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ANTITRUST LAW A Practice Focus

Finding the Right Price

Better reform of sentencing rules in price-fixing cases will produce fairer fines.

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Across the antitrust community, there is universal agreement that price fixing is a serious crime deserving of serious punishment. There is also an uneasy sense that the current system of calculating penalties for price-fixers is a patched-together contraption in need of some statutory tinkering.

The Department of Justice's Antitrust Division certainly thinks so. With the encouragement of the division, reform legislation was introduced in the Senate Judiciary Committee in late October.

The proposed Antitrust Criminal Penalty Enhancement and Reform Act seeks to augment the already successful carrot-and-stick approach employed by the DOJ in recent years to bring down price-fixing cartels. It would strengthen the "stick" by increasing the statutory maximum penalty under the Sherman Act from $10 million to $100 million. It would add a new "carrot" by limiting the liability of a cooperator to single (rather than treble) damages in the inevitable private lawsuits that follow admission of cartel participation.

While specific provisions of the Penalty Reform Act make sense, the bill runs a risk of tilting the playing field too much to the DOJ's advantage. Further reform is necessary to ensure that cooperation is still encouraged and that the sentencing process produces punishments that fairly fit the crime.

COMPLEX CALCULATIONS

To understand the need for further reform, begin with the existing statutory structure for sentencing organizations in antitrust cases. That's a challenge—even for sophisticated practitioners—because there are actually three overlapping and arguably inconsistent statutes: the Sherman Act, the U.S. Sentencing Guidelines, and 18 U.S.C. §3571(d).

The DOJ's modus operandi is to set price-fixing fines based on a complicated formula set out in the Sentencing Guidelines. First, a base fine is calculated by measuring the "volume of commerce"—which is all goods or services subject to the price-fixing conspiracy that were sold by the company during the life of the cartel, as determined by the DOJ—and multiplying that figure by 20 percent. Why 20 percent? It's twice the presumed 10 percent overcharge paid by consumers as a result of the conspiracy.

Second, the DOJ determines a minimum and maximum multiplier for the base fine. The multipliers are set by reference to such factors as the company's antitrust history, cooperation with investigators, degree of involvement of senior management, and existence of an "effective" compliance program (a standard typically not met by virtue of the price-fixing itself). Multipliers can range between 0.75 and 4.0. The base fine thus multiplied yields a fine range.

To encourage cooperation from cartel participants, the DOJ waives the fine for the so-called "first in" to admit to price fixing. For the second-in, the DOJ has in the past given a discount of up to 65 percent from the minimum of the fine range for "substantial assistance" to the investigation. Later cooperators receive decreasing levels of leniency. However, the size of any discount is essentially discretionary: The DOJ has disclosed no standards, and may now be considering lower discounts.

Finally, the DOJ recommends the fine to the federal court as part of a plea bargain agreement. The court considers the recommendation, along with a host of other factors listed in the guidelines and the recommendation of the U.S. Probation Office, and issues the sentence. With some minor exceptions, courts have consistently deferred to the DOJ's recommendations—which in recent years have included several $100-million-plus fines.

Still awake? Eyes glazed over? Try explaining this process to a client, especially a non-U.S.-based company, facing the prospect of megamillion-dollar fines, even before dealing with treble damage claims in private class actions brought in federal courts on behalf of direct purchasers (including non-U.S. claimants for non-U.S. purchases) and in state courts on behalf of an unending stream of indirect purchasers (who bought products containing the price-fixed item).

SWORD OF DAMOCLES

The confusion is further compounded by the fact that the Sherman Act clearly provides for a maximum fine of just $10 million. Now, in a world of global conspiracies, $10 million does not buy much deterrence. So the DOJ has used the Sentencing Guidelines formula to demand and obtain much higher fines.

How are such penalties justified? The department has turned to the alternative fines provision of §3571, which it has exploited in sentencing negotiations despite a lack of success in actual sentencing hearings. This provision allows the DOJ to bypass a "statutory maximum" and pursue a fine of "not more than the greater of twice the gross gain or twice the gross loss, *unless* imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."

In the course of plea negotiations, the DOJ wields the potential for huge fines like the Sword of Damocles over the heads of investigation targets. And the department contends that, unlike the Sentencing Guidelines, which apply only to the individual defendant's sales, §3571 requires the court to calculate the gross gain or loss due to the offense by aggregating the gains or losses caused *by the entire cartel.*

If the DOJ's interpretation is correct (and no court has signed on to it), duplicitous recoveries are possible. The DOJ could try one defendant and fine it based on all sales made at an inflated price, then try another defendant and fine it based on all sales made at the inflated price, and so on. In a large-scale conspiracy, the government could collect many times over the actual loss or gain engendered by the price fixing.

And this all occurs before the European Union, Canada, Mexico, and other countries now jumping on the bandwagon of huge fines for price fixing enter the picture, and before the class action attorneys pile on. The total sums paid out can be mind-boggling. In other contexts, such overkill has been found unconstitutional. Remember *BMW of North America Inc. v. Gore,* 517 U.S. 559 (1996), in which the Supreme Court held that a punitive damages award of $2 million was grossly excessive and thus violative of due process where actual economic damages were a mere $4,000.

But Can You Prove It?

Nonetheless, the DOJ, wielding §3571, has successfully extracted fines of up to $500 million in price-fixing settlements. So why is it now seeking an increase in the apparently avoidable Sherman Act maximum of $10 million?

The answer is that the DOJ fears that someone might refuse to settle and call its bluff by litigating the amount of the fine. Under the Sentencing Guidelines/§3571 approach that the department uses to demand fines, the DOJ relies on a proxy for the loss resulting from a price-fixing conspiracy: It is *presumed* that 20 percent of the volume of commerce affected is equal to "twice the gross loss." This makes life pretty easy for the DOJ.

But at a §3571 sentencing hearing, the department can be forced to prove, by at least a preponderance of the evidence, what the loss or gain actually was. Indeed, the burden of proof may be even higher. In *United States v. Jordan,* 256 F.3d 922 (9th Cir. 2001), the U.S. Court of Appeals for the 9th Circuit held that if a sentencing factor has an extremely disproportionate effect on the sentence, the government must prove that factor by "clear and convincing evidence."

It is even possible, given the enormous fines levied under §3571, that the burden of proof may be "beyond a reasonable doubt." In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Perhaps even more significantly, the DOJ faces an initial hurdle under §3571. It can proceed with its proof at the sentencing hearing *only* if doing so will not "unduly complicate or prolong the sentencing process." Proof of the effects of price fixing is inherently complicated. While sophisticated econometric models have emerged, it takes time and great expense—and very precise data from all the conspirators—to formulate these models and present them to a judge.

No one is more aware of these concerns than the DOJ itself. It lost the only cases we could find in which it attempted to litigate under §3571. See *United States v. O'Hara,* 1991 WL 286176 (D.Me. Sept. 13, 1991) (rejecting alternative fine where calculating fine would unduly prolong or complicate the sentencing process); *cf. United States v. Andreas,* 1999 U.S. Dist. LEXIS 9655, *14 (N.D. Ill. June 2, 1999) (refusing to use the "twice-the-gain/loss" standard because it believed the DOJ did not comply with order to provide pricing information to defendants).

DOJ enforcers have admitted their dread of litigating under §3571. In an August 2003 speech before the Antitrust Section of the American Bar Association, R. Hewitt Pate, the assistant attorney general for antitrust, said in reference to §3571: "[F]or the largest, most harmful antitrust conspiracies—typically those involving international cartels and foreign corporations—the guidelines methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be considerably more difficult to administer, less certain, and potentially more lenient toward the offender."

Accordingly, the DOJ wants the protection of a new statutory $100 million maximum under the Sherman Act. Then, so long as Sentencing Guidelines calculations yield a fine of less than $100 million, the DOJ can present its suggested fine to the court without any risk of §3571 litigation.

Stay Balanced

The DOJ's proposal is not unreasonable: In light of the massive price-fixing conspiracies unearthed in recent years, it makes sense to increase the maximum fine available under the Sherman Act. But such an increase should only be enacted if there is corresponding reform of the Sentencing Guidelines.

The guidelines for antitrust crimes are different from those for other corporate crimes in utilizing a presumption of 20 percent of the volume of commerce for calculating the base fine. As noted, 20 percent is simply twice an assumed 10 percent across-the-board overcharge. There is no empirical or economic theoretical basis for that 10 percent figure—especially for all industries and all sales. The guidelines themselves provide no commentary on the setting of the presumed overcharge other than an intention to simplify the sentencing process.

Increasingly, the enormous fine ranges being produced by the guidelines—which can range as high as 80 percent of the volume of commerce affected—are chilling cartel participants' incentives to cooperate *absent* a willingness of the DOJ to offer "collateral benefits"—in the form of shorter or no jail sentences for company executives. That is something that the DOJ has consistently done, but now the department is, rightfully, demanding at least some jail time.

In other contexts, the department has warned against overly expansive liability as undermining its ability to offer incentives to those who cooperate. For example, the government recently submitted an amicus brief in an unsuccessful effort to persuade the D.C. Circuit to reconsider *en banc* a January 2003 panel decision in *Empagran v. F. Hoffman-LaRoche,* 315 F.3d 338 (D.C. Cir. 2003). *Empagran* granted foreign antitrust plaintiffs standing to sue for treble damages in U.S. courts for injuries suffered outside the United States. The DOJ argued that such expansion of the reach of U.S. laws will result in excessive punishment that will hamper, not help, the department's overall enforcement efforts. According to the DOJ: "The panel's decision thus threatens to impair the ability of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce in the United States."

Excessive, arbitrary fines have similar effects on conspirators' willingness to cooperate. While first-in cooperators may not see their incentives change due to higher fines (since they are eligible for complete amnesty from criminal liability), second-in cooperators undoubtedly do. When formulaic calculations lead to fines way out of proportion to the loss caused by the offenders' conduct, incentives to fight are enhanced.

The prospect of over-deterrence has other costs as well. At first blush, it may not seem plausible that one could *over*-deter price fixing, any more than one would care about over-deterring drug sales to schoolchildren. But excessive zeal in pursuit of alleged illegal activity can be harmful to business entities and consumers. There is no shortage of cases in which the government, not to mention class action attorneys, prosecuted suits involving what in hindsight was clearly efficient, consumer-friendly conduct.

Moreover, when a company's potential liability grows due to the prospect of exorbitant fines, compliance costs rise accordingly. Those costs will ultimately be reflected in consumer prices. Business may also, quite rationally, shy away from otherwise efficient conduct (for instance, trade association participation or joint research) if there is any risk it might be labeled "price fixing," with the potential for enormous liability.

If Congress is going to enact the Antitrust Criminal Penalty Enhancement and Reform Act and raise the Sherman Act maximum to $100 million, it should consider both the benefits and costs. While the legislation would allow the government to more easily avoid §3571 hearings, those savings may be swamped by the costs—to prosecutors, to defendants, and to consumers—of encouraging more defendants to fight rather than settle.

In 1989, Vanderbilt professors Mark Cohen and David Scheffman, writing in the *American Criminal Law Review,* put forth an excellent idea for balancing these dueling needs: The government should continue to utilize a proxy figure for harm associated with price fixing, but that figure should be lowered to reflect "a reasonable estimate of the minimum markup expected in a price-fixing case." Then, either party should be allowed to present evidence during the sentencing hearing as to why that proxy figure is inappropriate in the particular case. The burden of proof should rest with the party seeking the departure.

In that way, settlements would be fostered, and punishments would be more fitting to the actual consequences of the crime. Can any good antitruster seriously object to this more efficient outcome? ■

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