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Interview: Update on “Antitrust Sanctions”

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INTERVIEW: UPDATE ON "ANTITRUST SANCTIONS"



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As part of our Spring 2012 issue, CPI is presenting a retrospective of our best articles in the past and providing updates. One of our selections is "Antitrust Sanctions," originally appearing in the Fall 2010 issue of the Journal. Douglas Ginsburg and Josh Wright, the two co-authors, are here to discuss developments since the article was published. They will also be exploring some of the issues raised in depth. But first, some background information on the authors:

Douglas H. Ginsburg is a Judge of the United States Court of Appeals for the District of Columbia Circuit, to which he was appointed by President Reagan in 1986 and which he served as Chief Judge from 2001 to 2008. He is also a Professor of Law at New York University, and Visiting Professor, University College London, Faculty of Laws. Judge Ginsburg was previously a Professor at Harvard Law

School and Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice.

Josh Wright is a Professor of Law at George Mason University School of Law. His areas of expertise cover antitrust, law and economics, consumer protection, and intellectual property. Josh has published dozens of law review articles and co-edited three books: PIONEERS OF LAW AND ECONOMICS, COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY, and the RESEARCH HANDBOOK IN THE LAW AND ECONOMICS OF THE FAMILY. He is the co-editor of the Supreme Court Economic Review, and also serves on the Editorial Advisory Board of our own Antitrust Chronicle.

Could you provide an update on what trends have continued or changed since you wrote “Antitrust Sanctions”? In particular, has the use of fines continued to rise in frequency as well as amount, and does incarceration continue to lag behind fines as an antitrust sanction?

DG: It is not so much a matter of frequency as it is the amount of the fine, and whether the fine is still the usual sanction in most jurisdictions, which it is. I have little doubt that the amounts have continued to increase—they certainly have not fallen off. In fact, not long ago, the Mexican competition authority imposed a fine of \$1 billion USD.

JW: I would add that it is certainly the case that incarceration trends in the U.S. have remained relatively stable since the article, both in terms of average length of sentence and the rate of incarceration. For our purposes in the article, the most important trend has been that the mix of sanctions has remained relatively constant in the U.S. and the EU as between corporate fines, jail, and the absence of debarment.

DG: Since we wrote the article, though, Mexico has instituted a system of criminal sanctions and Japan has increased the penalties for criminal antitrust violations, but I don’t think there’s been a criminal case concluded in either of those jurisdictions.

You propose shifting high fines away from the corporation in favor of increasing fines on the individual wrongdoers at the firm as a more optimal sanction. Since you’ve written the article, anti-corporation sentiment has flared up. Given this more hostile climate, and also considering any type of political atmosphere, are there any adjustments you’d now make to account for public reception?

DG: If the analysis was right when we wrote it, then it is still right now. You are certainly correct that the political environment has changed a bit, but that might actually make it more likely that individuals would be sanctioned in jurisdictions where previously it was only the companies that were sanctioned. After all, individuals who were at the helm of some major companies have come in for a large share of criticism over the last several years, along with their companies.

JW: Another point is that our proposal is to adjust the mix of sanctions, holding constant the level of corporate fines and increase accountability or culpability for individuals within the firm. Professor Harrington, in his response to our article in CPI, incorrectly presumed our proposal would require a reduction in current levels of corporate fines. It may well be the case that such a reduction would

Our proposal begins with the modest observation that increases in corporate fines to date haven't been associated with any marginal gains in deterrence, and that holding corporate fines at current levels, the proposed shift in the mix of sanctions would improve deterrence

improve the efficiency of deterrence if coupled with an increase in individual accountability and debarment. Our proposal begins with the modest observation that increases in corporate fines to date haven't been associated with any marginal gains in deterrence, and that holding corporate fines at current levels, the proposed shift in the mix of sanctions would improve deterrence. Perhaps the fact that the corporate fines would remain constant might make the move more, rather than less, palatable in the current environment, as Judge Ginsburg just observed. I agree that if the analysis was right on the merits then, it remains so.

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It's worth pointing out, as we do in the article, that a shift in debarment would be consistent with modern trends in the U.S., where we're already moving toward an increase in criminal sanctions and individual accountability. Recall that the evolution of debarment as a sanction at the SEC for white-collar crime arose

out of the SEC's decision to start pursuing it, rather than any legislative action. That general trend toward greater individual sanctions hasn't been coupled with debarment before in the antitrust context, at least here in the U.S., but it has been adopted as an antitrust sanction in other countries. And we even have debarment here in the U.S. at other agencies, indeed even right down the road at the Federal Trade Commission, for different types of violations. It may only be a matter of time before the DOJ takes a closer look at adding debarment to the enforcement toolkit.

Is there a concern that with a sanction like debarment or a focus on the individual, that it might actually be counterproductive because it might be seen as a shaming penalty or scapegoating?

DG: If it is the individual who is engaging in the criminal violations, then shaming seems to me quite appropriate. Individuals are going to have limited resources available for fines, which punish their families as well as them individually. There is a good case for a modest amount of jail time, and the shame of jail is certainly much greater than it is for any other individual sanction. I think that has been an important source of deterrence for individuals ever since the Department of Justice started seeking real jail time—not just a very short sentence that was often suspended—but some real time in jail starting in the mid-1980s, and increasing since then.

JW: I’d like to add two additional related points about the economics of reputational sanctions and the efficacy of deterrence. The first, as we discussed in our article, is that the constant increase in corporate fines over the past twenty years doesn’t appear to have generated much bang for your buck in the way of marginal deterrence. When analyzing whether to add another penalty to the mix such as debarment

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with its potential to increase reputational sanctions, the economist immediately turns to the “compared to what” question. Likewise, if there are potential fairness concerns with increasing individual penalties, even if they produce greater returns for consumers because of increased or more efficient deterrence, one must compare them to the fairness concerns with ever-increasing corporate fines. Recall that the corporate fines are borne in large part by passive shareholders and consumers, neither of whom seem like particularly fair targets for penalties. Measuring these things in the antitrust context, in terms of fairness, is a mixed bag. That is why, in antitrust at least, thinking about deterrence in terms of efficiency and the consumer welfare standard is a much more fruitful avenue of thought. It’s certainly the avenue of thought that the DOJ has in mind, and it is responsible for starting this shift towards increasing individual accountability.

The second important economic point is that one of the benefits of increasing reputational sanctions for price-fixing as an offense potentially cuts in the other direction—that is, in favor of a reduction in corporate fines. The greater the reputational sanction, the less—for any specific given level of deterrence—is required to achieve efficient or optimal deterrence. The economic logic is that we can rely to a lesser extent upon more inefficient methods of deterrence which tax passive shareholders and consumers. We can aim the deterrence more directly at the perpetrator, who is in the position to stop the offense—in this case, price-fixing. So there is an efficiency gain as well, and one way to think about that efficiency gain is the marginal gain from increasing the reputational sanction. Debarment is not in use as an antitrust sanction at all in the U.S. currently. There’s much more to gain there in terms of increasing reputational sanctions from its current level of zero up the scale to one or two, than the potential gains from a further dollar increase in level of the corporate fines, which are already at very high levels.

If you're working at a corporation and there is some gray area in your line of work—an example that you use is non-collusive vertical restraints versus price-fixing—and let's say you yourself are not sure whether what you're doing is an antitrust violation, how do you take this into account when formulating an appropriate punishment model?

As soon as they are in a gray area, it is appropriate to bring a civil action, not a criminal action; only when it has been clarified that what may have been gray in the past is actually unlawful, then is it be appropriate to bring a criminal case

DG: The enforcement agencies that have criminal sanctions available—the U.S., of course, but also Canada, the UK, Australia, and several others—have been appropriately careful never to bring a criminal case where the conduct is in a gray area, where it is just anything other than naked price-fixing or market division, which any reasonable business person would know is against the law. As soon as they are in a gray area, it is appropriate to bring a civil action, not

a criminal action; only when it has been clarified that what may have been gray in the past is actually unlawful, then is it be appropriate to bring a criminal case. A noteworthy example of how this has been practiced by the Antitrust Division is the much-publicized current filing involving Apple and some book publishers. This was brought as a civil case because it is not just a bunch of competitors getting together and fixing prices, it is a little bit different, and requires the Department to proceed cautiously.

JW: The Apple example is a good one. It's an example where, in addition to some agreement or alleged agreement among publishers in the DOJ's complaint, you've got other factors going on. Although the DOJ's complaint alleges a horizontal conspiracy, it is a complicated agreement. The agreement may not directly be on price, instead, it may be to move to something like the agency model, something more akin to an agreement between rivals to adopt resale price maintenance without further agreement on what the minimum prices will be. It's a more complicated arrangement—the technology is more complicated, the involvement is more complicated. So in these sorts of cases, the DOJ, even in the presence of horizontal agreement doesn't bring criminal cases.

The second example that comes to mind is the FTC's invitation to collude cases. Although the FTC does not have authority to pursue a criminal case, it certainly can refer those cases to the DOJ. But in its invitation to collude cases, rather than refer them to the DOJ for criminal investigation, largely what it's done is to pursue those cases under Section 5 of the FTC Act and treat them a little bit differently. When in that gray area somewhere short of

what appears to be a plain vanilla hardcore cartel offense that would traditionally be the subject of criminal jurisdiction, I think the stance of the agencies, in the United States at least, is to exercise appropriate caution in making use of criminal sanctions.

DG: To follow up on what Josh was saying, soliciting a price-fixing agreement was first litigated in the American Airlines case in 1984. If you recall, the president of American Airlines called the president of Braniff and suggested they fix prices, but the president of Braniff instead taped the conversation and sent it to the New York Times, which put it on the front page. It was not entirely clear, however, until the Fifth Circuit made it clear, that this was a violation of the Sherman Act. Now the FTC has brought a number of civil cases, and I think the Department of Justice would be entirely justified if it had a clean-cut solicitation case to prosecute it as a crime. The public is on notice that it is a flat-out violation of the Sherman Act; it is not a gray area anymore, even if it was 25 years ago.

How has your proposal been received in the European Union?

DG: The problem is that the European Commission has a very limited toolkit. They don't have, at the European level, a criminal sanction; in fact, they cannot even fine an individual for price fixing. I do not think they have any specific authorization for debarment, but of course, if that seems to be the right thing to do, they could seek that authorization. So they're quite limited at present, but potentially interested in some new ideas. At least, I hope so.

Thank you for taking the time to provide an update on your article, “Antitrust Sanctions,” and it's been great talking to the both of you.