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PERSPECTIVE

It's time to revisit antitrust penalties

By Kellie Lerner and Jill Casselman

Does antitrust crime pay? Many antitrust lawyers and scholars believe it does, and have called upon the U.S. Sentencing Commission to revisit the penalties imposed on individuals and corporations who commit antitrust violations. Despite escalating corporate fines and longer jail sentences, it is widely acknowledged that cartel activity is still being under-deterred. By many accounts, only 25 percent of cartels are ever detected by enforcement agencies, and of those detected and prosecuted, even less result in significant fines or jail time for participants. Plus, recidivism amongst cartel participants is common.

In light of these discouraging statistics, not surprisingly, when the commission recently issued a request for public comment regarding whether it should revise the sentencing guidelines for antitrust offenses. And although the commission ultimately declined to revise the guidelines for now, the considered responses to its request shed light on both sides of the debate. There are two points of contention arising from these responses — the size of corporate fines and the sanctions imposed on individuals who violate the antitrust laws.

Corporate Fines

The size of corporate fines has taken center stage in the fight over whether the time reforms the guidelines. Some advocates of reform, including the American Antitrust Institute (AAI), suggest revising the rule which estimates that the average overcharge arising from an antitrust cartel is 10 percent of the selling price of a price-fixed good. This presumption has become the default used by courts in setting corporate fines, with a base fine recommendation of 20 percent of affected commerce. AAI argues that the overcharge presumption should be doubled to 20 percent, with a commensurate increase in the base fine recommendation, to better deter antitrust violations.

AAI relies on a body of research assembled by John M. Connor and Robert H. Lande, who have endeavored to calculate the optimal level of sanctions to deter cartel conduct. They say collusion will only be deterred if the expected rewards are less than the expected costs, adjusted by the probability the illegal activity will be uncovered and sanctioned. Analyzing a survey database of 75 cartel cases, including the size of the sanctions imposed, they determined that the current regime imposes fines probably only 9 to 21 percent as large as they would need to be to deter violations. In their view, cartel activity remains profitable under the current guidelines.

Judge Douglas H. Ginsberg from the U.S. Court of Appeals for the D.C. Circuit and Federal Trade Commission head Joshua D. Wright contend that increasing corporate fines will do little to solve the problem of under-deterrence. In recent years, corporate fines have increased almost a hundredfold, averaging \$480,000 from 1990-1994, compared to \$44 million today. In the face of record-breaking fines, corporations continue to violate the antitrust laws.

The prevalence of corporate misconduct despite historic fines lead commentators to question whether increasing fines will backfire by discouraging participants of a conspiracy to come forward and cooperate with the federal government in exchange for leniency. Perhaps this is why the Department of Justice submitted its own comments in which it concluded that it does "not believe it would be a worthwhile expenditure of resources to put any process in motion to increase the 10 percent presumption marginally." The view of some antitrust practitioners is that the dangers of over-deterrence could discourage other, potentially pro-competitive, conduct among businesses.

Individual Penalties

Many of the comments submitted to the commission questioned whether the sanctions imposed on individuals are sufficient enough to deter future violations. Even the largest of corporate fines may do little to deter individuals from committing antitrust violations if they do not face serious penalties themselves. While antitrust offenders have been sentenced to prison with increasing frequency and for longer periods of time, many argue that more can be done to deter individuals from committing antitrust violations.

First, some question whether sufficient predictability in the jail time is imposed on individual offenders. The current guidelines provide a base guideline jail time of 10 to 16 months, with a maximum lawful sentence of 10 years if the offender engaged in particularly egregious conduct or if the affected volume of commerce was over \$1.5 billion (an exceedingly common phenomenal given the Antitrust Division's blockbuster cartel investigations in recent years). However, the government often requests and the courts freely order departures from the guidelines based on their own views of the cooperation or culpability of the individuals before them. More predictable jail sentences could more effectively deter antitrust offenses if violators knew with certainty the sentences they could face.

Some also question what role the volume of commerce should factor into a jail sentence. Does the owner of a small regional company, who stands to reap a personal fortune by colluding with his competitor, deserve a shorter sentence than a low-level employee who acted at the direction of his supervisor in a multi-billion dollar market? Unfortunately, under the current guidelines, a first time offender, regardless of his or her role, could receive the 10-year maximum sentence based on the volume of commerce alone. Many proponents of reform, including Robert E. Connolly, argue that the guidelines should be revised to place greater emphasis on the motive and role of a participant in an antitrust crime.

Ginsburg and Wright also argue that fines and imprisonment may not deter individuals from committing antitrust violations, and suggest a third sanction — debarment. Debarment is an order prohibiting an individual from serving as a corporate officer or director. Although it has not been used for antitrust crimes, the U.S. Securities and Exchange Commission routinely negotiates debarment against individuals who violate the securities laws. In this context, debarment is an effective deterrent because it imposes a direct and substantial opportunity cost upon an individual and adds a level of reputational sanction that fines do not. A recent speech by Bill Baer of the Antitrust Division indicates that the DOJ may consider some version of debarment. He said:

"It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management ... and who the companies know to be culpable ... If any company continues to employ such individuals in positions of substantial authority ... we will have serious doubts about that company's commitment to implementing a new compliance program."

While the U.S. guidelines do not explicitly provide for debarment to deter price fixing, this sanction may be sought by prosecutors (as one of the conditions for leniency) and implemented by courts without further reform of the guidelines.

Given the complexity of antitrust sentencing, there is no silver bullet solution to solving the problem of under-deterrence of antitrust violations. The recent comments to the commission identify certain key aspects of the guidelines that should, at a minimum, be further explored to determine whether the time for reform is now.

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