Comments on Elhauge, Kovacic et al.

Erik Hovenkamp

Serial Collusion by Multi-Product Firms

By W. Kovacic, R. Marshall, and M. Meurer

Multi-Market Collusion

- Compelling evidence of "serial collusion" spanning numerous markets within a broader industry
- Emphasizes strategic advantages and heightened complexity w.r.t. enforcement
  - More flexibility in inter-firm side-payments and punishment
  - Diminished risk of detection of overall scheme
  - Strategic use of amnesty to punish within single-market defectors
  - Easier to establish credibility of punishment threats

Proposed Reforms

- (1) Cartel "reconstruction" – post-detection info gathering to learn about the scope and functionality of the cartel
- (2) Expanded ex post monitoring and disclosure requirements
- (3) Increased weight on coordinated effects in merger review based on prior cartel operations in relevant market(s)
- (4) Make whistle-blowing affirmatively profitable
  - Give (some) whistle-blowers a share of collected fines

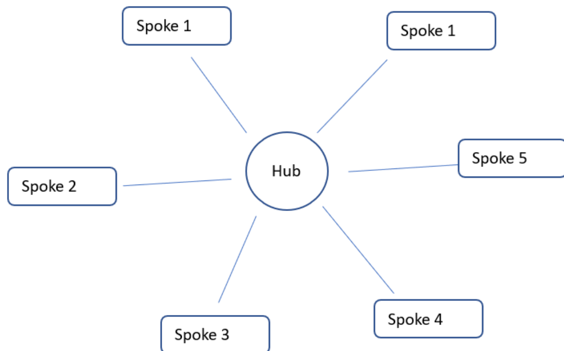
Whistle-blower rewards

- Whistle-blower inducements don't require prior detection to bear fruit
  - This probably provides the best bang-for-the-buck
  - Current inducements too stingy.
  - No inducements for those who aren't prospective defendants.

- Authors seem to contemplate "firms" as the relevant whistle-blowers
  - Why not rewards available to any individual agent within any firm (except for the most culpable principals).
  - Undermine stability of within-firm operations.
  - Eliminate principal's ability to trust its own agents.

Hub-and-spoke conspiracies

- Many of the cartels were "hub-and-spoke" arrangements
- Centralized management/oversight of competing "spokes" by a non-competing "hub."



“Common representation” as facilitating practice?

- Common representation of most/all competitors by a single managerial firm may create serious risk of coordination.
  - Roughly analogous to horizontal shareholding concerns.
- Facilitating practice:
  (a) Dangerous capacity to facilitate coordination;
  (b) Not reasonably necessary for defendants' business operations; and
  (c) No significant procompetitive explanation.
- It's become very hard to challenge facilitating practices on their own terms.
  - Further need for evidence of horizontal agreement.
  - Facilitating practices now lumped in with inferential “plus factors”

Reinvigorating challenges to facilitating practices

- Unlike"conscious parallelism" in pricing, here there's a workable remedy.
  - Condemn the common representation.
  - Joe Harrington (2017) makes same argument w.r.t. unilateral adoption of pricing algorithms that "learn to coordinate"
- Coordination-facilitating behavior is not always unilaterally irrational.
  - E.g., MFNs, rationally adopted unilaterally, may elicit coordination.

New Evidence, Proofs, and Legal Theories on Horizontal Shareholding

By E. Elhauge

Developments in the Literature

- This literature is growing quickly
- Paper provides a nice overview of recent developments in the shareholder literature
- New theoretical and empirical arguments
- Responses to critics/skeptics

Executive Pay Concerns

- Executive pay may not reflect *relative* performance
- Ambiguous relationship with competition policy goals
  - Firm value rises with procompetitive (output expanding) behavior, but also with coordinated (output reducing) behavior.
- The concerns go beyond antitrust
  - Corporate literature emphasizes that it permits windfalls, or "rewards for luck"

Executive Incentives

- A self-interested executive gives weight to both *(a)* his pay per time period; and *(b)* his duration of employment.
- Some new papers show (unsurprisingly) that *(b)* leads the executive to cater to major shareholder interests
  - Many such shareholders are horizontal

Shareholder litigation probably won't help

- Some commenters say that (non-horizontal) shareholders would sue if executives prioritized the interests of horizontal shareholders.
- Paper responds that such suits would not be viable
  - Profits go up $\Rightarrow$ no harm
  - Suit probably barred by the business judgment rule
- But there are also non-doctrinal reasons why shareholder litigation probably won't help
- If profits are higher, then the plaintiff and corporation can mutually-benefit from a cash settlement preserving the current system
  - This may also be a problem for private antitrust enforcement

What's the right approach?

- Suppose we agree that there is a serious problem.
- What's the right remedy?
- Should we prioritize divestiture?
  - Some authors have noted complications with one party's transaction affecting another party's liability
  - How will preclusion work?
  - If DOJ sues and loses, are subsequent acquisitions addressed incrementally?
- To what extent would alternative approaches provide an adequate result?
  - What about restrictions on voting?

Less Onerous Solutions?

- As other authors have argued, behavioral restrictions could be a viable approach in some cases.
- Prohibit horizontal shareholders from voting on executive pay structure?
  - Or from voting on directors *unless* the pay structure depends on performance relative to horizontally-held rivals?
- Some such alternatives mitigate concerns about antitrust errors, since there is no divestiture.
- In sum: while §7 seems viable in terms of law, we should also keep thinking about creative alternative approaches.

Thanks!