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Conspiracy Screens: Practical Defense Perspectives

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The detection of cartel behavior is the most difficult task in antitrust enforcement. Because cartelists conduct their business in secret and go to great lengths to keep their customers from knowing what they are doing, it is seldom easy to find evidence that would lead to detection and prosecution. As part of enforcement and compliance efforts, prosecutors and defense counsel endeavor to evaluate pricing practices, pricing stability, and opportunities for competitors to meet. Traditionally, prosecutors investigated industry pricing histories and evaluated complaints from victimized customers and disgruntled and terminated employees. From the late 1990's, these traditional efforts have largely been displaced by the enormous success of the Antitrust Division's corporate leniency program and the development of the Amnesty Plus policy. The Amnesty Plus policy has resulted in criminal prosecutions running from product to product through several industries—chemicals, computer components, and auto parts, to mention the most significant. Leniency and Amnesty Plus policies have spread around the world and have been responsible for literally billions of dollars in corporate fines as well as substantial incarceration of many, many corporate executives.

Despite this enormous success, wide segments of the economy have been ignored by antitrust enforcement. The enforcers have been incredibly busy and resources are very limited. At the same time, there have been great advancements in the use of econometric analysis to look at and analyze pricing and market data to determine if there is likely to be collusion in a given market. The econometricians create a screen, which is a statistical test based on a theory of collusion designed to identify whether collusion may exist in a particular market and who may be involved in the conduct. These screens have been utilized in detecting various types of collusion and misconduct, from price-fixing to insider trading. Several competition enforcement agencies around the world have used these econometric screens to detect collusion. The Brazilian and Mexican agencies have been very active in conducting screens analysis with considerable success. There has been a slow but steady increase in the use of screens in detecting violations, but there is also some remaining skepticism of whether screen analysis can become a complement to leniency policies.

While enforcers around the world are still sorting out these new detection methods, defense counsel have the great opportunity to utilize screen analysis to evaluate client price activity as part of their compliance/internal investigation efforts. Defense counsel, as a group, have been slow to embrace screens for a variety of reasons. A principal reason is the traditional skepticism that counsel often display when considering economic and econometric analysis of any kind. Judges and antitrust counsel often ridicule mathematical analysis as not providing the "evidence" of the "what, why, and who" that is essential to proving their case in court. They often

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see the analyses and testimony of dueling economists as cancelling each other out in the attempt to prove a violation in a court or before a jury. Judges and lawyers are slow to endorse what they don't fully understand. If, on the other hand, enforcement agencies in major jurisdictions announced that they were using screen analysis to choose their investigations, the demand for knowledgeable econometricians would be incredible.

On the defense side, the criticism of screens that we often hear is that they do not provide definitive answers and that the econometric analysis often results in "false positives." Both enforcers and defense counsel need to understand that when trying to uncover a covert conspiracy put into effect by very smart people, there is no definitive answer. Screens are not the complete answer—they are a tool. That tool informs the factual investigation that must still be conducted to determine what is actually going on. It does not render a verdict of guilty or not guilty. When the analysis renders positive results, those results become the road map of the fact investigation, and the investigator now knows where to look.

Screens can rationally determine critical points in a possible cartel, including the duration, breadth, and success of a conspiracy, when the conspiracy was ineffective or non-existent; and whether it had an impact on specific customers. That is the key value of screens today.

When should defense counsel consider using screens?

First, screens can be valuable in the due diligence process before a merger or acquisition. Antitrust counsel will almost always conduct an audit or some focused review of pricing and market behavior before any merger. This is obviously critical to determine whether the two companies face any antitrust risk either by the merger or by their pre-merger conduct. Merger review, especially if a second request is issued, is an important means for the enforcement agencies to discover antitrust conspiracies that are buried deep in the computer files of the executives. During due diligence, it is possible to conduct systematic reviews of pricing data and use the screen technology to make a preliminary assessment of whether the parties to the merger require more intensive due diligence. Assuming the screen analysis discovers activity consistent with conspiracy, counsel for both companies can proceed with interviews and document reviews to find the problem and end it. Screens, as an additional step in the due diligence process, could save both parties from the tragedies of announcing the merger only to withdraw it, as well as facing a multiple-year criminal investigation of its pre-merger conduct.

Second, screens can play an important role in antitrust compliance and audits. Conducting the screen analysis based on data collected from the sales department for the compliance session or the audit will allow counsel to focus questions to selected executives about pricing and market issues. One of the most difficult tasks in conducting compliance and audit interviews of corporate executives is the interviewer's lack of leverage. Often, counsel will ask the key questions about communications with competitors and conspiracy without having any data to challenge the executives' denials. In these open ended interviews, executives have every possible incentive to shade the truth, omit important information—or outright lie. With the results of the screens, the questioner has two advantages: first, the results of the screen analysis will provide specific and detailed areas of inquiry for counsel; and, second, the mere existence of the screen analysis can destabilize the errant executive who thinks he can otherwise bluff his way

through the interview. Few executives will be familiar with econometric analysis—some will dismiss it, but all will be concerned with what it determines. Screens add a degree of focus and credibility to counsel's questions, making the interviews potentially much more valuable in either finding a problem or determining that one does not exist.

If the compliance audit discovers a problem during the compliance process, the probability of obtaining leniency—and, thus, immunity from prosecution—is very high. Even more significantly, it is highly likely that the conduct discovered will not be known to the enforcers since no investigation is yet underway. Leniency before any investigation provides the leniency applicant with greater certainty and with an easier path to obtaining full leniency.

Third, screens can be a very useful corporate tool in the early days of a government investigation. When a company receives a subpoena, or is subject to a dawn raid, or has its executives interviewed by the enforcers, screens can help the company focus on the conduct, the timing, and duration of the conspiracy and plan the internal investigation efficiently. In the typical race to the Antitrust Division to gain leniency after the investigation has begun, or to qualify for second-in status, the ability to find the offending conduct very quickly is an enormous advantage that can save significant money as well as the liberty of some of its executives. Any tool that moves counsel to an early analysis of whether or not collusion took place is of enormous value to any company facing a race to the Division to obtain leniency.

Fourth, even in situations where the company is contesting the charges, screens can provide valuable information to develop the company's defense. Screen analysis can show that the conduct ended at an earlier time or did not affect certain customers. The value of the screens in limiting the scope and breadth of the conspiracy is applicable to both criminal charges and civil damage litigation. The screen analysis helps counsel and investigators to concentrate on the events surrounding a certain time period or a certain price increase. From that road map the facts can be sorted and evaluated more quickly and efficiently.

Finally, screen analysis may be helpful to defense counsel in preparing a motion to dismiss under *Twombly*. A creative defendant can put forward a market analysis based only on publicly available data that could demonstrate no indications of collusion in the market. There could also be creative use of screens by a plaintiff suggesting to the Court that collusion is a strong possibility. This use of screens will require good data and great creativity, not to mention judicial consideration of the facts and science.

As the scholarship of screens continues to develop rapidly, and as enforcers around the world increasingly rely on screens as a means to detect cartels, the use of screens as part of internal investigations, compliance programs, and litigation strategy will also grow. As it does, the factual evidence that develops out of the screens' "road map" will likely lead to more leniency applications in jurisdictions around the world. It will also broaden the number of industries where leniency applications come from. Broader industry coverage will also have the effect of greater deterrence. Instead of investigating twenty different chemical markets and ten computer parts markets and sixty auto parts markets, which looks to an industry executive like the investigative resources are limited to three markets, broader industry representation could have the important effect of destabilizing cartels in many additional industries.

Despite the enormous increase in cartel detection and the internationalization of both detection and enforcement since 1995, many believe that the enforcement agencies have just scratched the surface. How do the enforcers—and compliance counsel—detect more cartel activity? Simply put, aggressive compliance, due diligence, econometric analysis, leniency programs, and careful observation of markets are all central ingredients to keep markets free and fully competitive. Screens provide an additional and complementary tool that fits perfectly into the leniency paradigm, enhancing detection and punishment around the globe.