COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Nov 2014 (1)

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Kathryn Hellings & Daniel E. Shulak
Hogan Lovells US LLP

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I. INTRODUCTION

This past summer the United States Sentencing Commission ("USSC") prompted a public debate about the adequacy of fines imposed in criminal antitrust cases by including the issue in its list of priorities for the then upcoming fiscal year. For the reasons outlined below, rather than increasing criminal antitrust fines to increase deterrence, the U.S. Department of Justice's Antitrust Division (the "Division") could instead promote and foster corporate compliance—thereby preventing or reducing anticompetitive conduct—by incentivizing companies to adopt effective internal compliance programs.

II. THE ROLE OF THE U.S. SENTENCING GUIDELINES AND STATUTORY MAXIMUM FINES

Over the last ten years, the Division has resolved all but two of its corporate cases by plea agreement. Since at least 2005, there has not been a single criminal plea agreement filed by the Division in which the Division's prosecutors deviated from the United States Sentencing Guidelines (the "Guidelines"). The Division has explained this practice by noting that the Guidelines promote "consistency, fairness, and transparency in sentencing."[2]

The Guidelines are established by the USSC, an independent agency in the judicial branch of the U.S. government that aims to make criminal penalties more standardized and consistent. The non-binding Guidelines provide advisory standards for criminal penalties imposed on defendants convicted in federal district court. In practice, the Guidelines provide a formula for determining penalties in federal cases—points are assigned to various factors, and the resulting point calculation leads to a Guidelines range for sentencing.

Under the Guidelines, until 2004, the maximum fine for a criminal antitrust violation was $10 million for corporations and $350,000 for individuals. In 2004, however, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), which enhanced

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[1] Kathryn Hellings is a partner in the Washington, D.C., office of Hogan Lovells US LLP. She worked as a trial attorney for over 10 years in the Antitrust Division of the U.S. Department of Justice. For her last three years in the division, Hellings served as Assistant Chief of the National Criminal Enforcement Section. Daniel E. Shulak is an associate in the Antitrust, Competition and Economic Regulation practice group within the New York City and Washington, D.C., offices of Hogan Lovells US LLP. He served as an assistant attorney general in the Criminal Prosecutions Bureau at the New York State Office of the Attorney General where he prosecuted white collar crimes. The views expressed in this paper are those of the authors and do not necessarily represent the views of Hogan Lovells or any of its clients.

[2] Scott D. Hammond, "Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants," Remarks Before the ABA Section of Antitrust Law, Spring Meeting (March 30, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/208354.htm.

criminal antitrust penalties to $100 million for corporations and $1 million for individuals. Moreover, despite the existence of an enhanced maximum fine under the Guidelines, ACPERA provides for an alternative fine calculation tied to twice the gain or loss associated with the illegal conduct, which allows prosecutors to seek fines well above $100 million. Nevertheless, the statutory maximum is a significant guidepost to the stakeholders in criminal antitrust cases.

III. THE CASE FOR HIGHER FINES

Since ACPERA's enactment in 2004, corporate criminal antitrust fines have increased substantially. From 2004-2013, the total amount of corporate fines levied in criminal antitrust cases was $6.6 billion.[3] In contrast, from 1994-2003, the 10-year period preceding ACPERA, total corporate antitrust fines totaled only $2.24 billion.[4] The annual average for total fines obtained by the Division in the ten years preceding the enactment of ACPERA was $240M, while, in the ten years following ACPERA's passing, the average was $660 million.[5] In just the last five years, the Division obtained, on average, $820M in fines per year; and, notably, the Division has obtained more than $1B in fines in each of the past three years.[6]

Despite drastically increasing criminal antitrust fines, however, the American Antitrust Institute ("AAI"), citing a 2012 study by Professors Connor and Lande, has advocated that criminal antitrust fines should be doubled. In their 2012 study, Professors Connor and Lande analyzed criminal antitrust fine data and concluded that the current antitrust fine levels are insufficient to optimally deter anticompetitive conduct and protect potential victims of cartelization. Connor and Lande concluded, "the combined level of U.S. cartel sanctions has been only 9% to 21% as large as it should be to protect potential victims." Thus, they opined, the "average level of U.S. anti-cartel sanctions should be quintupled."[7] The AAI, although citing this study, only calls for doubling the fines.

IV. UNFORESEEN IMPACT OF INCREASED FINES

While it is possible that substantially higher corporate fines would deter at least *some* quantity of cartel behavior, higher fines would likely lead to more trials and increase the need for costly "inability to pay" analyses. These increased litigation burdens could be so significant that they would constrain the Division's ability to investigate cartels and win convictions, ultimately decreasing the number of antitrust conspirators that are caught and prosecuted.

In an environment where fines are routinely in the hundreds of millions dollars, doubling recommended fines would likely result in fines in the billions of dollars, drastically changing the

[3] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2004-2013 *available at* http://www.justice.gov/atr/public/workload-statistics.html

[4] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 1990-1999 *available at* http://www.justice.gov/atr/public/246419.pdf; and DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2000-2009 *available at* http://www.justice.gov/atr/public/281484.pdf.

[5] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 1990-1999 *available at* http://www.justice.gov/atr/public/246419.pdf; and DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2000-2009 *available at* http://www.justice.gov/atr/public/281484.pdf.

[6] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2004-2013 *available at* http://www.justice.gov/atr/public/workload-statistics.html

[7] C&L at 428.

calculus for companies accused of violations. Substantially higher corporate fines would likely cause many more corporate defendants to forgo plea agreements and incentivize them to go to trial. Criminal antitrust cases are complex, and in the face of a billion dollar plea offer, a corporate defendant might be more willing to take its chances with a skilled defense litigator rather than accept a plea bargain.

Further, an increase in trials would be a significant drain on already limited DOJ resources, an agency that relies heavily on corporate pleas. More trials would likely mean fewer wins for the Division. A review of Division's criminal antitrust cases reveals that Division has resolved all but two of its corporate cases by plea agreement over the past 10 years. Of the two corporate cases that went to trial, *United States v. Stora Enso North America Corporation*, in 2007, resulted in an acquittal, and *United States v. AU Optronics Corporation*, in 2012, resulted in a guilty verdict and the largest antitrust fine in history ($500 million).[8] While the Division undoubtedly employs skilled litigators prepared to try cases successfully, one must question how many cases the Division can successfully prepare for and try concurrently if significantly more corporate defendants refuse to plead guilty.

Compounding the problem, a decrease in corporate plea agreements also means fewer cooperating witnesses providing information and evidence for use by Division prosecutors against defendants opting for trial. The absence of some of this evidence, which would have otherwise been provided pursuant to the cooperation obligations of the plea agreements, would further drain DOJ's investigative resources and could ultimately lower the Division's overall effectiveness at trial.

A lesser-known cost likely to be associated with higher fines would be an increase in the number of "inability-to-pay" cases, in which a corporate defendant makes a showing that it cannot pay the fine and continue to survive as a viable enterprise in the market. These cases can be a significant burden on the Division, as they require an extensive investigation into the corporate defendant's overall financial status. Often, inability-to-pay cases require the Division to retain an outside expert to conduct detailed analyses of and opine on a company's financial health. These analyses are time consuming and resource draining, further increasing the strain on DOJ resources and slowing down progress of an investigation.

For example, in *U.S. v. Florida West International Airways Inc.*, the defendant's ability to pay was hotly contested, and the case included a protracted fight over the credibility of Division's "inability to pay" expert.[9] Florida West argued it could only pay a fine of $50,000, while Division argued, after opening Florida West's books, for a $1 million fine.[10] While ultimately, the court sentenced Florida West to pay the full $1 million fine recommended by the Division, the time and expense of the litigation associated with the defendant's claim of inability to pay was significant[11] Notably, the $1 million fine recommended by Division was a fraction of the Guidelines fine range of $20.7 million and $41.4 million.

[8] The $500 million fine was actually a tie for the highest ever with F. Hoffmann-La Roche, Ltd. in 1999.

[9] *See* http://www.law360.com/articles/389965/doj-wants-at-least-1m-fine-in-airline-price-fixing-case.

[10] *Id.*

[11] *See* http://www.law360.com/articles/364195/florida-west-fined-1m-for-price-fixing-after-rare-plea.

A survey of publically available data suggests that higher corporate fines will lead to an increase in inability to pay cases. In the ten years preceding the 2004 ACPERA enhancements, only 16 fines of 269, or 5.9 percent, were reduced because of a defendant's inability to pay. Since 2004, however, 21 of 168, or 12.5 percent, of fines have been reduced based upon a corporate defendant's inability to pay. One can only imagine how many inability cases would result if criminal fines again were increased as proposed by Professors Connor and Lande. These cases would only further drain DOJ resources.

V. INCENTIVIZING EFFECTIVE CORPORATE COMPLIANCE PROGRAMS AS AN ALTERNATIVE

Rather than increasing the penalties for compliance failures, the Division could instead improve overall deterrence for antitrust offenses by incentivizing corporate compliance. A shift in focus—from the stick (the penalty) to the carrot (compliance incentives)—would ultimately reduce crime and protect U.S. consumers.

In contrast to other enforcement agencies and other DOJ components, including DOJ's Criminal Division, the Division has never provided credit to a cooperating corporate defendant for an "existing compliance program"—a compliance program in effect at the time that the criminal conduct occurred. While the U.S. Attorneys' Manual states that "no compliance program can ever prevent all criminal activity by a corporation's employees," and the Guidelines provide for compliance credit, the Division has never filed a case in which the penalty was reduced in recognition of a company's existing compliance program. Similarly, according to publicly available information, the Division has never provided credit to a cooperating defendant for compliance program improvements made after the Division uncovered the defendant's collusive conduct. By failing to provide compliance program credit to all cooperating corporate defendants, the Division is effectively disincentivizing companies from putting into place effective, but oftentimes costly, programs that could deter cartel conduct more effectively than any increase in penalty.

By comparison, the DOJ's Criminal Division takes into account a corporation's compliance program in fashioning an appropriate resolution. In the 2012 Resource Guide, for example, the Criminal Division outlines the potential benefits corporate defendants can obtain because of compliance efforts:

> DOJ and SEC…consider the adequacy of a company's compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. It will often affect the penalty amount and the need for a monitor or self-reporting.

Moreover, the Criminal Division doesn't simply address the compliance program in existence at the time of the criminal conduct, but also regularly requires companies address compliance program lapses in order to prevent future violations. In short, the Criminal Division is engaged with the corporate community on the issue of corporate compliance, recognizing defendants' compliance efforts, fostering efforts to implement sufficient compliance programs, and, where necessary, ensuring, as part of the corporate resolution, that adequate compliance programs are implemented.

VI. CONCLUSION

The mission of the Division is to "promote economic competition through enforcing and providing guidance on antitrust laws and principles." By encouraging and fostering effective corporate compliance, and adopting policies in line with other agencies and DOJ components, the Division will be meeting this stated objective and ultimately protecting American consumers. Moving the focus from the penalty for criminal conduct to the prevention of the conduct would lead to stronger corporate compliance, and stronger corporate compliance should lead to fewer breaches of the law.