
- Civil investigations
- Industry rumors
- Leniency applicants and cooperators
Proactive Outreach

• Talk about cartel conduct with:
  – Those working directly in the marketplace
    – businesses
    – business organizations
    – lawyers who represent businesses
    – public and private customers who purchase items
  – Other agencies/investigators
  – Community
  – Law schools, business schools

• Media outreach: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/media.aspx
Two Types of Applicants: A & B

Leniency applicants:

- Leniency Before an Investigation Has Begun (A)
  - Corporation and all confessing and cooperating employees get a complete criminal pass

- Alternative Requirements for Leniency (B)
Requirements for Type B

Alternative Requirements for Leniency:

1. First to come forward and qualify for leniency
2. **Not yet enough evidence to convict corporation**
3. Prompt and effective action to terminate participation upon discovery
4. Full report & cooperation
5. Confession of wrongdoing is truly a corporate act
6. Restitution to injured parties, where possible
7. Leniency not unfair to others considering nature of, and role in, the activity and when came forward
How Type B is Different

Same requirements as Type A, except:

• Division already knows about the existence of the cartel:
  – First to qualify for leniency
  – Division does not yet have evidence likely to result in sustainable conviction

• Leniency would not be unfair considering nature of activity, applicant’s role, and timing
Indirect Evidence and Type B Leniency

- As a result of an ex officio investigation, a Type B Leniency can arise
- Indirect evidence may then lead to direct evidence, as insiders come forward
Conclusion

• We pursue both direct and circumstantial evidence.
• We consider all the evidence together when trying to meet our burden.
• Circumstantial evidence can bolster direct evidence and vice versa.
  – “Some circumstantial evidence is very strong, as when you find a trout in the milk.” - Henry David Thoreau