Criminal Antitrust Remedies

Written Testimony of Anthony V. Nanni[1]
Before the Antitrust Modernization Committee
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Thank you for the invitation to address the Commission regarding Criminal Remedies. The views that I express here are mine alone and are not intended to reflect the views of my firm or its clients.

When I began my career as a trial attorney in the Antitrust Division at the United States Department of Justice (the "Division"), criminal antitrust violations were misdemeanors, fines were small, and prison sentences were almost non-existent. It was not until 1975 that the Sherman Act was amended to make violations of the Act a felony punishable by a maximum 3-year sentence, up from one year, and the maximum fine for corporations was increased from $50,000 to $1 million. Even after that increase, judges rarely imposed substantial prison sentences for price fixing.

Despite this initial caution, fines have skyrocketed over the last 15 years, reaching levels in the hundreds of millions of dollars, and typical prison sentences have increased from a few months to multi-year terms. In 1990, Congress raised the maximum corporate fine for an antitrust offense to $10 million, and in 1995, the first $10 million fine was imposed and collected. In subsequent years, through the use of 18 U.S.C. § 3571(d), the Division collected a number of large fines including a $500 million fine against F. Hoffman-La Roche and the recent $300 million fine against Samsung. Notwithstanding these fines, Congress further increased the

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maximum Sherman Act fine for corporations to $100 million and the maximum prison sentence from 3 to 10 years in 2004.[2]

While many of these developments have on the whole been beneficial for antitrust enforcement, I believe that criminal exposure for antitrust defendants (both corporations and individuals) is now so high that cases which might be expected to go to trial are settled. Not every corporation convicted of an antitrust crime is a Samsung or a Hoffman-La Roche that can afford huge fines. For a middle-sized corporation in a struggling industry (which is often a contributing factor for the formation of an illegal cartel) a large fine, even if under the new Sherman Act maximum, is equivalent to a death sentence. While I do not mean to suggest that all corporate fines are too high, I believe that potential sentences have reached the point where they can exceed the level necessary for effective deterrence and where the negative side effects can outweigh any positive benefits. Similarly, I believe that the recent increase in the maximum sentence for convicted individuals from 3 to 10 years is excessive.

Antitrust sentences should not be higher than necessary for effective deterrence. In general, criminal sentences serve a number of different goals including deterrence, restitution, retribution, restraint or incapacitation, and rehabilitation. Traditionally, antitrust enforcement has properly placed almost exclusive emphasis upon the need for deterrence. Individual antitrust defendants are usually respected members of their communities and clearly pose little or no threat to society. Punishment for its own sake or rehabilitation does not seem necessary or

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2 The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified in note accompanying 15 USC § 1), increased the Sherman Act maximum corporate fine from $10 million to $100 million and the maximum individual fine from $350,000 to $1 million. The Act also significantly increased the Sherman Act maximum prison sentence from 3 years to 10 years.

appropriate. Since antitrust crime is difficult to detect, deterrence is the most effective way to ensure that its negative economic effects are avoided.

The Division has long recognized that its most effective enforcement tool is to target culpable individuals for jail sentences. Individuals commit the criminal acts, not corporations. While criminal fines have some beneficial effect on deterrence by helping to change corporate policies and forms of governance, ultimately the personal exposure of individual executives is the greater threat and the best deterrent. High corporate fines are a recent phenomenon and they have traditionally been given a secondary role by antitrust prosecutors.

Notwithstanding the importance of jail time for convicted individuals, I believe that the recent increase in potential jail terms from 3 years to 10 years is excessive and unnecessary to deter corporate executives from antitrust crime. In my view, even relatively short prison sentences provide significant deterrence for most potential antitrust violators. Being a convicted felon, in itself, has deterrence value and although corporate executives can gain personally from their crimes in the form of higher salary, bonus, or career advancement, the likely financial gain for such individuals is ordinarily not so large that the benefits would not be overcome by the threat of even a modest jail term. Today, a convicted antitrust offender of any magnitude is certain to spend a significant period of time in jail. It may be that a 3-year, or even a 5-year, term is necessary to deter the most hard-headed individuals, but a 10-year term, particularly for an executive over 60, is tantamount to a life sentence.

In addition, the increasing prospect of detection is an important component of deterrence. Since the Division has had great success with its Corporate Leniency Policy (or "amnesty program") in inducing corporations and their executives to report violations and cooperate with criminal investigations, antitrust offenders know, or should know, that the potential for detection has increased. More recently, when Congress raised the maximum fines and jail term, the same law contained provisions allowing for single civil damages for defendants that cooperate under the Leniency Policy, thereby increasing the benefit to participating in the amnesty program.[3] In addition, the Division has had more success persuading foreign enforcement authorities to cooperate in criminal antitrust enforcement and adopt penalties for antitrust violations in their jurisdictions. These developments have not only increased the odds that cartels are detected, but they have also increased the odds that even foreign defendants will have to serve time in prison for their criminal acts. It is open to serious debate, therefore, whether sentences as long as 10 years incarceration are necessary to provide greater deterrence or may serve solely retributive ends without overall benefits for society.

Excessive sentences can also have negative side effects. Because of the sentencing leverage obtained by the prosecution after a conviction, many cases that should go to trial will be settled. The Division (as all prosecutors do) will offer a lower fine for a company that agrees to settle but will seek the highest fine possible upon conviction at trial. Of course, fines will be limited at sentencing by the firm's ability to pay. Unfortunately, limiting the fine to the corporation's ability to pay can still force the company into bankruptcy given the exposure to follow-on treble damages suits. Only large corporations with deep pockets can afford to take the risk of trial. While even large corporations are subject to massive exposure under 18 U.S.C. § 3571(d), at least under that statute the government must prove beyond a reasonable doubt at trial an actual loss from the offense sufficient to justify a fine in excess of $100 million (or

3 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. at 661 (2004).

$10 million for crimes committed before the latest increase).[4] Smaller firms that would be devastated by fines at or below $100 million do not have that protection as the government need not prove any actual loss and is only required under the Sentencing Guidelines to prove the volume of commerce by a preponderance of the evidence. Further, corporate executives will be wary of trying any case with a potential 10-year jail term. The terms of an individual plea can easily be made so favorable that pressure on executives to plead can also be used effectively to induce a corporate plea even when the government's case is quite weak or ill advised. When a sentence moves beyond the levels necessary for deterrence, society as a whole also tends to pay a price. Pleas obtained as a result of excessive sentencing leverage by the prosecutor undermine the fairness of our criminal justice system. Any firm weakened by an excessive criminal fine will also not be able to compete or innovate with the same vigor as an otherwise healthy firm. Similarly, a corporate executive who ordinarily can be expected to resume his or her role as a productive member of society is of no benefit while serving a 10-year prison term.

1. *In setting corporate fines for criminal Sherman Act violations, should there be a means for differentiation based on differences in the severity or culpability of the behavior?*

Yes. I do not believe this issue is subject to serious debate. Corporate fines for Sherman Act violations under the Sentencing Guidelines reflect the harm done by the defendant. Basing the fine imposed on a percentage of the volume of commerce done by the defendant provides a benchmark that is typically commensurate with the defendant's importance to the success of the conspiracy as well as the economic harm it causes. In general, large firms that have the most

4 *Apprendi v. New Jersey*, 530 US 466, 490 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

sales are the most culpable. In addition, other factors should also be considered as discussed below.

A. Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Sentencing Guidelines provide distinctions between different types of antitrust crimes (e.g., price fixing versus monopolization)?

Criminal prosecution should focus upon horizontal, *per se* violations of the antitrust laws such as bid rigging, price fixing, and market allocation. I do not believe that monopolization cases, involving unilateral conduct, should be prosecuted criminally, absent the rare case where violence is involved. Current Division practice recognizes this well-settled distinction and I see no reason to depart from it.

Nevertheless, I would like to point out two areas where the Sentencing Guidelines should explicitly take account of other factors that potentially reflect upon the culpability of defendants. The first involves cases where the crime may not clearly fall within the hard-core area of criminal enforcement. These cases are ones that present a close policy question whether the Division should proceed with a criminal case, but where it nevertheless decides to prosecute. The second area involves those cases where culpability under the Sentencing Guidelines is not in dispute but where the Division uses a parallel fraud prosecution to obtain a higher sentence.

Downward Departure Where There is No Clear Hard-Core Violation

Although *per se* violations are well described in caselaw and are understood by prosecutors and defense counsel alike, there are a few situations that fall within a gray area. In certain cases where the law is not well-settled, current practice is to establish new precedent through a civil prosecution in order to put parties on notice before seeking indictments. As the Antitrust Division Manual explains, "There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be considered appropriate. These situations may include cases in which: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their actions."[5] Notwithstanding the arguments of defense counsel to the contrary, the Division may decide to prosecute certain cases criminally even where one or more of these factors is arguably present. Because of the fact-specific nature of cases that fall within the gray area, it is difficult to establish bright line rules for determining whether to prosecute criminally. While the Division properly should decide in its sole discretion whether to proceed with a criminal indictment, I believe that defendants should be able to raise these points at sentencing. I suggest that the antitrust section of the Sentencing Guidelines, 2R1.1, be amended to include the four factors listed above as possible mitigating factors for the sentencing judge to consider. My proposal will serve as a check, at least to some degree, on aggressive decisions to prosecute criminally in cases where one or more of these factors are present.

All Antitrust Violations Should be Sentenced Under the Antitrust Guideline

Price fixing and bid rigging are both antitrust crimes with similar effects on consumers. Notwithstanding their similarities, bid rigging in particular is often charged and prosecuted as fraud in order to take advantage of the longer prison terms that can be obtained by using the fraud guideline to calculate the sentence.[6] Despite the recent changes by the Sentencing

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5 Antitrust Division Manual, Chapter 3 at ¶ C.5 (http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm).

6 Circuits have taken different approaches to sentencing what are principally antitrust violations. *Compare United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003) (applying fraud guideline to bid rigging and construing bid rigging as a "means" to commit fraud) *with United States v. Rubin*, 999 F.2d 194 (7th Cir. 1993) (applying antitrust guideline to price fixing scheme where mail fraud violations merely part of the price fixing scheme).

Commission to the antitrust guideline 2R1.1 that reflect the new $100 million fine, the fraud guideline 2B1.1 continues to require significantly longer prison terms. For example, a bid rigging scheme that generates an overcharge between $1 and $2.5 million on a contract whose face value is between $1 and $10 million results in an offense level of 23 under the fraud guideline (using the overcharge as the loss), compared with an offense level of 14 under the amended antitrust guideline (using the contract value as the volume of commerce).[7] Without taking account of any upward or downward departures, an offense level of 14 yields a prison term range of 15-21 months compared to 46-57 months for an offense level of 23.[8]

In *United States v. Rubin*, the Division argued that a defendant who had been convicted of price fixing and mail fraud should be sentenced using the fraud guideline because the defendants engaged in "a scheme to deceive customers into believing that prices fixed in violation of the Sherman Act were competitive rather than collusive -- and use of the mails in furtherance of that scheme."[9] The Seventh Circuit rejected the Division's argument and held that where the fraud violation is "directly related" to the antitrust violation and is not a "separate course of conduct," the antitrust guideline should govern calculation of the sentence.[10] Sentences for activity charged as bid rigging or price fixing should not be any different than sentences for essentially the same conduct charged as a fraud. I see no substantial difference

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7 Even if the contract were valued between $10 and $40 million, the antitrust guideline would still yield an offense level of 16, which is lower than the fraud guideline.

8 This assumes the defendant is in criminal history category I. *See* U.S. Sentencing Guidelines Manual ch. 5, pt. A, Sentencing Table (2004).

9 Response of the United States in Opposition to Defendants-Appellants' Motion for Release Pending Appeal at 11-12, *United States v. Rubin*, 999 F.2d 194 (7th Cir. 1993) (No. 93-1076).

10 *United States v. Rubin*, 999 F.2d 194, 199 (7th Cir. 1993). The analysis in *Rubin* is equally applicable to bid rigging cases. *Compare United States v. Anderson*, 326 F.3d 1319, n.6, *supra*.

between conspiracies that are carried out through use of the mails or wires rather than through face-to-face meetings or hand delivered bids. Certainly the entire point of having a separate antitrust guideline is to distinguish antitrust crimes from ordinary theft or fraud. I suggest that all antitrust violations be sentenced under the antitrust guideline and that the burden should be on the Division to recommend changes to the antitrust guideline if it wants to secure longer prison terms in bid rigging cases.[11]

B. The Sentencing Guidelines use 20% of the volume of commerce affected as the starting point for computation of corporate antitrust fines. See United States Sentencing Commission, Guidelines Manual § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for setting fines? If not, what other measure(s) or methods would provide a more appropriate way for the Guidelines to establish fine levels.

I propose that the base fine be calculated based on 10% of the volume of commerce rather than the current 20% of the volume of commerce and that the government be allowed to prove, where it deems necessary, that the cartel overcharge is more than 10%. This proposal takes account of a number of factors that were not present or as significant at the time the original 20% estimate was adopted. First, at the time that the 20% of the volume of commerce rule was proposed and adopted the organizational guidelines (Chapter 8 of the Sentencing Guidelines), which imposed a multiplier for antitrust crimes between 0.75 and 4, had not been implemented. Thus, the current practice of imposing a fine that is a multiple of 20% of the volume of commerce was not part of the calculus used by the original drafters of antitrust guideline 2R1.1. In my view, a base fine of 20% of the volume of commerce, coupled with the

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11 Arguably the fraud committed in a bid rigging case is worse than in price fixing because the buyer is explicitly seeking competition by soliciting bids In many cases, false certifications of independent pricing are also submitted in bid rigging schemes. In my view, even if one were to concede the merits of these points, increasing sentences for bid rigging under the antitrust guideline is preferable to the use of the fraud guidelines. Note that the current version of 2R1.1 contains a one-point increase in the offense level for bid rigging that is eliminated in the amended 2R1.1 that will take effect November 1, 2005.

multiplier, can lead to unfair and excessive fines for certain companies and tend to force settlements where cases should go to trial. Using 10% of the volume of commerce as the base fine will often yield a fine that is 20% of the volume of commerce or more when the multiplier is taken into account.

Second, to the extent the government is required to prove the actual cartel overcharge, the result will more closely track the actual harm done by the defendants as opposed to a theoretical benchmark. When the Sentencing Guidelines were first developed, 10% of the volume of commerce was viewed as an adequate proxy for profits gained through collusion. That percentage was doubled to 20% to account, in part, for harm to consumers that did not purchase the higher priced product due to the higher price -- the deadweight loss, in economic terms.[12] It is not surprising that the 20% benchmark has its detractors. Some argue that 20% is too high given the average overcharge in price fixing conspiracies and others argue that 20% is too low.[13] It is difficult to tell which side has the better argument given the limited detailed information available. Given the propensity of cartel members to cheat or otherwise discount from agreed upon list price levels (particularly for large customers) it is my belief that the 10% assumption is too high.

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12 U.S. Sentencing Guidelines Manual § 2R1.1, cmt. n. 3 (2004) ("It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3)").

13 John M. Connor and Robert H. Lande, "How High Do Cartels Raise Prices? Implications for Reform of Sentencing Guidelines," Working Paper 04-01, American Antitrust Institute (August 2004) (arguing that a 10% overcharge is too low); Mark A. Cohen and David T. Scheffman, "The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?," 27 Am. Crim. L. Rev. 331 (1989) (arguing that a 10% overcharge assumption could be too high).

In any event, the problem with considering the criminal penalty in isolation, or in this case 20% of the volume of commerce, is that it ignores the subsequent civil suits that are likely to follow as well as the cost of jail time imposed on the individuals. As the Commission is no doubt aware, criminal penalties are only one piece of the patchwork of litigation that often ensues following the public disclosure of a price fixing investigation or settlement. In addition to the high penalties collected by the Division, an antitrust defendant is also likely, depending on the nature of the conspiracy, to confront suits by foreign governments, state attorneys general, and customers in federal and state courts.[14] Private litigants assert that treble damages are necessary in order to provide adequate deterrence because fines imposed by the Division are not high enough and that, in any event, treble damages understate the actual harm. State attorneys general and indirect purchasers seek recoveries even where issues of double recovery arise. Finally, foreign governments are increasingly advancing their own theories of the appropriate level of punishment. These various civil threats combined with the possibility of individuals receiving jail time should at least be considered in determining the optimal criminal fine.

The onslaught of follow-on litigation, dubbed the "cluster-bomb effect" by Judge Posner, can have deleterious effects on businesses.[15] The resulting criminal fines coupled with prolonged exposure to civil litigation where outcomes are uncertain, sometimes resulting in duplicative recovery, can impair a defendant's ability to compete in the marketplace. Price fixing and bid rigging often occur in industries where the players are already in financial distress. Price fixing is more a sign of desperation than of a healthy industry where firms enjoy ample

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14 Companies that do business with the government will also face possible debarment and suits under the False Claims Act (31 USC § 3729 *et seq*.).

15 Richard A. Posner, "Antitrust in the New Economy," 68 Antitrust L.J. 925, 940 (2001).

profits. If, as some claim, overcharges are actually as high as 30-50%, then proving such overcharges (at least at some approximate level) should not be particularly difficult. If they are not so easily proven, then it is likely that a presumed 10% overcharge as a base fine is more than generous to the government.

2. *The Sherman Act provides for a maximum fine of $100 million (or, previously, $10 million). The government may seek criminal fines in excess of that maximum pursuant to 18 U.S.C. § 3571(d).*

   A. *Should "twice the gross gain or twice the gross loss" as provided in Section 3571(d) be calculated based on the gain or loss from all coconspirator sales or on only the defendant's sales?*

   B. *Should fines above the statutory maximum, and thus limited by Section 3571(d), be based on 20% of gross sales as provided for in the Sentencing Guidelines, as they are for fines below the statutory maximum, or should they be calculated differently? If differently, how should they be calculated?*

Courts have not definitively determined whether 18 U.S.C. § 3571(d) sets an alternative maximum fine for an "offense" based upon the conduct of all conspirators or based solely on the conduct of each defendant. I take no position on that issue. Irrespective of how the question of statutory interpretation is resolved, § 3571(d) does not provide a method of determining the appropriate sentence for a specific defendant. I believe that the Commission should recommend that all antitrust corporate defendants be sentenced up to the allowable maximum based on the methodology used in the Sentencing Guidelines, namely that the base fine for each defendant should be calculated based upon the harm it caused. Where the government proves the actual overcharge resulting from the defendant's conduct, then the base fine should reflect the actual overcharge rather than the assumed overcharge derived from 10% of the defendant's volume of commerce.[16]

Further, the fine should be calculated based on the defendant's sales to United States consumers rather than upon worldwide sales. This policy serves the dual ends of punishing in proportion to the harm committed by the specific defendant and also of respecting the principle that the United States should not apply its antitrust laws extraterritorially where there is no harm to U.S. citizens proximately caused by the crime. This interpretation parallels the analysis in *Empagran* in which the Supreme Court held that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) restricts the Sherman Act from reaching foreign injury claims where they arise from largely foreign price-fixing conduct.[17] This approach also ensures that domestic antitrust enforcement respects a foreign jurisdiction's discretion to prosecute (or not prosecute) the same conspiracy and thereby avoids multiple punishments for the same conduct.

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16 If only the overcharge attributable to the entire conspiracy is proven, then the base fine for a defendant should equal the defendant's percentage share of the volume of commerce times the total overcharge. This approximation seems preferable to an assumed overcharge based upon 10% of the defendant's volume of commerce.

17 *F. Hoffman-La Roche Ltd. v Empagran SA*, 124 S Ct 2359, 2367 (2004) ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").