AntitrustConnect Blog

Is Convergence on Penalties for Punishment for Individual Cartel Violators Possible?

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One of the aspirations of many antitrust/competition lawyers worldwide is to achieve as much convergence as possible among competition authorities in enforcing competition law. Counseling companies and individuals who do business on a worldwide basis on the many differences in competition law can be inefficient, costly and result in less than optimal competition and deterrence of anticompetitive acts. A series of recent global cartel enforcement actions highlights how individuals responsible for cartel behavior around the world are treated in vastly different ways.

The European Commission just announced record cartel fines of $3.2 billion against truck manufacturers. A New York Times article is here and the EC official statement is here. Despite the clear-cut hard-core cartel activity (and many would say fraud) it appears that no individuals will be held accountable. While there is some collateral penalty in terms of their careers, and the possibility of criminal prosecution by a member state, the brunt of any penalty is clearly borne by the stockholders of the company. Recently Australia announced its first criminal prosecution for a cartel offense (here). No individuals were charged in this cartel, but it is a beginning. Only time will tell whether individuals will eventually be held responsible in Australia, and if so, whether the penalty will include any jail sentence.

Japan has long had criminal penalties for bid rigging, but those penalties rarely include imposing jail terms on individuals. This story from the Japan Times of fines and cease-and-desist orders looks familiar:

> *"The Fair Trade Commission has fined Fujitsu Ltd. and Oi Electric Co. a total of ¥402.91 million for repeated bid-rigging for communications equipment tendered by Tokyo Electric Power Company Holdings Inc. The FTC on Tuesday also issued a cease-and-desist order to the two electronic equipment producers to prevent similar misconduct. Of the fines, ¥285.1 million was imposed on Fujitsu and ¥117.81 million on Oi Electric."*

The United States is at the other far end of the individual penalty spectrum. The Sherman Act imposes up to a 10-year maximum jail term on individuals. This is not a mere theoretical possibility. The Antitrust Division has sought, but not gotten, a ten-year period of incarceration for

two AU Optronics executives convicted in the LCD-TFF international cartel. The record jail sentence in the United States for an individual for a price fixing offense is 5 years—a sentence that was also below what the government had requested.

When I started with the Antitrust Division in 1980, very few individuals went to prison for a criminal Sherman Act violation. Our goal was to make incarceration the norm and our mantra was "short but certain jail sentences are the most effective form of deterrent for antitrust offenses." Antitrust Division prosecutors could argue with great conviction that some incarceration for culpable individuals was not only fair punishment for the guilty party, but the best form of general deterrence. Now, however the Sherman Act maximum is ten years and sentencing of individuals is governed by the United States Sentencing Guidelines, more specifically, USSG 2R1.1—Antitrust Offenses. In my opinion, these guidelines are fundamentally flawed and lead to unnecessarily draconian recommended sentences. They are based primarily on the volume of commerce, and with the focus of the Antitrust Division on international cartels, the recommended guidelines sentence can be quite harsh—including the 10 year maximum the government has sought. But the best evidence that these volume of commerce driven guidelines are divorced from actual culpability is that both the Antitrust Division in plea agreements and the Courts in contested, sentences, almost always depart from these guidelines.

In the next few posts, I will be discussing a possible revision to the antitrust sentencing guidelines. These proposed "Shadow Guidelines" will attempt to focus sentencing more on factors relevant to culpability such as the defendants' position of authority in the company and motive in joining the cartel. As I will explain, the precedent for establishing a "Shadow Guideline" was set by the Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes. The Task Force's Shadow Guidelines can be found here. The Task Force felt that the sentencing guidelines for fraud, like the antitrust guideline, resulted in draconian sentencing recommendation having little to do with culpability because intended loss was the primary driver of the sentence. The Task Force issued what have now become referred to as "Shadow Guidelines" that have been used by federal judges when imposing sentences in fraud cases. My hope is to generate enough interest among leading practioneers of cartel work, federal judges and scholars for the ABA Antitrust Section to form a similar Task Force to establish a "Shadow Antitrust Guideline." My initial solo stab at a Shadow Antitrust Guideline is here.

As a side benefit, I think the United States needs a much more rationale method to determine individual sentences if it hopes to encourage the rest of the word to impose penalties on individual price fixers/bid riggers, including the real possibility of spending some time in prison. It is my hope that someday "short but certain jail for cartel offenders" is the mantra in many languages.

More to come. Thanks for reading.

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