File

Department of Justice

DETERRING ANTITRUST CRIMES
THROUGH STIFFER PENALTIES

REMARKS OF

CHARLES F. RULE
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

AT

"ANTITRUST LAW"
AN ALI-ABA COURSE OF STUDY

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It is a pleasure to be here today to discuss recent developments at the Antitrust Division, in particular the use of strong criminal penalties to deter naked anticompetitive restraints. Deterring agreements among competitors, such as price fixing and bid rigging, that are clearly and unequivocally anticompetitive is the heart and soul of the Division's existence. Unlike most of our other activities, criminal enforcement of the Sherman Act is the exclusive province of the Justice Department.

Outside of the realm of naked horizontal collusion, it is often difficult to determine whether a particular agreement or type of conduct is, on balance, anticompetitive. Although most such commercial conduct is clearly not anticompetitive, where valid antitrust questions are raised, a sophisticated economic analysis that is sensitive to the facts and circumstances of the particular case should be employed. Moreover, for such "rule-of-reason" conduct, courts, enforcers, and lawmakers must be careful not to impose penalties that are too stiff. If penalties are set too high or nonmeritorious suits cannot easily be dismissed, there is a real threat that procompetitive or competitively neutral conduct will be chilled. That is why, for example, there is a growing consensus that the current

regime of automatic treble damages in all antitrust cases should be changed. 1/

There is little if any need for concern, however, that current criminal enforcement combined with very stiff penalties will chill anything other than clearly anticompetitive conduct. The targets of the Department's criminal enforcement are naked horizontal restraints such as price fixing, bid rigging, and market allocation, that unambiguously restrain competition. 2/ In these instances, it is possible to say that the likelihood the Division will mistakenly prosecute conduct that is in fact procompetitive is virtually nonexistent. Furthermore, because categories of offenses to which the

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1/ See "Interview: Dean Robert Pitofsky," Antitrust, Winter 1988, at 24, 27; Statement of Charles F. Rule, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, U.S. Senate, concerning S. 539, S. 635, and S. 1407, Antitrust Remedies, March 31, 1988.

2/ The Department has generally prosecuted criminally only classes of conduct that meet four interrelated criteria: (1) with the possible exception of monopolization involving physical violence, the classes of prosecuted conduct involve agreements among competitors; (2) the agreements have as their inherent likely effect the raising of price and/or restricting of output (2A) without the promise of any significant integrative efficiencies; (3) the conduct is generally covert; and (4) the perpetrators are aware of the probable anticompetitive consequences of their conduct. See "Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints," Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, Department of Justice, before the 36th Annual ABA Antitrust Section Spring Meeting, March 24, 1988 (hereinafter "Criminal Enforcement Speech").

criminal sanction is attached are clearly defined, procompetitive and even competitively neutral conduct will not be chilled. Perpetrators of conduct subject to criminal prosecution know that what they are doing amounts to commercial theft and fraud, and they are on fair notice that those activities will be treated as serious crimes.

Furthermore, the magnitude of the harm to the economy and consumers from naked horizontal restraints makes vigorous enforcement imperative. Unfortunately, it is not easy to quantify that harm for several reasons, including the fact that it is impossible to know the precise extent of the conduct since the perpetrators spend so much time and effort keeping it hidden from prosecutors and the public. Nevertheless, one study estimates that our prosecution of 52 price-fixing conspiracies between 1962 and 1980 (out of a total of about 200 prosecuted by the Department during that period) prevented the conversion -- that is, the outright theft -- of about $2 billion 3/ that the conspiracies would have achieved had they not been stopped. 4/ That amount does not include the loss of efficiency -- that is, the loss of consumer welfare -- that would otherwise have resulted if the conspirators had been able

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3/ The number represents 1982 dollars.

4/ J. Bosch & E. Eckard, Jr., The Benefits of Antitrust Enforcement: Some Evidence from Federal Price-Fixing Indictments (August 1987) (unpublished manuscript).

to continue artificially inflating prices. Moreover, these numbers reflect only the direct savings attributable to stopping just those 52 conspiracies -- and we have stopped many times that number in the 560 cases that we have brought in the last seven years. Lastly, the numbers fail to reflect the most important benefit from a vigorous program of criminal antitrust enforcement -- the naked horizontal agreements that were never formed because of the threat of punishment. Nevertheless, the $2 billion, as understated as it is, does strongly suggest that a strong and active program of criminal antitrust enforcement can save consumers and the economy billions of dollars a year.

An effective criminal enforcement program has three components. First, the enforcers must successfully uncover the perpetrators. Second, prosecutors must convict the perpetrators they uncover. And, third, courts must severely punish those who are convicted. I have, on numerous occasions, described the evidence that suggests we are increasingly successful in catching and convicting antitrust perpetrators. 5/ Today, I want to focus on the third and possibly most important component of successful criminal enforcement -- punishment. If antitrust criminals thought the punishment they received in the past was severe, they ain't seen nothing yet.

5/ See Criminal Enforcement Speech, supra note 2; "60 Minutes with Charles F. Rule," 56 Antitrust L.J. 261 (1987).

Purposes of Punishment

There are generally considered to be four purposes of punishment in the criminal justice system: retribution, rehabilitation, incapacitation, and general deterrence. All of these have relevance to antitrust, but general deterrence is the most important consideration in setting penalties for antitrust criminals.

Retribution is always present to some extent in a criminal sentence. Those who violate the antitrust laws by entering into naked, horizontal agreements have stolen from consumers, and justice requires that they be made to pay. Although vengeance underlies the criminal sanction, it does not, as a practical matter, control the nature of the sentence.

Rehabilitation is somewhat less relevant to antitrust violations. It is certainly the hope that convicted felons will spend their time in prison (or the time spent writing out the check to pay the fine) reflecting on their wrong, and that they will not repeat their offense for reasons unrelated to the fear of being imprisoned again. But convicts are not sent to the penitentiary to make them good boys and girls.

Incapacitation -- or specific deterrence -- also is sometimes a function of the criminal sanction. It is, of course, hard to participate in a price-fixing conspiracy while in jail, and convicted antitrust felons are often debarred from participating in bidding on private, state, and federal contracts. In these cases, punishment has prevented the repetition of the crime, but only temporarily.

General Deterrence

The central function of criminal punishment for antitrust violations, then, is not rehabilitation, retribution, or incapacitation. It is general deterrence. That is, the punishment should be designed to make violation of the Sherman Act so unattractive that prospective perpetrators will just say no.

In the antitrust context, the punishment consists of the criminal stigma, fines, follow-on civil damages, and incarceration. In order optimally to deter anticompetitive agreements, the expected punishment-cost of the conduct facing a prospective perpetrator must exceed the harm to society that the conduct is expected to generate. If prospective perpetrators believe that there is a significant chance their crime will go undetected, penalties equal only to the actual harm caused will underdeter. Thus, the penalty must be some multiple of the harm, reflecting the likelihood that the conduct will in fact be detected and punished. 6/ Because the

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6/ In general, the penalty necessary to achieve optimal deterrence of a harmful activity is the total harm caused by the activity multiplied by the probability that the activity will be detected and the penalty imposed. See Becker, "Crime and Punishment: An Economic Approach," 76 J. Pol. Econ. 169 (1968). In the antitrust context, therefore, the appropriate penalty is the sum of the deadweight loss and the transfer of surplus from consumers to producers caused by the exercise of market power, multiplied by the probability that the penalty will be imposed. See Werden & Simon, "Why Price Fixers Should Go to Prison," 32 Antitrust Bull. 917 (1987). This essentially

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classes of antitrust cases to which the criminal sanction is applied involve no efficiencies, the harm to society will always equal or exceed the gain to the conspirators. Therefore, a penalty reflecting the harm caused by the crime should render the activity unprofitable and should achieve maximum deterrence.

It has been estimated that the probability of detecting naked cartel restraints may be less than ten percent. 7/ It is certainly true that people who enter into naked cartel agreements often believe that there is a significant chance they will successfully evade detection and prosecution. This makes stiff criminal penalties both necessary and appropriate. 8/

6/ Continued

forces all businessmen to bear the total social costs of their activity. If the efficiencies generated by a particular practice exceed the total harms to society -- and it is thus procompetitive -- the practice will still appear profitable and the optimal penalty will not deter the conduct. As discussed in the text, however, because efficiency-generating conduct is not prosecuted criminally, the optimal penalty should be great enough so that it always deters.

7/ See Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, before the U.S. Sentencing Commission Hearings Concerning Alternatives to Incarceration (July 15, 1986).

8/ For example, if a price-fixing cartel is expected to generate a profit of $150,000 for each of its members, and the perceived probability of detection and conviction is 15 percent (0.15), the fine if caught must be at least $1 million ($150,000/.15 or $150,000 x 15) in order for the agreement not

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Because antitrust violations are economic crimes, it might be argued that fines alone are sufficient. However, common sense and the weight of the evidence are to the contrary -- prison terms are essential to successful deterrence. 9/ First, there are statutory ceilings on the fines that may be levied against convicted antitrust felons. Individuals may be fined only $250,000, twice the pecuniary loss by victims, or twice the gain to the defendant caused by the violation, whichever is greater. 10/ Therefore, if the chances of getting caught are not high, the fine necessary to deter -- one greatly in excess of the expected profit from the conspiracy -- often would exceed the statutory maximums.

Second, even if there were no statutory limits on fines, the individuals responsible for illegal agreements often would be insulated from the full brunt of a high fine. Individuals within a corporation may not be deterred by a fine because they

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8/ Continued

to appear to be a profitable endeavor. This assumes that the perpetrator is risk neutral. If risk averse, a smaller expected fine may make the conduct unprofitable; if risk preferent, a larger expected fine may be necessary.

9/ Of course, in the case of corporate defendants, prison is not an option.

10/ Sentencing Reform Act of 1984, Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, as amended by the Criminal Fine Improvements Act of 1987, Pub. L. 100-185, § 6, 18 U.S.C. § 3571.

are judgment proof themselves or will be reimbursed by the corporation. And if the corporation is effectively judgment proof -- perhaps having distributed the illegal proceeds of a conspiracy to executives and shareholders -- then no one could be held accountable and effective deterrence would be thwarted.

In such cases, only the threat of incarceration will represent a true deterrent to naked horizontal agreements. Jail time gets the attention of corporate executives, imposes a cost that cannot be reimbursed, and can be served regardless of the resources possessed by the responsible individual. The Division has therefore consistently argued for substantial incarceration for the vast majority of convicted individuals. We are committed to pushing for even higher fines and for lengthier and more routine incarceration.

Inadequacy of Past Punishment

Unfortunately, we cannot say that sentences have always been meted out in a fashion that ensures adequate deterrence. The very fact that we are prosecuting record numbers of cases involving hard-core cartel activity suggests that the Division in the past has not been fully successful in obtaining (or perhaps publicizing) the sentences needed adequately to deter criminal antitrust behavior.

While we are now witnessing an increased willingness of judges to take antitrust felonies seriously, some judges in the past have shown undue lenience toward antitrust criminals.

First, although the Division consistently opposes pleas of nolo contendere by defendants to criminal antitrust charges, some judges have shown a greater willingness to accept such pleas in antitrust cases than in cases involving violations of other criminal statutes. A far smaller percentage of federal criminal cases involving crimes other than antitrust -- like murder, robbery, and larceny -- are disposed of by nolo pleas. 11/ Whether this is because defendants would not even consider asking to plead nolo or because judges do not grant those pleas, these statistics show that priorities are misplaced. Antitrust crimes are nothing more than sophisticated larceny. By accepting nolo pleas more readily in antitrust cases, judges send the totally inappropriate message that such crimes are less morally reprehensible than theft by less sophisticated means.

While antitrust defendants are theoretically subject to the same criminal penalties whether they plead nolo or guilty, less social stigma accompanies a plea of no contest. In addition, and more importantly, Section 5 of the Clayton Act, 12/ which provides that final judgments in certain antitrust cases brought by the United States may be given prima facie effect in

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11/ See Administrative Office of the United States Courts, Annual Report of the Director, 1982, 1983, 1984, 1985, 1986, 1987, Table D-4.

12/ 15 U.S.C. § 16(a) (1982).

subsequent private litigation, has been held not to apply to criminal cases that end with nolo pleas. 13/ Thus, by making private follow-on treble damage suits more difficult to prosecute, the acceptance of nolo pleas in antitrust cases quantifiably lessens the severity of the punishment.

Second, even after defendants have pleaded guilty or been found guilty after trial, some judges in the past have been reluctant to impose sentences that are tough enough to provide an adequate level of deterrence. For several years now, Antitrust Division officials have publicized some of the more ridiculous sentences and terms of probation that have made a mockery of the law. 14/ I hope that by now we have exposed to sufficient ridicule the more notorious cases, such as the one in which a judge required, as a term of probation, that a convicted antitrust felon organize a golf tournament.

This country is fed up with white-collar crime and wants judges to start treating white-collar criminals like the crooks they really are. In the past several years, partially at the

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13/ See, e.g., General Electric Co. v. City of San Antonio, 334 F.2d 480, 484-87 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 415-17 (7th Cir. 1963), cert. denied, 376 U.S. 939 (1964).

14/ See, e.g., "Priorities and Practices -- The Antitrust Division's Criminal Enforcement Program Today," Remarks by Judy Whalley, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Association of the Bar of the City of New York, April 8, 1988.

urging of my Division, the attitudes of judges and Congress have begun to catch up with the get-tough approach of this Administration and the American people.

Judges appear less willing to accept defendants' nolo pleas than in years past. 15/ Similarly, since the Division began publicizing the "country club" sentences offered to antitrust offenders, there seems to have been a decline in those plush community service sentences.

More important, there has also been a trend toward more jail time and heavier fines in antitrust cases, although the averages are still too low. In the last 12 months, we have received fines of at least $1 million against corporate defendants on 11 separate occasions. And in one case, a court employing the double-the-gain, double-the-loss provisions of the law assessed a $1.25 million fine against a corporation for a one-count violation of the Sherman Act.

Since the beginning of 1987, we have had individuals sentenced for antitrust violations to terms of imprisonment of at least six months on 7 separate occasions. A defendant in one of our electrical construction bid-rigging cases received a six-month jail term and a fine of $126,000. A defendant in a bid-rigging case involving steel and alloy pipe received a

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15/ See, e.g., United States v. Dynalectric Co., Crim. Action No. 87-00008-O(CS) (W.D. Ky. Dec. 1, 1987) (memorandum opinion and order).

prison sentence of 18 months. The average jail sentence is up over 30 percent since 1978. And in the last ten years, the average individual fine has doubled.

But the truly dramatic transformation of antitrust sentencing is just around the corner in the form of the new Sentencing Guidelines. The Guidelines, mandated by the Sentencing Reform Act and developed by the United States Sentencing Commission, strive for consistency in sentencing by narrowing the sentencing judge's discretion to craft an individualized sentence. In place of that discretion, the Guidelines substitute a series of formulae -- consisting of base levels and adjustments -- by which the sentence can be found in a table. Of course, the constitutionality of the Guidelines has been attacked, and before too long, the Supreme Court will have to address the issue. However, the approach of the Guidelines represents a tremendous improvement in sentencing in the federal courts.

Because the Guidelines apply to violations continuing or occurring on or after November 1, 1987, as a practical matter it will be a while before they are binding on judges in most cases brought by the Antitrust Division. But once they do apply, the increase in penalties will be substantial and mandatory. The Sentencing Commission shared the Division's views that general deterrence is the "controlling consideration" in sentencing antitrust defendants. Given the difficulty in detecting covert criminal conspiracies, the

Commission recognized that fines and prison terms would have to increase substantially over prevailing norms to achieve an adequate level of deterrence. As a result, unless peculiar circumstances require adjustments, the Guidelines require judges to sentence individual antitrust defendants to confinement for a minimum of four months (or 120 days). 16/ That is more than twice the average jail term imposed on all individuals convicted by the Antitrust Division over the past ten years, and longer than the average in any given year.

In addition, the Guidelines mandate large fines based on the volume of commerce "attributable to the defendant." An individual conspirator must be fined an amount between 4 and 10 percent of the volume of commerce done by him (or his principal if he is an employee) in goods or services that were affected by the conspiracy, but not less than $20,000. 17/ This Guidelines minimum is roughly the same as the average individual fine over the last ten years, and the typical Guidelines fine imposed on individuals, even for small conspiracies, is likely to be well in excess of current fines.

16/ See U.S. Sentencing Commission, Sentencing Guidelines Manual, § 2R1.1 (April 13, 1987). While probation may be imposed in lieu of jail for terms of up to six months, see id. §§ 5B1.1(a), 5C2.1(c), the Guidelines Commentary strongly discourages judges from doing so in antitrust cases, see id., commentary to §§ 1A4(d), 2R1.1.

17/ Id., § 2R1.1.

For corporations and other organizations, the Guidelines provide for fines ranging between 20 and 50 percent of the volume of commerce done by the organization in goods or services affected by the violation, but not less than $100,000. 18/

Even now, we are making every effort to have the stronger Guidelines punishments applied to antitrust crimes that did not extend past November 1, 1987, on the ground that the Guidelines sentences are necessary adequately to deter antitrust crimes. Since shortly after the final Guidelines were published, I have directed my staff to conform their sentencing recommendations to the Guidelines whenever possible. Keep that in mind if you come in to negotiate a plea. In addition, we have been urging courts to follow the Guidelines when imposing sentences whether or not they are obligated to do so.

On the whole, then, the punishment meted out to antitrust criminals is approaching the level necessary for effective deterrence. But the fact that antitrust penalties are now moving in the right direction does not mean that the Division will reduce its enforcement efforts: quite the contrary. We will continue to make life tough for antitrust felons by opposing nolo pleas and pushing for more meaningful sentences.

18/ Id.

Enhanced Maximum Fines

With the prospect for longer prison terms and higher criminal fines continuing to grow, low statutory maximum fines may prove to be the remaining obstacle to truly optimal deterrence. While the Sherman Act $1 million maximum corporate fine is among the highest in the U.S. Code, the profits that can be reaped from a major antitrust conspiracy often will dwarf the maximum, even when it is combined with the award of treble damages. 19/ Indeed, even the fines called for in the Sentencing Guidelines for antitrust offenses will often exceed the present statutory maximum.

Perhaps it is time once again to up the ante on antitrust felons, at least with respect to fines for corporations. The maximum corporate fine in Canada for price fixing is $10 million; and for bid rigging, corporate fines are left solely to the court's discretion. 20/ Even adjusting for exchange rates, this far exceeds the penalty available in the United States. While the Department has no position, I am inclined to believe, based on my experience at the Division, that there

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19/ Of course, the potential of an infinite double-the-gain or double-the-damage alternative maximum does allow for higher fines; however, if the probability of detecting the violation is less than 50 percent, simply doubling the gain or loss will result in a suboptimal fine.

20/ See Competition Act, Can. Rev. Stat. ch. C-23, §§ 32, 32.2(2) (1970).

should be similarly stiff fines available for criminal antitrust violations in the United States.

As I said when I began my talk, we in the Antitrust Division are going to do our very best to ensure that those who engage in criminal violations of the antitrust laws will be punished appropriately. I only hope that potential antitrust defendants get the word before they get indicted.

If It's Too Late to Stay Clean, Cooperate!

For those who do not get the message, or for whom the message has come too late, the future looks awfully dim. And they cannot look to plea bargaining as a way out. In addition to the stiffer penalties provided by the Sentencing Guidelines, implementation of the Guidelines will also reduce the Division's flexibility with respect to plea bargaining. The major purpose behind the Sentencing Guidelines is consistency in the sentencing process, and this goal cannot be achieved if prosecutors can freely bargain away charges or agree to make sentencing recommendations inconsistent with Guidelines sentences for the offending conduct. 21/

21/ Indeed, Congress indicated that it expects judges to examine plea agreements to ensure that prosecutors have not used plea bargaining to undermine the Sentencing Guidelines. S.Rep. No. 98-225, 98th Cong., 1st Sess. 63, 167 (1983).

Given our reduced flexibility in this area, I put it to you that early and substantial cooperation with the government (rather than avoidance of trial) is now the best hope that a company or individual has of reducing the severity of its punishment. The Guidelines recognize acceptance of responsibility as a mitigating factor in the sentencing process, and cooperation with the government is certainly a tangible indication of that acceptance. 22/ A guilty plea alone, however, does not entitle the defendant to a sentencing adjustment as a matter of right. Furthermore, the Guidelines explicitly contemplate that courts may deviate from Guidelines sentences upon motion of the government that a defendant has provided substantial assistance in the prosecution of another who has committed an offense. 23/

But perhaps a more important escape hatch will be the Antitrust Division's "amnesty" policy, which has been in effect for about a decade. Pursuant to that policy, we will generally not seek to indict the first person or organization that brings an antitrust violation to our attention and assists us in the prosecution of the ensuing case, provided that we have not already discovered, and would not be likely to discover, the violation independent of the information offered by the

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22/ Sentencing Guidelines Manual, § 3E1.1.

23/ Id., § 5K1.1.

defendant seeking amnesty. Given stiffer sentences and reduced plea-bargaining flexibility, this opportunity may well be the smartest move that a potential defendant can make -- assuming it is too late to stay clean.

Avoid Interference

On the other hand, an attempt to avoid jail or fines by interfering with one of our investigations is the worst move a corporation or individual can make and will only lengthen the stay and increase the price tag. In the last few years, there has been a marked increase in the Antitrust Division's efforts to prosecute obstruction of justice, the making of false material declarations, and perjury. Judges who are reluctant to sentence antitrust defendants to jail often do not think twice about imposing a significant prison sentence on those who interfere with the judicial process. Moreover, evidence that a defendant has obstructed an antitrust investigation can be used to obtain a stiffer sentence under the Sentencing Guidelines for the substantive antitrust violation itself. 24/

24/ Id., § 3C1.1.

Conclusion

Criminal antitrust enforcement, like all antitrust enforcement, strives to maximize consumer welfare. To accomplish that aim, unambiguously harmful activity must be rooted out and eliminated. Anyone contemplating a naked agreement to fix prices, rig bids, or otherwise harm consumers, must realize that they will not, nor should they, be treated lightly.