ANTITRUST SANCTIONS

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May 4, 2010

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I. Introduction

Antitrust authorities across the world are increasingly concerned with enforcement efforts devoted to fighting cartels, especially international cartels.[1] Countries previously without cartel prohibitions, including many in Latin America, Asia, and Africa, have in recent years adopted antitrust laws and begun enforcing them. Countries with longstanding cartel prohibitions have adopted corporate leniency policies and increased the resources they dedicate to antitrust enforcement, with the result that more cartels than ever are coming to light and being sanctioned. This development has also spurred closer cooperation among national enforcement agencies.[2] With the widespread introduction of more aggressive detection and prosecution efforts aimed at cartel activity, there has been a trend toward dramatically larger corporate fines and a slow but growing movement toward criminalization.[3]

Antitrust laws and enforcement agencies have largely followed the conventional wisdom that the primary cure for insufficient deterrence of hard core cartel activity,

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[1] In the United States, it has been estimated that over 90 percent of recent fines for antitrust violations are attributable to international cartel activity and said that "the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world." Scott Hammond, An Update of the Antitrust Division's Criminal Enforcement Program, Address Before the ABA Section of Antitrust Law Cartel Enforcement Roundtable 2005 Fall Forum 2 (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm.

[2] OECD, HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 RECOMMENDATION 30 (2005), http://www.oecd.org/dataoecd/58/1/35863307.pdf (stating that "OECD members and observers have found that international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels.

[3] The growing list of nations with, or in the process of adopting, antitrust laws providing for criminal sanctions includes Australia, Brazil, Canada, Germany, Ireland, Israel, Korea, Japan, Russia, and the United Kingdom. See Appendix.

such as price-fixing, is to increase corporate fines. For example, the United States and the European Union have in recent years pointed with pride and a sense of accomplishment to the large and increasing fines levied upon companies that participate in cartels. In the United States, the statute governing fines for antitrust offenses was amended first in 1987 to provide the option of a fine set by doubling the greater of the defendant's gain or the victims' loss.[4] It was amended again in 1990 to increase the maximum corporate fine from $1 million to $10 million and the maximum personal fine from $100,000 to $350,000,[5] and yet again in 2004 to increase the maximum corporate fine to $100 million, the maximum personal fine to $1 million, and the maximum jail sentence from three years, which it had been since 1974, to ten years.[6] The maximum fine that the European Commission can impose upon a company that violates the EU's competition laws is 10 percent of the company's global turnover but, under the 2006 EC Guidelines, hardcore cartel offenses may have an additional penalty bringing total fines to as high as 30 percent of relevant sales.[7] In both these jurisdictions, average corporate fines have increased dramatically over the last 15 years. The EU has gone from collecting an average corporate fine of €2 million in 1990-94, to €46 million in 2005-09; US average corporate fines have grown from $480,000 during 1990-94 to $44 million more recently.

[4] 18 U.S.C. § 3571.
[5] Antitrust Amendments of 1990, Pub. L .No. 101-588, 101 Stat. 2880 (codified at 15 U.S.C. § 1 (2000)).
[6] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified as amended at 15 U.S.C. §§ 1-3).
[7] Office of Fair Trading, An Assessment of Discretionary Penalty Regimes (October 2009).

Although the large fines demonstrate increased government attention to behavior that costs consumers billions of dollars, there is reason to rethink whether this approach is achieving its desired goal — namely to reduce the social cost of cartels by deterring their formation. Despite the ever-increasing fines, cartels — particularly international cartels — remain a substantial problem, and recidivism among price fixers is not infrequent. While the impossibility of proving how many cartels go undetected renders the empirical evidence on the issue subject to a broad range of reasonable interpretations, the data are largely consistent with cartel detection rates that, despite the growth in fines and the introduction of corporate leniency programs, imply that current antitrust sanctions provide an insufficient deterrent.

We believe the optimal sanction for price fixing (and other cartel activities) should be guided by two fundamental principles. First, the sanction must be great enough, and no greater than necessary, to take the profit out of price fixing. If the expected value of price fixing net of legal sanctions is positive, that is, if price fixing is profitable, then the market will produce it -- unless the gains to the perpetrator are outweighed by the reputational cost he bears. Where the criminal conduct is profitable to the firm, and therefore increases its share price, it is more likely that the perpetrator is rewarded than penalized by the market. In order to harness the power of market-based reputational sanctions in the service of deterrence, it is necessary that the sanction be sufficient to render price fixing presumably unprofitable. With an appropriately calibrated corporate sanction, reputational penalties imposed upon the corporation and its agents will reduce the individual fines and jail sentences necessary to achieve the desired level of deterrence.[8] On the other hand, if the sanction exceeds this level, then it risks overdeterrence by providing an incentive for excessive monitoring and compliance expenditures that are ultimately passed on to consumers in the form of higher prices and foregone products, and even in the absence of these two negative effects, are likely inefficient. This point remains valid even if the optimal level of cartel activity is zero.

The second principle is that the *individuals* responsible for the cartel activity, in the sense that they are engaged in, complicit with, or negligent in preventing the price-fixing scheme, should be given a sufficient disincentive.[9] The U.S. Antitrust Division reasonably believes that "individual accountability through the imposition of jail sentences is the single greatest deterrent" to cartel activity.[10] A survey done for the U.K. Office of Fair Trading confirms that criminal penalties are the ones of greatest concern to business people.[11] A penalty scheme that is faithful to the first principle implies that at least part of the disincentive for the responsible individual will be market-based; the

[8] Jonathan Karpoff, D. Scott Lee & Gerald S. Martin, The Consequences to Managers for Financial Misrepresentation, 88 J. Fin. Econ. 193 (2008) (finding the likelihood of termination or ouster for individuals responsible for SEC and Department of Justice financial misrepresentation enforcement actions increases substantially with the cost of the misconduct to shareholders).
[9] See also Donald I. Baker, The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging, 69 Geo. Wash. L. Rev. 693, 713-14 (2001).
[10] Scott D. Hammond, Ten Strategies for Winning the Fight Against Hardcore Cartels, Oct. 18, 2005 (Paris Working Party No. 3 Prosecutors Program).
[11] Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT (November 2007).

career prospects for a convicted price-fixer should be diminished, and certainly not enhanced, by his record of price-fixing. Because reputational sanctions are likely to be highly imperfect, however, it is important that the sanction be targeted directly at the responsible individuals, and not at their employers. The sanctions should also be proportional to fault. That is, the individual perpetrator should face a more serious sanction than the director or officer who negligently supervised the perpetrator. Note that while the first principle focuses upon calibrating sanctions to the optimal level of deterrence, the second principle emphasizes the efficient allocation or mix of deterrent capital between the corporation and the individuals who act on its behalf.

While in principle there is certainly some fine or a combination of fine and jail time sufficiently high to deter individuals from price-fixing, the available anecdotal and quantitative data suggest further increasing the fines imposed upon corporations is not likely to solve the problem. It is here that we offer an alternative solution: de-emphasizing fines for publicly traded corporations and instead debarring individuals responsible for price-fixing from further employment in a position from which they could again violate or negligently enable their subordinates to violate the antitrust laws. As we shall argue below, imposing ever-higher corporate fines is misguided, whereas debarment from serving as a corporate director or officer — as a complement to a criminal sanction for persons engaged in or complicit in price-fixing and for negligent directors and officers whose conduct does not warrant a criminal sanction — would deter more price fixing than would massive fines against the corporation that employed them. Debarment has already been authorized as a sanction in some countries, including the United Kingdom, Australia, and Sweden, and has been proposed by the Competition Commission of South Africa.[12]

Our proposal to alter antitrust sanctions for price-fixing has two key components. It considers both the overall level of deterrence, which entails making debarment and jail time available to enforcement agencies that do not now have those options, and the mix, rather than the level, of criminal sanctions. Guided by the principles of equivalence and responsibility, we propose a shift in sanctions away from the corporation and toward perpetrators and other responsible individuals.

In Part II we discuss traditional deterrence theory as applied to optimal criminal antitrust penalties. In Part III we evaluate both the US and EU experience with ever-increasing corporate fines and the available empirical evidence on the deterrent value of cartel sanctions. In Part IV we turn to our claim that the conventional wisdom of increased fines as the solution to underdeterrence is misguided, and propose altering the distribution of criminal antitrust sanctions for corporations, responsible individuals, and perpetrators in a manner consistent with the principles described above. In Part V

[12] Recently proposed legislation in South Africa would allow the Competition Commission to seek a court order debarring an offender from serving as a director of a firm.

we discuss the experience with debarment as an antitrust sanction around the world, and how it might operate in the US. Part VI concludes.

II. Traditional Deterrence Theory and Optimal Antitrust Penalties

The economic analysis of optimal legal sanctions and criminal punishments is built upon the foundational observation that penalties should be sufficient to induce offenders to internalize the full social cost of their crimes.[13] In a simple setting where detection of crimes and enforcement of the law are both perfect (probability of punishment = 1) and costless, the optimally deterring sanction will be equal to the total social harm of the crime. In more realistic settings in which the probabilities both of detection and of punishment are less than perfect and enforcement costs are positive, optimal penalties must exceed the social cost of the crime so that the expected sanction facing each potential violator is equal to the harm his violation will cause. This economic insight of optimal penalty theory is captured in our principle of equivalence. As applied to the furtive nature of cartel activity, which reduces the probability of detection and successful prosecution, the optimal total sanction must consist of a fine equal to the perpetrator's expected gain from the violation multiplied by the inverse of the probability of detection. The key insight of the economic approach to optimal penalties generally, which applies with full force to antitrust sanctions, is that the

[13] The seminal analysis is Gary S. Becker, Crime and Punishment: An Economic Approach, 76 Pol. Econ. 169 (1968). See also William M. Landes, Optimal Sanctions for Antitrust Violations, 50 Chi. L. Rev. 652 (1983).

penalty must be sufficient to render the expected value of the illegal behavior equal to zero.

Within this optimal deterrence framework, a central determinant of the optimal antitrust sanction is, therefore, the probability that price-fixing is detected and an enforcement action is successful. In the simplest model of optimal antitrust penalties, the trebling of damages implies a detection rate of 33 percent. While it is inherently difficult to determine the actual detection rate because some cartels go undetected, the best available estimate places the rate between 13 and 17 percent.[14] While that estimate is somewhat dated, as it relied on data from cartels indicted by the U.S. Antitrust Division between 1961 and 1988, more recent estimates based upon data for the European Union suggest a detection rate consistent with the low end of that range.[15] Furthermore, there is some evidence that the detection rate in the United States has increased by as much as 60 percent in recent years as a result of the corporate leniency program.[16] Therefore, assuming a prior detection rate of about 15 percent, the current rate would be approximately 25 percent.

The relatively low probability of detection raises the probability of underdeterrence, and the need for increased sanctions. At the same time, care must be

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[14] Peter G. Bryant & E. Woodrow Eckard, Jr., Price Fixing: The Probability of Getting Caught, 73(3) Rev. Econ. & Stat. 531 (1991).

[15] Emannuel Combe, Constance Monnier & Renaud Legal, Cartels: The Probability of Getting Caught in the European Union (Working paper, 2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061 (estimating a probability of detection between 12.9 and 13.3 percent).

[16] Nathan H. Miller, Strategic Leniency and Cartel Enforcement, 99(3) Am. Econ. Rev. 750, 760 (2009).

taken lest excessive penalties deter efficient conduct and cause corporations to overinvest in compliance.[17] The pertinent question is whether antitrust sanctions and the threat thereof impose costs greater than necessary to deter cartel activity.[18] There are two important potential sources of overdeterrence in criminal antitrust sanctions. The first is the possibility that criminal penalties will be used to deter socially efficient conduct, such as vertical restraints, that could be mistakenly attacked as price-fixing.[19] Although the antitrust statutes do not necessarily preclude their application to these activities, there is no modern support for extending criminal penalties to non-cartel activity, nor is there evidence that this type of mischaracterization problem has led to a reduction in socially efficient business practices. Accordingly, we strongly favor the modern *de facto* limitation of criminal penalties to cartel activities, such as naked horizontal price-fixing, bid-rigging, and market division.[20]

A second potential issue of overdeterrence involves agency costs. Agency costs refer to the broad set of costs imposed on the firm by divergent incentives between the firm and its employees and agents. Because agency costs create an environment that

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[17] Becker, supra note 13, at 191.

[18] See Bruce H. Kobayashi, Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations, 69 George Washington L. Rev. 715, 733-734 (2001).

[19] Mark A. Cohen & David T. Scheffman, The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?, 27 Am. Crim. L. Rev. 331,352-54 (1989).

[20] We make the simplifying assumption throughout our analysis that criminal penalties will be limited exclusively to naked cartel activity. This assumption will have little if any effect on the practical scope of our analysis. We are aware of no criminal cases involving non-cartel activity since 1980, when the U.S. Antitrust Division brought such a case for resale price maintenance case. See U.S. v. Cuisinarts, Inc., Crim. No. H-80-49 (D. Conn. Sept. 17, 1980).

facilitates criminal conduct by the firm's agents, corporate fines are designed to provide a counter-incentive for the corporation to monitor, detect, and prevent crimes committed by its agents.[21] Where agency costs are present, therefore, and the firm cannot costlessly transmit to its agents the incentive it has to avoid being sentenced, a fine greater than the total social cost of the crime will induce the firm to make excessive investments in monitoring and prevention.[22] The social costs of the monitoring and compliance expenditures adopted in response to an increase in antitrust fines increase the marginal costs of the firm and are passed on to consumers in the form of higher prices, a detriment that must be weighed against any potential increase in the probability of detection when assessing the optimal level of deterrence.[23] To our knowledge, however, there is no empirical evidence that suggests consumers anywhere are currently paying the cost of an overzealous cartel enforcement regime.[24]

The role of agency costs in determining the optimal antitrust penalty also brings to light a key distinction between the level of penalties required for optimal deterrence

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[21] See Kobayashi, supra note 18, at 736-38.

[22] Id.

[23] Id.

[24] There is some evidence of a related form of overdeterrence in other areas of law. While the impact of increased exposure to liability and compliance costs can be small when spread across industries, in particular settings it can be quite large. *See* Tomas J. Philipson & Eric Sun, Is the Food and Drug Administration Safe and Effective?, 22 J. ECON. PERSP. 85, 94–95 (2008) (finding the deadweight losses due to price increases resulting from product liability litigation in the pharmaceutical industry are in the tens of billions of dollars); Paul Rubin & Joanna Shepherd, Tort Reform and Accidental Deaths, 50 J.L. & ECON. 221 (2007) (estimating product liability has increased accidental deaths by raising the prices of safety-enhancing goods and services); Richard L. Manning, Changing Rules in Tort Law and the Market for Childhood Vaccines, 37 J. L. & ECON. 247, 273 (1994) (concluding the price of vaccines went up twenty-fold after product liability imposed).

and the efficient mix of those penalties as between the corporation and its agents. In addition to agency cost considerations, there are a number of other complications that are ignored in the simple model of optimal antitrust penalties. For example, reputational sanctions in the employment market can reduce the requisite level of legal sanctions.[25] The risk preferences of individuals and the possibility of legal error also alter the optimal sanction. Finally, other penalties – particularly the costs incurred by defendants in private damage actions – are also relevant to identifying optimal antitrust penalties because they, too, influence firm behavior ex ante.[26]

The standard economic approach to optimal antitrust sanctions has the policy implication that, because fines and damage awards are transfers that do not reduce social welfare, monetary sanctions should be used as often as possible and alternative sanctions relied upon only to the extent fines provide insufficient deterrence. Following this approach, the conventional economic wisdom therefore suggests an enforcement system with a low probability of detection, very high fines, and very few cartels. There are a number of reasons, however, to believe fines alone will not provide sufficient

[25] There is at present, however, little quantitative evidence that antitrust offenders suffer serious reputational losses when convicted. See Cindy R. Alexander, On the Nature of the Reputational Penalty for Corporate Crime: Evidence, 42 J. L. & ECON. 489 (1999). See also Jonathan Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear for Committing Criminal Fraud, 36 J. L. & ECON. 757 (1993).
[26] We put these issues aside for the purpose of our analysis.

deterrence and alternative sanctions such as debarment and imprisonment should also be introduced.[27]

As both a theoretical and a practical matter, it is likely impossible to pinpoint the optimal level of total antitrust sanctions given the inherent uncertainty about the probability of detection and other key empirical inputs, much less to understand the mix of the potentially available sanctions that would lead to the uniquely efficient level of deterrence. Still, the economic framework is useful for thinking about the tradeoffs between various types of sanctions and their likely consequences. Further, the optimal penalties approach does suggest that at some level, increasing fines will result in a reduction in cartel activity.

III. Are Cartels Being Underdeterred? The Experience in the US and EU

The bulk of scholarly opinion is consistent with the ever-increasing levels of corporate fines and longer jail sentences, and supports the view that cartel activity is currently underdeterred.[28] Whether current sanctions underdeter is ultimately an empirical question however. The rate of cartel formation over time is unobservable, which makes impossible any confident conclusion about whether current sanctions are

[27] See Gregory J. Werden & Marylin J. Simon, Why Price Fixers Should Go to Prison, 32(4) Antitrust Bulletin 917 (1987). For example, the profits from illegal activity can be dissipated with expenditures on taxes, dividends and wages. Id. at 928. See also A. Mitchell Polinsky & Steven Shavell, Should Employers Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 Int. Rev. L. Econ. 239 (1993).

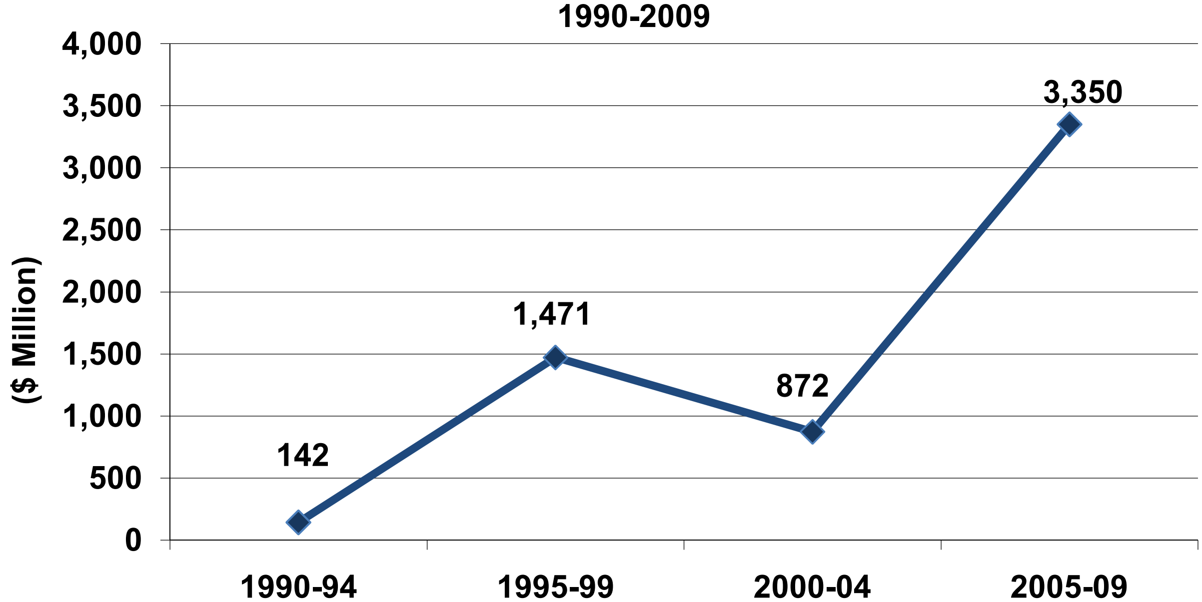
[28] See, e.g., Yulija Bulotova & John M. Connor, John M. Connor, Cartel Sanctions: An Empirical Analysis (Working paper, April 2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116421; Gregory J. Werden, Sanctioning Cartel Activity: Let the Punishment Fit the Crime, European Competition Journal (March 2009); OECD, Cartel Sanctions Against Individuals (2003).

overdeterring, underdeterring, or just right. Nonetheless, the experience in the US and EU with ever increasing fines gives some reason to doubt the efficacy of further extending this approach or even maintaining the status quo.

A. Increasing Fines in the US and EU

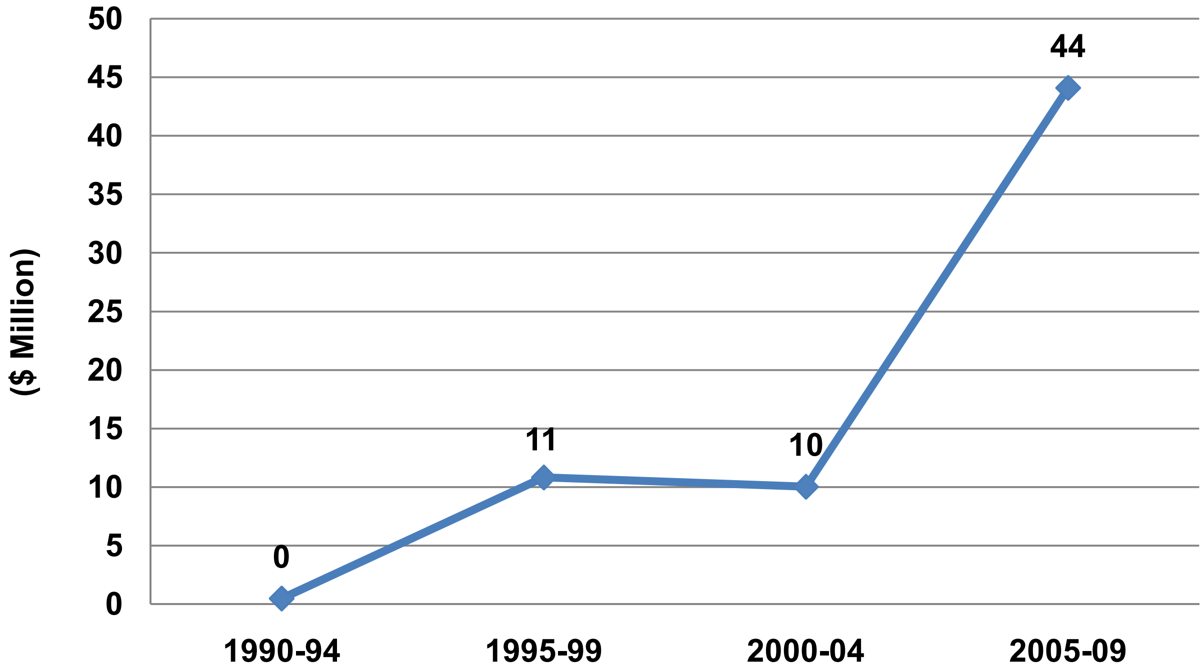
In the United States, corporate fines have increased dramatically since 1990. As Figure 1 illustrates, the enforcement agencies are clearly exercising their enhanced statutory authority for total corporate fines collected by the Antitrust Division have increased from $142 million during the period 1990-94 to $3.35 billion from 2005-09. Annual average total fines collected increased from $28 million during the period 1990-94 to $670 million from 2005-2009, a greater than 2000 percent increase.

Figure 1
United States Antitrust Division Total Corporate Fines
1990-2009



As Figure 2 illustrates, this upward trend in corporate fines over the last 20 years, and especially the last decade, is significant. Average corporate fines have increased from $480,000 during the period 1990-94 to over $44 million from 2005-2009, which represents a 9083 percent growth. The trend is not limited to a small number of extremely substantial fines, and includes 73 fines over $10 million from 1996-2009, with 18 of those greater than $100 million.

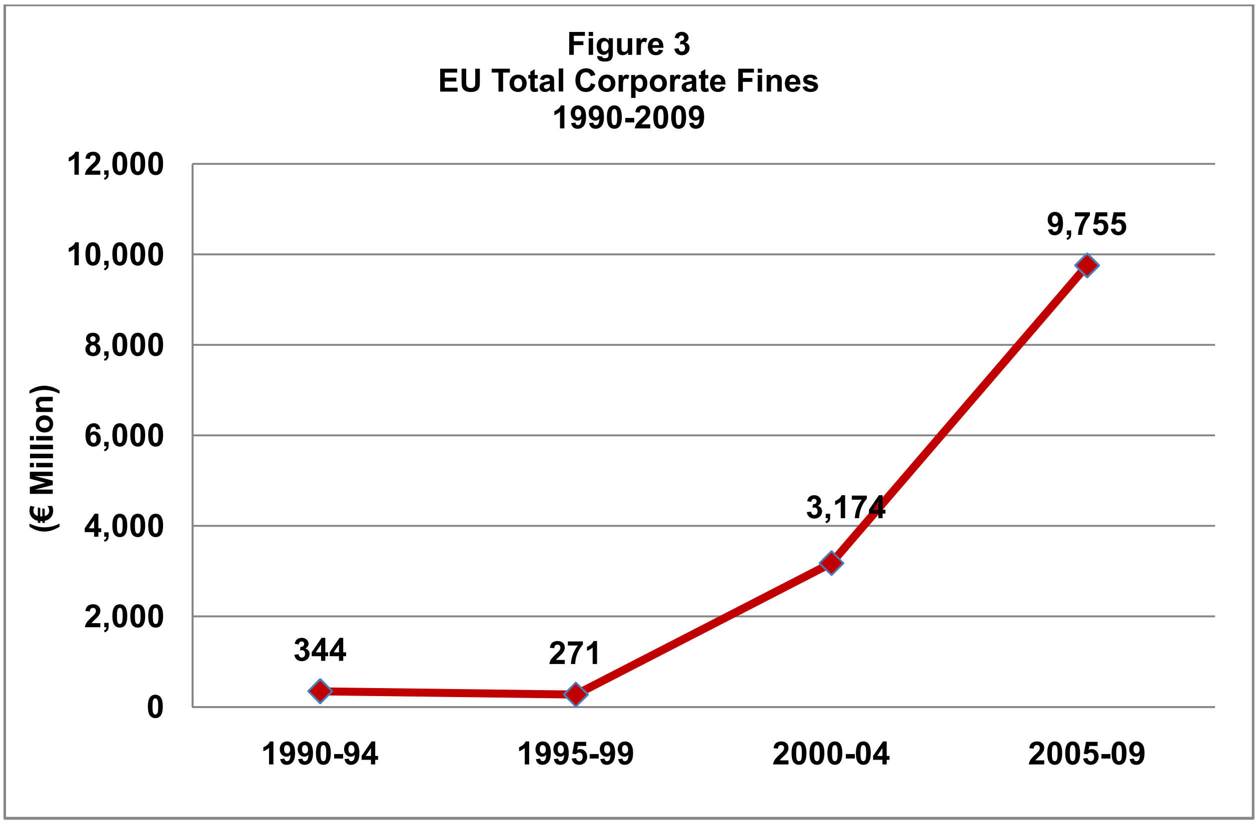
Figure 2
United States Antitrust Division Average Corporate Fines
1990-2009



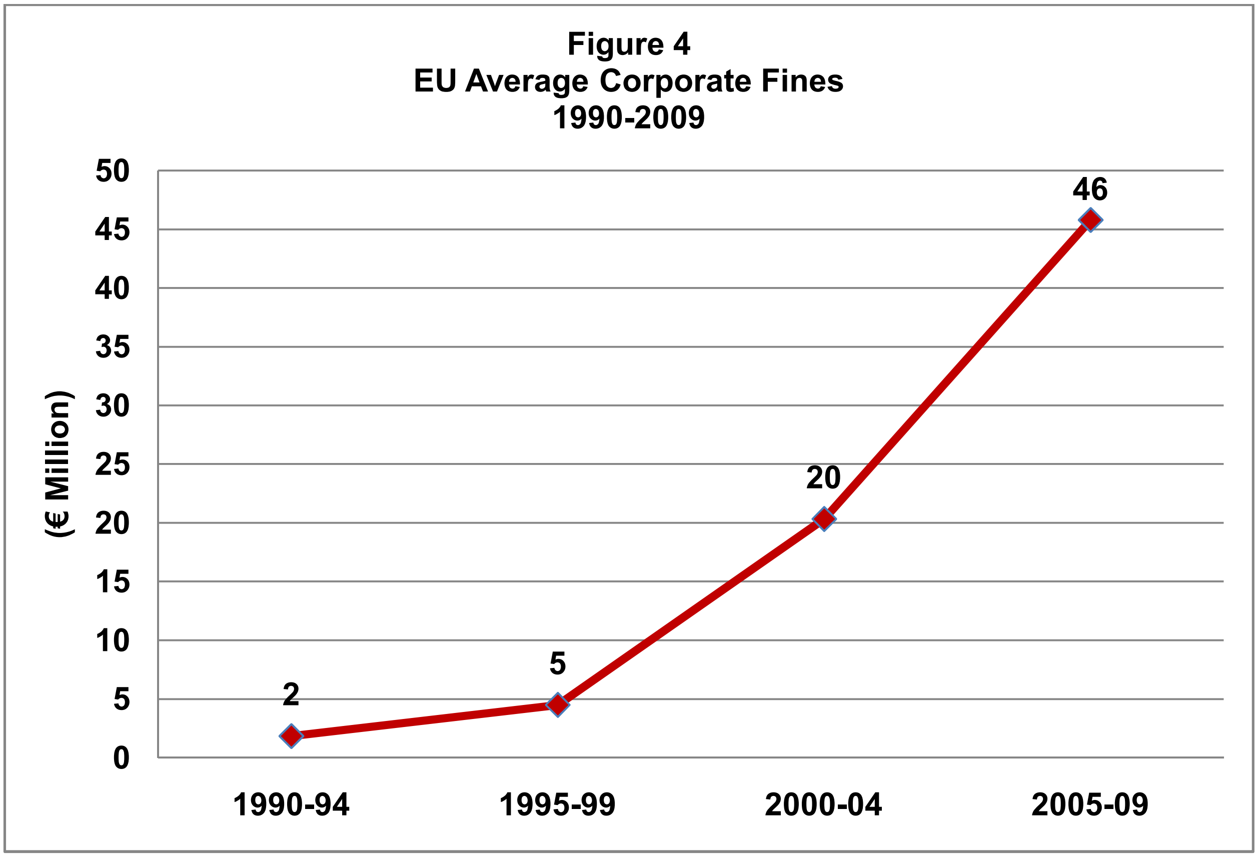
The EU now fines price fixers even more aggressively than does the US.[29] Growth in total EU corporate fines relative to their 1990-1994 levels is over 2700 percent,

[29] The United Kingdom has levied large fines, also. The largest fines from a single case totaled £225 million. *See OFT imposes £225m fine against certain tobacco manufacturers and retailers over retail pricing practices*, http://www.oft.gov.uk/news/press/2010/39-10 (Apr. 16, 2010).

which is greater than the growth rate of US corporate fines. As Figure 3 illustrates, total corporate fines in the EU were more than €9 billion in the period 2005-09. The US collected more in fines only in the '95-'99 period, which may be explained by the fact that the US fined Hoffman-La Roche for its participation in the vitamin cartel in 1999 whereas Europe did so in 2001.



As Figure 4 shows, average corporate fines in the EU increased from approximately €2 during the period 1990-94 to more than €46 million in 2005-09. Average annual corporate fines during the same time periods were €19 million and €450 million in 2005-09, respectively, representing an increase of over 2360 percent.



A critical question for our purposes is whether this increase in fines since 1990 has resulted in increased deterrence. Connor finds that while "[i]nternational cartel discovery rates have been increasing since 1990, from four to six per year in the early 1990s to about 35 per year in 2003-2005," price-fixing remained relatively frequent from 1990-2005, extracting from consumers (in constant 2005 dollars) aggregate overcharges exceeding $200 billion, with an average overcharge of $2.1 billion per cartel.[30]

The significance of the increase in aggregate cartel fines is ambiguous. Perhaps enforcement agencies are becoming more successful in discovering and prosecuting

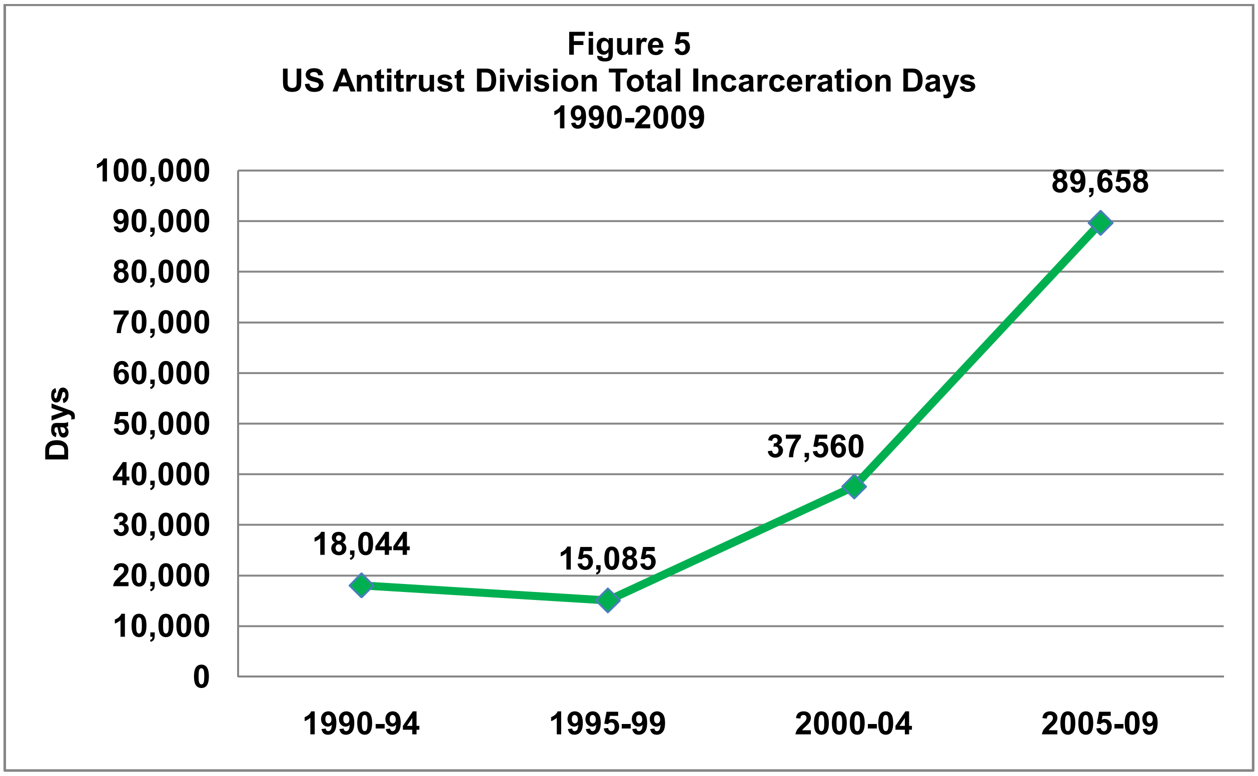
[30] John M. Connor & C. Gustav Helmers, Statistics on Modern Private International Cartels, 1990-2005 (Working paper, January 2007), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103610; Miller, supra note 16, provides evidence that the introduction of the corporate leniency program in the United States significantly enhanced detection rates and deterrence.

price fixers; or perhaps companies are even more frequently fixing prices despite the increase in the average fine. If the best way to deter price fixing is to increase fines, then we should expect the number of cartel cases to decrease. At this point, we do not have any evidence that a still-higher corporate fine would deter price-fixing more effectively. It may simply be that corporate fines are misdirected, so that increasing the severity of sanctions along this margin is irrelevant.

B. Increasing Jail Sentences in the US

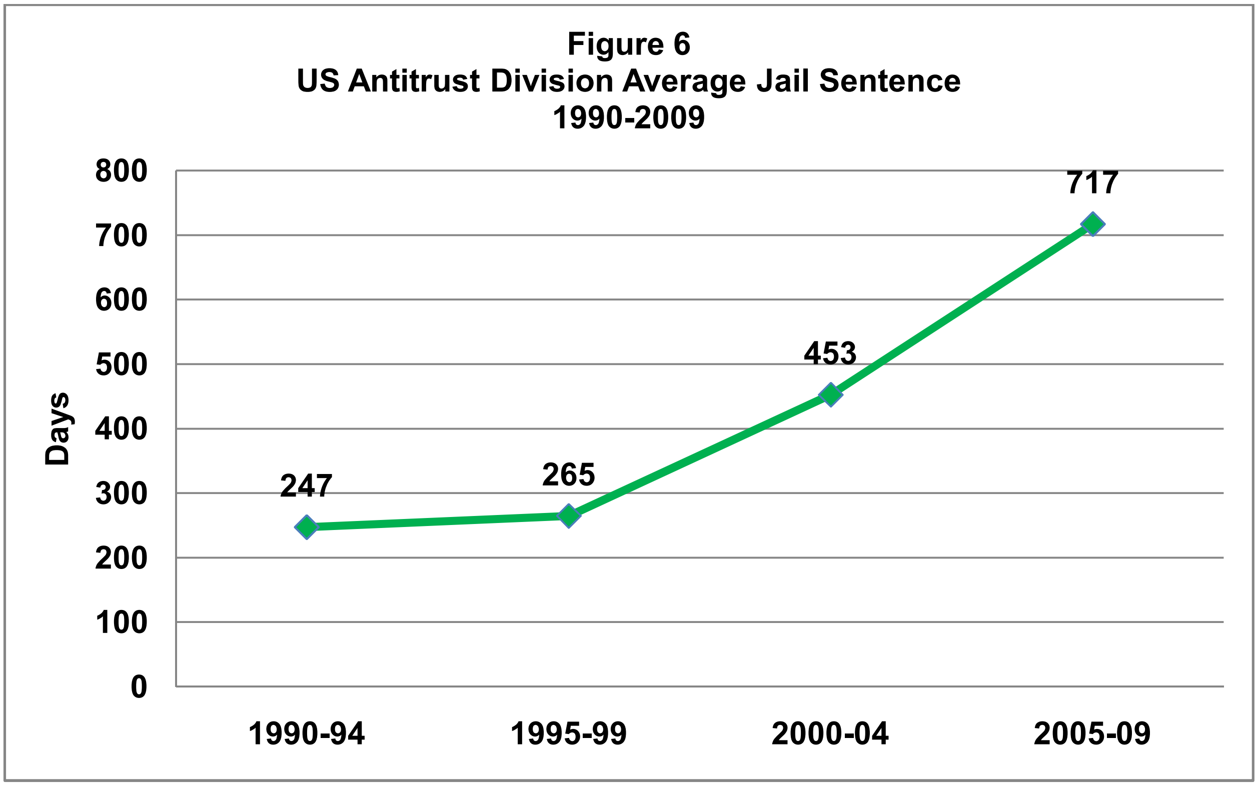
Corporate fines are not the only sanction imposed in the US. As Figure 5 demonstrates, the U.S. Antitrust Division has been sending more individuals to jail for longer periods of time since 1990, but the number of individuals sentenced is increasing less rapidly than fines in percentage terms.[31]

[31] Total incarceration days in 2005-09 about four times what they were during 1990-94; U.S. Antitrust Division total corporate fines increased by more than 2000 percent between the same two time periods.



Perhaps more important, as Figure 6 shows, the average length of the sentence meted out has also increased, especially since 2004, before which the maximum lawful sentence was three years.[32]

[32] The average sentence during 2005-09 is almost twice the average sentence during the 1990-04 period. The average duration of incarceration has increased despite a simultaneous increase in the number of persons sentenced from 73 to 125 between the same time periods. In 2009, 80 percent of criminal defendants were sentenced to jail. The average sentence was 24 months. See http://www.justice.gov/atr/public/update/2010/criminal-program.html.



This upward trend may well continue as some observers have argued that the U.S. Antitrust Division's current enforcement policies underdeter because the Government, rather than sentencing senior executives, prosecutes the mid-level sales executives and marketing directors involved in price-fixing, offers them short sentences in return for their guilty pleas, and appears altogether indifferent to whether corporations ultimately terminate or impose any disciplinary measures whatsoever on these individuals.[33]

Comparable data are not available for the EU since there is no provision for imposing any sanction— fine *or* jail time — upon an individual; individual sanctions may, however, be sought by the competition agency of a member country.

[33] Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies (Nov. 3, 2005).

C. The Proliferation of Criminal Antitrust Sanctions Around the World

The significant increases in corporate fines in US and EU and jail sentences in the US have been accompanied by a trend toward proliferation of criminal sanctions for cartel offenses over the last decade. These sanctions include traditional corporate and individual fines as well as jail sentences. For example, public prosecutors in Germany obtained a 34-month sentence for bid-rigging in the *Pipes Cartel* case.[34] Fines imposed by national competition agencies can be significant. For example, the United Kingdom Office of Fair Trading assessed an average corporate fine of £4.7 million from 2001-2006.[35] During the same time period, the German Bundeskartellamt collected a total of €969.2 million in corporate and individual fines.[36] The French Competition Council imposed fines of €2.0 billion from 2001-08 and €631.3 million in 2008 alone.[37] National competition laws have also increasingly authorized incarceration for cartel offenses. The Appendix summarizes the availability of antitrust sanctions in twenty nine countries. In 16 of these countries competition laws authorize prison time for price-fixing, but in fact criminal sanctions are rarely imposed outside the United States and Canada, where fines have been the usual penalty and imprisonment is becoming more

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[34] Florian Wagner-von Papp, Criminal Antitrust Law Enforcement in Germany: 'The whole point is lost if you keep it a secret! Why didn't you tell the world, eh?', forthcoming in Caron Beaton-Wells & Ariel Ezrachi (eds) CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERDISCIPLINARY REGULATORY MOVEMENT (Oxford, Hart Publishing, 2010).
[35] Office of Fair Trading, An Assessment of Discretionary Penalty Regimes (October 2009).
[36] Bundeskartellamt, Our Activities in 2005 and 2006 (July 2007).
[37] Natasha G Assadi-Tardif & Marc Lévy, The European Antitrust Review 2010 (September 2009).

frequent. The overwhelming majority of these penalty regimes provide for both corporate and individual criminal fines, while a few provide for debarment.

D. Are Conventional Penalties Deterring Cartels?

There is no indication that the dramatic increase in corporate fines and the average length of jail sentences has resulted in a significant decline in cartel activity. Corporate fines are unlikely efficiently to deter conduct by individuals because an individual employee will internalize almost none of the fine imposed against his employer. The data confirm this story. While it is impossible to quantify what, if any, effect the increase in criminal antitrust sanctions has had upon the level of cartel activity, the available data on the duration of price-fixing conspiracies, stock price movements in response to cartel-related indictments, and recidivism among companies are all consistent with the view that current penalties underdeter.

The best available estimate of average cartel duration, from a study of 40 recent cases brought either by the U.S. Antitrust Division or the European Commission is six years.[38] While the sample of cartels leading to indictments is biased, there is no a priori reason to believe that the sample selection biases the estimate of average cartel duration

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[38] See Simon J. Evenett et al., International Cartel Enforcement: Lessons from the 1990s, 24 The World Economy 1221, 1226 (2001); Gregory J. Werden & Marilyn J. Simon, Why Price Fixers Should Go to Prison, 32 Antitrust Bulletin 917, 925 (1987); Margaret C. Levenstein & Valerie Y. Suslow, What Determines Cartel Success? 44 J. ECON. LIT. 43, 49-50 (reporting an average duration of five years across several studies, with a range of 3.7 to 10 years). Levenstein and Suslow report no trend in average cartel duration over time. Id. at Table 1.

upward.[39] That these cartels persisted undetected for so long again suggests that, with current sanctions, deterrence is less than optimal.[40]

Stock price movements following price-fixing indictments also suggest inadequate deterrence. Indicted firms initially suffer significant negative stock price reactions. For example, the total loss of stock market capitalization for a sample of firms indicted from 1962 to 1980 is approximately $2.18 billion (in 1982 dollars), of which less than 13 percent can be attributed to fines, private treble damages, and other legal costs.[41] A similar loss of value obtains following indictments of publically traded firms from 1981 to 2000.[42] One reasonable interpretation of this finding is that the residual loss in value is associated with the expectation of a post-indictment return to competitive pricing and the loss of monopoly profits.[43] The finding also suggests a strong incentive for recidivism. Even after accounting for sanctions and legal costs, these studies suggest that cartel activity is profitable.

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[39] One possibility is that indicted cartels are those that have been in operation the longest, increasing the probability of detection, and suggesting that the average cartel duration rate is less than prevailing estimates based on indicted cartels. On the other hand, it is equally plausible that indicted cartels are less skilled or less likely to keep their illegal activities covert, which would suggest a greater average duration.

[40] The European Commission recently updated its guidelines to provide for doubling the fine against recidivists. *See* Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, [2006] OJ C210/2 at ¶ 28.

[41] Jean-Claude Bosch & E. Woodrow Eckard, The Profitability of Price-fixing: Evidence from Stock Market Reaction to Federal Indictments, 73 Rev. Econ. Stat. 309 (1991).

[42] John S. Thompson & David L. Kaserman, After the Fall: Stock Price Movements and the Deterrent Effect of Antitrust Enforcement, 19 Rev. Indus. Org. 329 (2001).

[43] One alternative interpretation is that the announcement of an indictment creates market expectations of lower operational efficiency, perhaps because of the loss of key management personnel, or risk of future illegal activity that could lead to further prosecution and fines.

Indeed, subsequent studies demonstrate that the stock prices of the overwhelming majority of indicted firms return to pre-indictment levels within one year.[44] Again, this result obtains for indictments between 1962-1980 as well as 1981-2000. Given the substantially greater corporate fines imposed in the latter time period, the consistency of the stock price recovery across both periods is suggestive that increased fines did not significantly increase cartel deterrence.[45] Regardless of the interpretation assigned to the initial post-indictment decrease in the stock price, the systematic recovery of pre-indictment stock prices over the short-run suggests current sanctions have no more than a transitory impact on market outcomes and offer little, if any, deterrent value.[46]

Recent recidivism data in Figure 7 are also consistent with the view that current sanctions are not adequately deterring cartel activity. These data are somewhat

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[44] See Thompson & Kaserman, supra note 41 (finding that 85 percent of the firms in the sample involving indictments between 1962 and 1980 had regained 100 percent of their pre-indictment levels within one year); Alla Golub, Joshua Detre & John M. Connor, The Profitability of Price-Fixing: Have Stronger Antitrust Sanctions Deterred? (working paper, April 2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1188515 (finding 87 percent of the firms in a sample involving indictments between 1981-2001 regained 100 percent of their pre-indictment levels within one year). The consistency of the percentages of full recovery of pre-indictment stock prices over the 40-year period spanned by the two studies suggests that the significantly higher corporate and individual fines in the later period likely did not affect recidivism rates.

[45] It is possible that the significant increase in sanctions in both the US and abroad after 2000 would result in greater deterrence or, perhaps, a slower recovery of pre-indictment price levels.

[46] One might, for example, hypothesize that the market overreacts to the initial announcement of the indictment before converging on pre-indictment prices within one year. While this explanation would be consistent with the general pattern of stock price movements of indicted firms, it is not consistent with optimal deterrence. Further, this interpretation requires one to believe that the market not only overreacts to negative information, but overreacts by nearly an order of magnitude, and does not improve its ability to form accurate expectations over a forty year period.

misleading as the same cartels were no doubt sued in multiple jurisdictions and in both civil and criminal cases, but they are still suggestive of a problem with recidivism.

Figure 7

The World's Leading Recidivists	
Company	**Number of Judgments Worldwide 1990-2005**
BASF	26
Total S.A. (TotalFina, Elf, Atofina)	18
F. Hoffman-La Roche	17
Azko Nobel	14
Aventis	14
ENI	14
Shell	14
Degussa (Evonik)	13
Bayer	11
Mitsubishi	10
Mitsui	10

SOURCE: Connor & Helmers, Statistics on Private Int'l Cartels, 1990-2005 (Working Paper, 2008)

Professor Connor has identified seven companies that averaged about one or more judgment annually over the 15-year period 1990-2005. In addition to these exceptionally persistent recidivists, there were 86 companies with three or more judgments worldwide in this period. The Antitrust Division's case filings for the same 15-year period include three cases against Bayer and two each against Hoffman-La Roche, Degussa (now Evonik) Chemical, and Archer Daniels Midland, which again tends to suggest there is a problem with recidivism.[47]

[47] Statistics on the Department of Justice Antitrust Division criminal enforcement filings are available at http://www.justice.gov/atr/cases.html.

Evaluating these data, Connor concludes that, although "[m]onetary sanctions imposed on international cartelists since 1989 have been the highest in antitrust history ... extensive recidivism implies that present cartel sanctions are inadequate to deter cartel formation." He notes that "even under the most optimistic assumptions about discovery, lenience, and prosecution rates, the average conspirator can reasonably expect to make a profit on the typical global price-fixing scheme .... To ensure optimal deterrence of global cartels, total financial sanctions should be four times the expected global cartel profits (the overcharge)."[48] This is consistent with our earlier estimate that perhaps 25 percent of cartels are now detected.

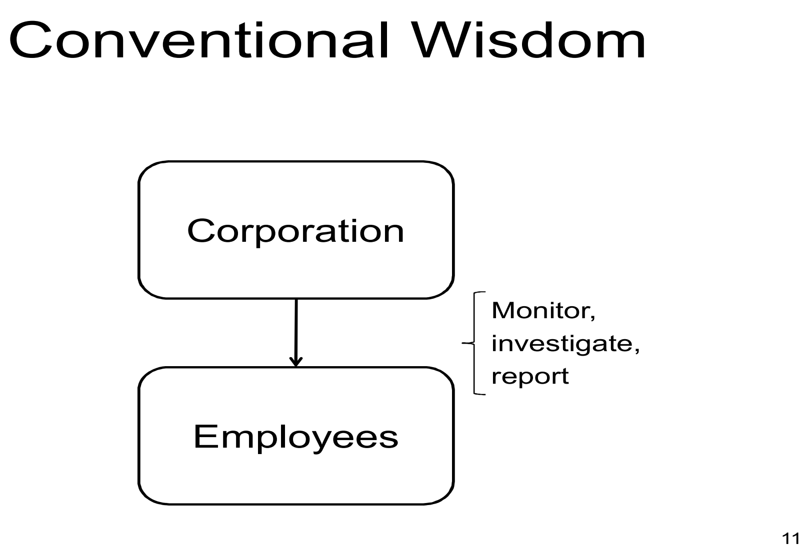
If one accepts that cartels are being under-deterred, then Connor's conclusion amounts to the conventional wisdom about how to solve the problem: Increase corporate fines. In our view, however, the conventional wisdom is in need of re-examination and is almost certainly wrong. Instead of expecting even-larger corporate fines to reduce cartel behavior, an alternative approach that shifts deterrence efforts away from the corporation and toward the perpetrator and other responsible individuals would provide greater deterrence than the current approach in the US and even more so in the EU, where individuals are not held criminally or civilly liable for

[48] Connor & Helmers, supra note 30. These recidivism data are consistent with a study of price-fixing indictments from 1962-1980 finding that 14 percent of the firms in the sample were repeat offenders. Jean-Claude Bosch & E. Woodrow Eckard, The Profitability of Price-Fixing: Evidence from Stock Market Reaction to Federal Indictments, 73 Rev. Econ. Stat. 309 (1991).

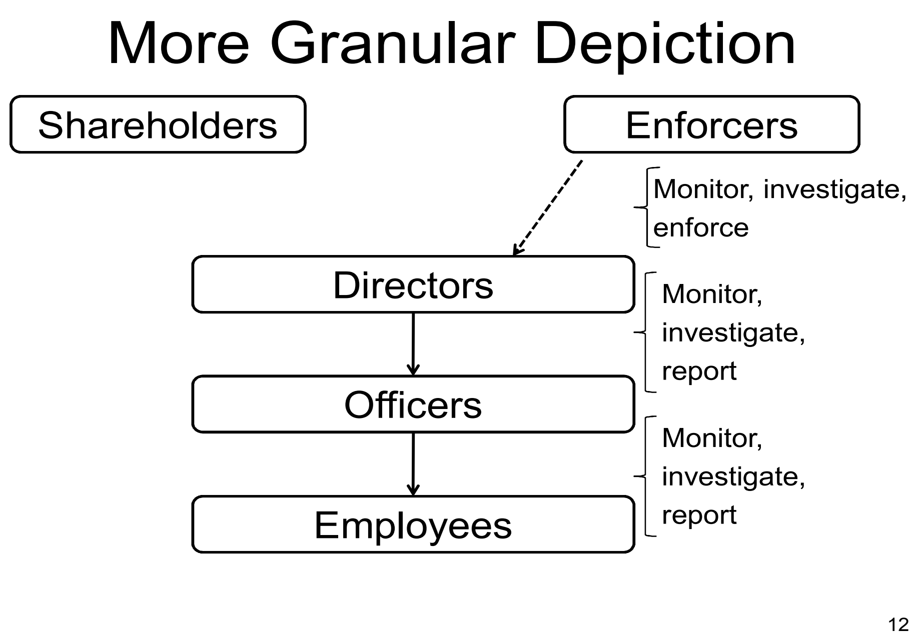
their role in price-fixing activities. As for the United Kingdom, we think it is on a better trajectory than either the US or the EU.

IV. OUR PROPOSAL

The model of the firm reflected in the approach taken by enforcement agencies implicitly views "the corporation" as an entity hovering above and apart from its employees, allowing the corporation to monitor, investigate, and report misdeeds. Therefore, it is no surprise that the conventional wisdom, supplemented by the standard economic approach to penalties, yields a policy that is focused upon the corporation.



A more granular model of a publicly traded corporation, however, brings into clearer focus the incentives and abilities of the individuals who operate within and on behalf of the firm. In this model, the directors oversee the officers, who manage the employees. The shareholders are investors; they have no influence over the day-to-day operations of the firm. Public authorities and perhaps private plaintiffs' lawyers monitor, investigate, and enforce the antitrust laws but, being outside the firm, have less information and exert less direct influence than do the senior managers and the directors.



This model makes it easier to see why a shift from further increasing penalties for corporations in favor of increasing the sanctions levied upon the individuals who engage in price-fixing is likely to be the more cost-effective way to increase the level of deterrence. Shareholders do not have the ability to prevent price fixing by employees of the corporation. Their options are to hold or to sell their shares and they will choose between them based upon whether price fixing is likely to increase the corporation's earnings and hence the market value of their shares.

Corporate officers and directors also reap gains from the corporation's participate in a cartel. They may capture some of the gains in the form of increased compensation and perquisites, and the increased value of shares in the corporation enhances their reputations and career opportunities.

In sum, neither shareholders nor directors and officers have an incentive to prevent price fixing as long as it remains profitable for the corporation. And, as we have seen, even at their present enhanced level, corporate fines seem not to take the profit out of price fixing. The level of corporate fines could, of course, be increased yet again but that makes sense only if it is likely to be the most cost-effective way of achieving an additional quantum of deterrence.

In contrast to both shareholders and directors and officers, an employee will rarely find it personally profitable to engage in fixing prices if he is likely to bear the burden of significant sanctions imposed upon him personally. To be sure, the employee who fixes prices does stand to gain greater compensation (salary, bonus, promotion) but even a modest ex ante probability of being detected and punished as a criminal can offset the incentive to fix prices.

We assume the probability of detection is relatively fixed for the foreseeable future: competition agencies have no shortage of resources for uncovering cartels and they have fine-tuned their leniency programs through experience. Still, the evidence suggests that cartel formation is insufficiently deterred. The question how best to increase deterrence therefore comes down to this: Is increasing corporate fines or increasing individual sanctions more likely to increase deterrence by a given amount at a lower cost?

We think it clear the time has come to increase individual sanctions rather than corporate fines. In reality, it is shareholders, not the abstraction called "the corporation," that bear the economic burden – such as it is -- of corporate sanctions. It was their agents, however, in management and on the board of directors, who violated the law or who may have been in a position to prevent the violation; they should be the focus of the law's efforts to deter price fixing.

Our more granular depiction of the firm also has implications for the role of compliance programs in evaluating optimal criminal antitrust penalties. If a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price fixing, then it makes no sense to fine the corporation, or even to sanction the directors or officers. On the other hand, if the directors or officers were negligent in performing their duty to supervise the employee who actually engaged in the price-fixing, then they should be held accountable along with the perpetrator.[49] Boards of directors of publicly held companies routinely task a committee of board members – most often the audit committee but sometimes a special committee – with responsibility for corporate legal compliance. Such a committee should and ordinarily does insist that management implement an antitrust compliance program.[50] If the board of a corporation that participates in a cartel has failed to do that, or has neglected to monitor management's continued adherence to the program, then it is only sensible to inquire whether the directors were negligent to the point that they,

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[49] *See* Restatement (Second) of Torts § 317. For directors, "no liability exists in the absence of red flags which the exercise of reasonable oversight would uncover. Reasonable oversight entails the creation of reporting systems that provide directors with the information necessary to monitor the corporation and compliance programs that ensure the corporation's adherence to applicable law. The sophistication of any reporting system or compliance program, however, remains a matter of business judgment. ... [O]nce a reporting system or compliance program exists, directors generally bear no liability for losses sustained from any deficiencies absent evidence of gross negligence." Bryan A. McGrane, *The Audit Committee: Director Liability in the Wake of the Sarbanes-Oxley Act and* Tello v. Dean Witter Reynolds, 18 CORNELL J. L. & PUB. POL'Y 575, 586–87 (2009) (citing In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970–71 (Del. Ch. 1996). In the UK, the Company Directors Disqualification Act permits disqualification for a director if: (1) "his conduct contributed to the breach of competition law"; (2) "his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it"; or "he did not know but ought to have known that the conduct of the undertaking constituted the breach." *See* Company Directors Disqualification Act of 1986 F21 9A (6).

[50] William Kolasky, when he was Deputy Assistant Attorney General at the Antitrust Division, said in 2002 that one of the most startling characteristics of cartels "is that they typically involve the most senior executives at the firms involved — executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs." *Speech Before the Corporate Compliance Conference*, Practising Law Institute, San Francisco, CA (July 12, 2002). Kolasky provided a very troubling anecdote about a then-recent DOJ investigation: "When a top executive at [a] firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, [the firm's general counsel accompanied him to the meeting as part of the firm's extensive compliance program.] The general counsel must have taken some comfort when [the two executives greeted one another as if they had never met before.] ... Imagine how that general counsel must have felt when he learned, during the course of the [DOJ] investigation, that the introduction ... had been completely staged for his benefit.... In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years." *Id.* The conspirators even used code names to refer to their general counsels!

too, should be sanctioned in some way proportionate to their role in the corporation's violation.[51]

In theory at least, the means by which shareholders constrain management is through oversight by their representatives on the board of directors. Indeed just last year the Idaho Supreme Court entertained a shareholder suit against the board of directors of Micron Technology on the theory that the board had failed to constrain known price fixing by the company's managers.[52] It is notoriously difficult for a derivative suit to succeed, however, and shareholders are typically unable to exert control over their board through the annual election of directors. In short, shareholders simply cannot prevent or deter a corporate executive from price-fixing but the law, properly targeted, could do so.

With this more granular model of the firm as our foundation, we turn to our proposal for the design of optimal antitrust penalties. Three groups are implicated: the perpetrator, the directors and officers responsible for overseeing operations and implementing an antitrust compliance program, and the corporation (as a stand-in for the shareholders).

Clearly, the actual perpetrator should face the traditional criminal sanctions -- jail and fines, to which we would add debarment. There is ample evidence that jail

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[51] *See In re Federal National Mortg. Ass'n Securities*, 503 F. Supp. 2d 25, 37 (D.D.C. 2007)(audit committee liable in private litigation only for extreme recklessness).

[52] Orrock v. Appleton, 213 P.3d 398 (Idaho 2009) (holding shareholder insufficiently pled case involving manipulation of prices for computer memory).

sentences significantly deter individuals in general and business executives in particular.[53] The deterrent value of a prison sentence is supplemented by any decrease in income or employment opportunities incurred by an individual who has been convicted of price fixing.[54] Adding debarment to the mix of potential penalties increases both the likelihood and the magnitude of the reputational sanction, and imposes a direct opportunity cost on the perpetrator. Alternatively, debarment reduces the required length of incarceration as well as the individual fine necessary to achieve any given level of deterrence. Both debarment and incarceration protect the public from recidivism by a particular individual. But because incarceration involves significant social costs,[55] debarment as a complement to incarceration is more likely to achieve the desired level of individual deterrence at a lower social cost than would additional jail time.

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[53] Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT (November 2007) (finding the business executives and their lawyers report criminal penalties as the strongest motivating force for antitrust compliance). More anecdotal evidence also supports the view that jail sentences are a strong deterrent. See Smith, supra note 33, at 15 ("every antitrust compliance presentation I have seen or delivered begins with the threat of jail for individual executives. It then speaks of 'large' fines and, lastly dwells on the -- certain -- avalanche of treble-damages and joint and several liability for the sales of all the co-cartelers").

[54] This effect, which "appears to be based on stigma," is particularly large for "those whose pre-conviction jobs apparently involve trust." Joel Waldfogel, The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen," 29 J. HUMAN RESOURCES 62, 75 (1994). See also Kent R. Kerley & Heith Copes, The Effects of Criminal Justice Contract on Employment Stability for White-Collar and Street Level Offenders, 48 Int'l J. Offender Therapy & Comparative Criminology 65 (2004); John R. Lott, Jr., The Effect of Conviction on the Legitimate Income of Criminals, 34 Econ. Letters 381 (1990).

[55] Operating costs for federal prisoners are about $62 per inmate per day, or $22,630 per inmate year. James J. Stephan, *State Prison Expenditures, 2001*, U.S. Dep't of Justice Bureau of Justice Statistics Special Report (NCJ 202949).

Directors and officers[56] responsible for overseeing operations and implementing antitrust compliance programs[57] should also be held accountable for their performance, whether civilly or criminally depending on the nature of their acts or omissions. Of course, those who discharge their responsibility appropriately should not be sanctioned at all. Those who perform these tasks negligently, however, should be fined and debarred from serving as directors of officers for a period of years.[58] Similarly, those who are complicit in a price-fixing scheme without rising to the level of a perpetrator – such as an aider or abettor -- should also be both debarred and fined.[59]

The corporation should be responsible for damages, multiplied by a scaling factor equal to the inverse of the rate of detection. If the government brings the first successful suit, then the multiple damages should establish a pool from which any

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[56] Cases concerning the UK's Company Directors Disqualification Act of 1986 have extended the Act's scope to include one who "has assumed the status and function of a company director," or a "de jure director." *See Holland v. Commissioners for Her Majesty's Revenue and Customs*, [2009] EWCA Civ. 625.
[57] *See* United States Sentencing Guidelines § 8B2.1 (describing effective compliance programs). *But see* Raymond Banoun & Margaret Ryznar, *Federal Sentencing Commission Modifies Sentencing Guidelines Pertaining to Organizations*, http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/04/guest-bloggers---raymond-banoun-margaret-ryznar--earlier-this-month-the-united-states-sentencing-commission-voted-to-chang.html (explaining proposed changes to sentencing guidelines that restrict the ability to get credit for a compliance program).
[58] Fanean v. Rite Aid Corp. of Delaware, Inc., 984 A.2d 812, 825–26 (Del. 2009) ("An employer is liable for negligent hiring or supervision where the employer is negligent ... in the employment of improper persons involving the risk of harm to others or in the supervision of the employee's activities") (quoting Simms v. Christina School District, 2004 WL 344015 (Del. Super. Jan. 30, 2004)). *But see Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) ("Generally where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation, . . . only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability." (quoting In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 971 (Del.Ch.1996))).
[59] 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). See Law Commission, Inchoate Liability for Assisting and Encouraging Crime (2006).

follow-on claimants may draw single damages. Single damages are sufficient for follow-on claimants, who do not need multiple damages in order to detect illegal conduct and litigate. Subjecting the corporation to fines payable to the government in addition to damages payable to private claimants in effect increases the multiplier, which is unnecessary; establishing the pool of multiple damages provides the optimal level of deterrence and incentives. Private litigants should be able to draw from this pool because the government has no real interest in the fines other than as a deterrent. On the other hand, if an entrepreneurial private litigant brings the first successful action, then it should recover the multiple damages. In such a case, the award of multiple damages provides an incentive for the private actor to detect and litigate. The government need not collect a fine in addition to the award of multiple damages because its interest in deterrence has been vindicated. Because of debarment, jail, and leniency programs, we anticipate the rate of undetected violations will decline over time and so, therefore, will the correct multiplier.

A central premise of our proposal is that shifting incremental cartel sanctions away from corporations and toward the individuals who engage in price-fixing or are responsible for monitoring antitrust compliance will enhance deterrence. Generally, debarment complements traditional antitrust sanctions aimed at the individual, such as fines and jail, as well as any market-driven reputational penalty. More specifically, debarment offers a number of unique advantages as an antitrust sanction.

The first advantage is that debarment enhances the likelihood and magnitude of any reputational sanction imposed by the market. Increasing reputational penalties would not only enhance deterrence but would also reduce the required level of fines and jail time necessary to achieve any given level of deterrence. That is, when coupled with debarment, a lower individual fine and a shorter period of incarceration would be required. To the extent an individual is wealth constrained and therefore unable to pay a large fine, debarment would further improve the efficiency of deterrence.

A second advantage is that, like jail, debarment imposes a direct and substantial opportunity cost on individuals engaged in price-fixing. Indeed, an Office of Fair Trading report presents survey evidence indicating that in the United Kingdom, after criminal penalties, disqualification from serving as a corporate officer or director is the sanction most likely to motivate compliance.[60] Debarment enhances the reputational penalty imposed on the responsible individual, at a lower social cost because top executives need not be incarcerated for as long to achieve the desired level of deterrence.[61]

V. DEBARMENT IN OTHER SETTINGS

While the United States has relied on a mix of corporate fines and individual penalties including both fines and incarceration, neither the US nor the EU has used

[60] Office of Fair Trading, The deterrent effect of competition enforcement by the OFT (November 2007).
[61] We think it unlikely that the reputational effect of a jail sentence continues to increase when the sentence exceeds one year.

debarment; indeed, EU competition law does not allow for sanctions against individuals. Several countries, however, either do or will in the near future debar antitrust violators. For example, the Competition Commission in South Africa is seeking the authority to apply for a court order barring a person convicted of price-fixing from serving as a corporate director. Similarly, under the 2009 Amendments to the Australian Trade Practices Act, an individual who violated either the competition laws (the Trade Practices Act) or the securities laws (the Corporations Act) may be disqualified from managing a corporation. In Sweden, a law effective since November 1, 2008 provides for a disqualification order (or "trading prohibition") that bars an individual who has participated in a cartel from managing any business for a specified period.[62]

The United Kingdom is the only jurisdiction that has any experience with debarment as a remedy for an antitrust violation,[63] and that is limited to one case thus far.[64] Under the Company Directors Disqualification Act of 1986, a regulator may apply for a court order disqualifying a company director from acting as a director or participating in the management of any UK company for up to 15 years. The OFT

[62] Under the new law, the Swedish Competition Authority is granted the authority to petition the Stockholm City Court to grant a trading prohibition. Swedish Competition Act (Ch. 3, Article 24).

[63] Apart from the experience of the United States in relation with debarring corporations, not individuals, from bidding for federal government contracts. Several countries authorize debarment as an antitrust sanction, see Appendix, but we are not aware of any other case in which it was used.

[64] However, the United Kingdom's Office of Fair Trading recently issued a report considering expanded use of debarment in the form of competition disqualification orders. See Office of Fair Trading, Competition Disqualification Orders: Proposed Changes to the OFT's Guidance (August 2009).

acquired this authority in 2002 when the U.K. made participation in a cartel a criminal offense.

The Act applies to a person if "[a] company of which he is a director commits a breach of competition law," which means participates in a cartel; and "[h]is conduct as a director makes him unfit to be concerned in the management of a company"; which means that his conduct "contributed to the breach of competition law" or "he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it."[65]

Such an order provides the individual "shall not be a director of a company, ... or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation, or management of a company." Since 1986 the Act has been applied frequently in contexts other than antitrust, with dozens of disqualification orders issued in 2009 alone,[66] so there is a substantial body of precedent informing terms that are facially unclear, such as what it means indirectly to "take part in the … management of a company."[67] Thus far, the single example involving debarment of an antitrust violator is the *Marine Hose* case, which is also the only criminal competition case to go to judgment in the United Kingdom. The court sentenced three individuals to jail terms of two to three years for their participation in a cartel. In addition, upon the petition of

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[65] Company Directors Disqualification Act of 1986.
[66] See, e.g., Secretary of State for Business, Enterprise & Regulatory Reform v. Sainsbury, [2009] EWHC 3456 (Ch.).
[67] Company Directors Disqualification Act 1986, c. 46, § 1(1)(a).

the OFT, the court entered disqualification orders of from five to seven years against each of the three defendants.

One need not look only to the United Kingdom, however, for experience with debarment as a legal sanction. At least since the early 1980s, the U.S. Securities and Exchange Commission has routinely negotiated consent decrees barring a person accused of violating the securities laws from serving as an officer or director of a public company for a stated period of years. The SEC has had express statutory authority to seek such an order only since 1990, however.[68] Similarly, the FTC has regularly negotiated consent decrees amounting to debarment orders against individuals and businesses accused of violating state and federal consumer protection laws.[69]

The U.S. Department of Justice should consider taking a similar approach to sentencing individuals convicted of a criminal violation of § 1 of the Sherman Act. We are aware of no reason the Department needs to wait for statutory authority to get

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[68] That was when the Congress directed the courts to issue an order of suspension or debarment only upon finding the defendant in a securities case — regardless whether he consented to debarment — committed a violation "demonstrating unfitness to serve" as an officer or director of a publicly held corporation. *See* 15 U.S.C. § 77t(e); *id.* § 78u(d)(2).

[69] *See, e.g.*, Plaintiffs' Motion to Enter Revised Permanent Injunction and Final Order as to Defendant Tarzenea Dixon, *FTC v. Your Money Access, LLC.*, No. 2:07-CV-05147-ER. (E.D. Pa. Dec. 22, 2009), 2009 WL 5177847 (permanently enjoining a defendant individual from payment processing, including ACH debits and credit card transactions); Consent Decree, No. 02-5115 (C.D. Cal. (July 8, 2002), *available at* http://www.ftc.gov/os/2002/07/dcsconsent.pdf (permanently enjoining from debt collection and assisting in debt collection activities); Stipulated Judgment & Order for Permanent Injunction, No. 02-cv-01256 (D. Ariz. (Feb. 6, 2003) (enjoined from telemarketing and assisting or facilitating telemarketing); Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, FTC v. Universal Greeting Card Corp., No. 02-21753 (S.D. Fla. Dec. 17, 2002), *available at* http://www.ftc.gov/os/2003/01/ugccstipruffeino.pdf (permanently enjoining defendant individuals from "receiving any remuneration in any kind whatsoever from . . . any person engaged in the advertising, marketing, promoting, offering for sale, or sale of any business venture").

started with debarment in a negotiated consent order.[70] Prosecutors might, for example, if the conditions for leniency are met, agree to allow individual defendants to reduce or avoid jail time, in return for debarring them from working for any publicly traded corporation or for and company in a particular industry if it is either located in or sells into the United States.[71]

Debarment would allow the Antitrust Division to accrue much of the benefit of a prison sentence — keeping the perpetrator "off the street" — without exposing it to the risk and cost of a criminal trial. The period of debarment should be long enough to have the same deterrent effect as jail. Further, as we have pointed out, debarment would bolster currently weak reputational penalties, thereby reducing the need for individual fines, which are less likely to deter efficiently because of individuals' wealth constraints.

Without debarment, moreover, a criminal charge is not a threat against anyone but the usually single executive at each company who does the price fixing. Debarment, at least if it had a statutory foundation, would be a threat to directors and officers who may not now be reached personally at all — the negligent directors or

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[70] Further, debarment is not unconstitutional. The United States Supreme Court has heard challenges to the constitutionality of debarment as a remedy for bad acts, based upon the due process, ex post facto, bill of attainder, and double jeopardy clauses, and rejected them all. See De Veau v. Braisted, 363 U.S. 144, 157-60 (1960) (rejecting such challenges based on due process, ex post facto, and bill of attainder clauses); Hudson v. United States, 522 U.S. 93, 105 (1997) (rejecting challenges to debarment based on double jeopardy).

[71] With additional statutory authority, however, the DOJ could also seek debarment of individuals whose conduct may not meet the threshold requirements for a criminal charge.

officers who should have prevented or uncovered the price fixing but had little if any personal incentive to do so. Because of its potential to reach beyond the sole price-fixing executive, debarment is likely the most effective deterrent an antitrust enforcement agency could have — and certainly makes more sense and is more likely effective than is a fine against "the corporation."

VI. CONCLUSIONS

The press releases of the competition agencies worldwide notwithstanding, we think it is questionable, indeed doubtful, whether a $100 million fine — or even a fine of over €1.3 billion, such as the EC levied against car glass manufacturers[72] — when imposed upon a corporation because one of its executives fixed prices, serves the primary goal of an antitrust sanction -- to deter anticompetitive conduct that injures consumers.

When fines are levied against a publicly traded corporation, the ones burdened are consumers and shareholders, who almost certainly are unable to affect the conduct of the corporation. It is a corporate executive who conspired to fix prices or allocate the market. It is his superiors in management or on the board of directors who failed to ensure the company operated lawfully. These are the individuals we want to deter and detect. That will not happen as long as the shareholders bear the brunt of antitrust

[72] See Sigyn Monke et al, *Commission Imposes the Highest-Ever Cartel Fine (More than EUR 1.3 Billion) on Four Car Glass Manufacturers*, COMP. POL'Y NEWSLETTER (No. 1 2009) at 59, available at http://ec.europa.eu/competition/publications/cpn/2009_1_15.pdf.

penalties while the directors and officers of the company have too little incentive to prevent violations.