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SANCTIONS IN ANTITRUST CASES

Contribution by the United States

-- Session IV --

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SANCTIONS IN ANTITRUST CASES

-- United States --

1. Introduction

1. In U.S. federal competition law enforcement, sanctions are used almost exclusively against hard-core cartel activity, which is a crime. Companies are fined when criminally convicted of price fixing, bid rigging, customer allocation, or market allocation.¹

2. Individual accountability is a cornerstone of effective cartel enforcement in the United States, and the principal cartel deterrent is threat of imprisonment for culpable individuals. Typically, multiple individuals associated with each corporate cartel participant are prosecuted, and prison terms as long as five years have been imposed.

3. The table below provides statistics on individual sentencing in cases handled by the Antitrust Division of the U.S. Department of Justice (Division) during the present decade. The columns are U.S. government fiscal years (fiscal year 2015 ended September 2015). The Division handles some non-cartel criminal cases, and some cartel cases include both cartel and related non-cartel criminal offenses.

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
|-------------------------------|------|------|------|------|------|------|
| Individuals Sentenced | 37 | 39 | 55 | 39 | 35 | 15 |
| Sentences of Incarceration | 29 | 21 | 45 | 28 | 21 | 12 |
| Average Days of Incarceration | 898 | 502 | 747 | 750 | 787 | 402 |

4. Since 1987 both individual and corporate sanctions for cartel activity have been governed by guidelines promulgated by the United States Sentencing Commission (Guidelines). The advisory Guidelines, available at <http://www.ussc.gov/guidelines>, detail calculations yielding a Sentencing Range for each convicted offender.

5. Courts impose sentences after considering the prosecutor’s recommendation and arguments from the offender. The remainder of this contribution is devoted to the determination of the fines imposed on corporations convicted of cartel offenses.

¹ Companies may be *civilly* fined for violating the pre-merger notification statute or violating final orders issued by the Federal Trade Commission, but they are not fined when found liable in civil antitrust cases for engaging in anticompetitive conduct. Companies also may be subject to civil or criminal contempt fines for violating antitrust decrees issued in cases brought by the U.S. Department of Justice. In addition, companies may be subject to monetary remedies, such as disgorgement or restitution. Such monetary remedies, civil penalties, and contempt fines are beyond the scope of this paper.

2. Statutory Provisions

6. A court's imposition of a sentence under U.S. law is governed by 18 U.S.C. § 3553, which requires it to "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes. These purposes include the need to "reflect the seriousness of the offense . . . and to provide just punishment for the offense" as well as the need to "afford adequate deterrence." A court also must consider the Sentencing Range resulting from the calculation detailed in the Guidelines.

7. Criminal sentences under U.S. law are constrained by statutory maximums. The statute that makes cartel activity a crime, 15 U.S.C. § 1, specifies maximum fines of \$100 million for corporations. In addition, the alternative fine statute, 18 U.S.C. § 3571, provides that an offender may be fined the greatest of: (1) the amount in the law setting forth the offense; (2) twice the gross gain from the offense; or (3) twice the gross loss to victims of the offense. In many significant U.S. cartel prosecutions, corporate fines have exceeded the \$100 statutory maximum. Fines as high as \$500 million have been imposed.

3. Corporate Fines under the Sentencing Guidelines

8. The Sentencing Range for corporate fines in cartel offences is governed by Chapters 2 and 8 of the Guidelines. Chapter 8 sets out principles and rules for corporate sentencing generally, and Chapter 2 sets out principles and rules for sentencing with each specific type of offense.

9. Calculation of the sentencing range begins with the determination of the Base Fine. Guideline 8C2.4(a) states that the Base Fine is the greatest of (1) the "pecuniary gain" to the company from the offense, (2) the "pecuniary loss from the offense caused by" the company, and (3) a number related to the Offense Level for the specific offense. Guidelines 8C2.4(b) then mandates the application of "special instructions" for particular offenses in Chapter 2. As a special instruction for cartel offenses, Guideline 2R1.1(d)(1) provides that "20 percent of the affected volume of commerce" is used "in lieu of the pecuniary loss." In cartel cases, the Base Fine normally is this proxy for loss.

10. The Guidelines specify that the "volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." Business records obtained from a cartel participant and its customers document its relevant commerce and that of its executives. The volume of commerce attributed to a participant in a cartel operating entirely with the United States is its sales of products subject to the cartel during the cartel's period of operation. International cartels present additional issues because the Guidelines do not exclude foreign sales. In sentencing the only participant in the LCD conspiracy that went to trial, the Department successfully argued that the affected commerce was at least the participant's sales of LCD panels incorporated into computer monitors and laptops sold in or for delivery to the United States.

11. The Guidelines separately address the attributable commerce in a bid-rigging conspiracy for a company that submitted "one or more complementary bids" (i.e., bids intended only to create an appearance of competition). The Guidelines specify the use of the greater of (1) the company's actual sales of the affected goods or services, or (2) "the largest contract on which the organization submitted a complementary bid."

12. In formulating the Guidelines, the United States Sentencing Commission believed that fines for economic crimes should be closely related to the resulting gain to the perpetrators or the resulting loss to the victims. But the Commission also appreciated that determining gain or loss could be difficult. For cartel offenses, the Guidelines employed a readily-determined proxy for gain and loss, explaining that: "The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss."

13. Guideline 8C2.7 provides that the Base Fine is converted into the Sentencing Range through the application of the Minimum and Maximum Multipliers. The Maximum Multiplier normally is twice the Minimum Multiplier, and Guideline 2R1.1(d)(2) provides that neither shall be less than 0.75 for cartel offenses. Guideline 8C2.6 sets the Multipliers on the basis of the offender's Culpability Score, which Guideline 8C2.5 assigns on the basis of several factors, including the company's size, the involvement of its high-level officials, and its cooperation and acceptance of responsibility.

14. In 2006 Akzo Nobel Chemicals International B.V. agreed to plead guilty to the charge that it participated in price fixing on hydrogen peroxide from July 1, 1998 to December 1, 2001. Its hydrogen peroxide sales to U.S. customers during this period totaled \$82.9 million. The base fine used in that case was 20% of that, or \$16.58 million. The Culpability Score was 10: To the 5 points the calculation began with, 5 more were added because Akzo Nobel was a very large company and high-level personnel had participated in or tolerated the price fixing. In addition, 2 points were added for Akzo Nobel's prior history of cartel activity, and 2 were subtracted for its cooperation with the investigation and acceptance of responsibility. With a Culpability Score of 10, Guideline 8C2.6 provides for multipliers of 2.0 and 4.0. Thus, the Base Fine of \$16.58 million yielded a Sentencing Range of \$33.16-66.32 million.

15. Under the Guidelines, recidivism increases a corporation's Culpability Score, and the Division likely would seek a fine near the top of the Sentencing Range in a case of recidivism. But instances of cartel recidivism are rare in the United States. An examination of the issue by the Division in 2011 found not a single instance of recidivism since the first non-U.S. citizen was sentenced to imprisonment for a cartel offense in 1999.² All instances in which a company had been convicted of multiple cartel offenses in the United States since 1999 were at that time found to have involved cartel activity that began before the company was convicted for the first time.

16. Under the Guidelines, an effective compliance program can theoretically lower a corporation's Culpability Score, but effective compliance programs are rarely found to exist in companies that engage in cartel activity. Guideline 8C2.5(f)(3)(B) asserts a rebuttable presumption that a corporation did not have an effective compliance program if an individual with substantial authority within the company "participated in, condoned, or was willfully ignorant of, the offense." In most U.S. cartel cases, such individuals actively participated in the cartel activity. Cartel activity by rogue employees is often hypothesized but hardly ever found.

4. Leniency and Plea Agreements

17. The Antitrust Division's Corporate Leniency Program offers a company and its employees the opportunity to avoid criminal convictions, fines, and prison terms provided the company is the first to report a criminal antitrust violation and provided it is the first to qualify for leniency, including by providing full, continuing, and complete cooperation and meeting other conditions. A company losing the race to be the first to qualify cannot escape a fine, but it can reduce its fine by pleading guilty to criminal charges and cooperating with the Division's investigation. The vast majority of corporate convictions for cartel offenses in the United States result from entry of guilty pleas, and many guilty pleas are accompanied by sentencing recommendations that include a fine below the Sentencing Range.

18. Guideline 8C3.3 provides for the reduction of fines on the basis of inability to pay but "not more than necessary to avoid substantially jeopardizing the continued viability" of the company. When a company asserts limited ability to pay in plea discussions, it must open its financial books to the Division. The Division does not seek a fine that a company cannot pay, although sometimes the fine recommended cannot be paid immediately, and is instead paid in installments over a period of up to five years.

² Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, Recidivism Eliminated: Cartel Enforcement in the United States since 1999, *CPI Antitrust Chronicle*, Oct. 2011 (1).

5. Other Issues

19. Nearly every international and major domestic U.S. cartel prosecution is accompanied by one or more private civil damages action. This has been true for many years. These actions secure substantial recoveries for victims of cartel activity and thus contribute significantly to cartel deterrence.

20. Disqualification of individuals has not been used as a sanction for cartel offenses in the United States, nor does the Division anticipate any substitution of individual disqualification for prison time. Disqualification largely acts as a deferred and recurring fine that cannot be paid by an individual's employer. The Division does not believe that disqualification can have the deterrent effect that is now being achieved through prison terms. In addition, imposing the sanction of disqualification could entail costly monitoring.

21. Disqualification of companies from bidding in public procurement has been used in the United States as a sanction for cartel offenses. The Division normally does not make specific recommendations against debarment. The Division, however, sometimes requests that authorities with the power to debar consider several factors in exercising that power, such as the manner and extent of a company's cooperation with investigation and prosecution of the offense, including investigation and prosecution of co-conspirators, the payment of restitution, the need to incentivize early cooperation, and the effect of debarment on competition in the industry.