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**LATIN AMERICAN COMPETITION FORUM**

**Session I: Criteria for Setting Fines for Competition Law Infringements**

**Contribution from the United States Department of Justice**

**3-4 September 2013, Lima, Peru**

*The attached document from the United States Department of Justice is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 3-4 September 2013 in Peru.*

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English - Or. English



## LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

### Session I: Criteria for Setting Fines for Competition Law Infringements

#### CONTRIBUTION FROM THE US DEPARTMENT OF JUSTICE

#### CRITERIA FOR SETTING FINES FOR CRIMINAL CARTEL CASES

1. This paper addresses fines in federal criminal antitrust cases. In the United States, federal district courts impose fines in federal criminal antitrust cases based upon the recommendation of the Antitrust Division of the U.S. Department of Justice (“Division”), the defendant and the district court’s Probation Office. Federal statutes set the maximum fines and the United States Sentencing Guidelines<sup>1</sup> provide an advisory fine range. The court determines the amount of the fine imposed.

#### 1. Statutory Provisions

2. Under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1,<sup>2</sup> companies can be fined a maximum of \$100 million, and individuals may be fined a maximum of \$1 million and may be imprisoned a maximum of ten years. An alternative fine statute, 18 U.S.C. § 3571, provides that corporate and individual defendants can be fined the greatest of: (1) the amount in the law setting forth the offense (in the case of antitrust offenses \$100 million for companies and \$1 million for individuals); (2) twice the gross gain from the offense; or (3) twice the gross loss to victims of the offense. In many of its most significant prosecutions, the Division seeks and obtains fines greater than the Sherman Antitrust Act maximum based on the alternative fine statute. For example, in the international vitamins cartel, the Division in 1999 obtained a record corporate fine of \$500 million. The \$500 million fine was at the time the highest fine ever imposed in any U.S. Department of Justice case, not just in any Antitrust Division case. In September

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<sup>1</sup> Available at [http://www.usdoj.gov/Guidelines/2012\\_Guidelines/index.cfm](http://www.usdoj.gov/Guidelines/2012_Guidelines/index.cfm).

<sup>2</sup> Examples of hard-core violations of 15 U.S.C. § 1 that the Division prosecutes criminally include agreements to fix prices, rig bids, restrict capacity, and allocate markets, customers, or sales or production volumes. Note that U.S. federal courts have the power to enforce their orders in civil and criminal cases, including through the imposition of fines.

2012, a judge imposed after trial a \$500 million fine on AU Optronics Corporation for its role in the liquid crystal display cartel.<sup>3</sup>

## 2. Role of Incarceration

3. With respect to the prosecution of individuals, the Division seeks fines but focuses especially on individual accountability via imprisonment. Corporations commit cartel offenses through their employees, and individual offenders must be held accountable in ways that are not reimbursable directly or indirectly by their employers. Jail is the most effective deterrent and punishment for individuals. It is a cost that a defendant's employer cannot reimburse.

## 3. U.S. Sentencing Guidelines Provisions

4. The U.S. Sentencing Guidelines ("Guidelines") play a significant role in sentencing calculations. The Guidelines apply to almost all federal criminal offenses, not just antitrust offenses.

5. From 1987 until January 2005, the Guidelines established mandatory fine and jail ranges within which judges had to impose sentences, subject to statutory minimum and maximum penalties. The Guidelines factors that determined the ranges were found by the sentencing judge post-trial or after a guilty plea had been entered. Prior to the enactment of the Guidelines in 1987, sentences in federal cases were left largely to the discretion of the sentencing judge, subject to statutory minimum and maximum sentences. For both individual and corporate antitrust defendants, the Guidelines standardized sentencing, based largely on the defendant's volume of affected commerce, its role in the offense, any obstruction of justice committed by the defendant, cooperation by the defendant in the Division's investigations and prosecutions, and the defendant's acceptance of responsibility. For corporate antitrust defendants, the size of the organization, the involvement of high-level personnel in the offense, and any prior criminal history also play a role in the calculation of the defendant's Guidelines range.

6. In January 2005, the U.S. Supreme Court issued a decision holding that the Guidelines were to be applied in an advisory rather than a mandatory manner. The Supreme Court held that the Sixth Amendment right to a jury trial contained in the U.S. Constitution "is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact . . . that was not found by the jury or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 245 (2005). The Court held that the remedy for that violation was not a requirement that juries determine Guidelines factors, but that the Sentencing Guidelines should be applied in an advisory rather than a mandatory manner. Thus, courts are now required to consider Guidelines ranges, along with other general sentencing factors contained in 18 U.S.C. § 3553(a), in determining and imposing sentence.<sup>4</sup>

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<sup>3</sup> In addition to the criminal fines described above, the HSR Act of 1976, 15 U.S.C. § 18a, imposes notification and waiting period requirements on individuals and companies over a certain size before they consummate acquisitions resulting in holding stock or assets above a certain value. Federal courts can assess civil penalties for pre-merger notification violations under the HSR Act in lawsuits brought by the Division; the maximum civil penalty is \$16,000 a day.

<sup>4</sup> See Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, Department Policy on Charging and Sentencing (May 19, 2010), at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> ("In the typical case, the appropriate balance among [sentencing] purposes will continue to be reflected by the applicable guidelines range, and prosecutors should generally continue to advocate for a sentence within that range."); see also Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Antitrust Sentencing in the Post-Booker Era: Risks Remain High For Non-Cooperating Defendants, Speech before the American Bar Association Section of Antitrust Law Spring Meeting (March

### **3.1 Guidelines provisions for individual defendants**

7. Section 2R1.1 of the Guidelines (attached as an annex) applies to bid-rigging, price-fixing or market-allocation agreements. The 2R Guideline provides an individual will be fined one to five percent of his employer's volume of commerce, but not less than \$20,000. The 2R Guideline also provides a methodology for calculation of an offense level, which is used to calculate an imprisonment range for individuals. The offense level is based largely on the volume of commerce. In addition, there are other Guidelines sections that affect the imprisonment sentencing range for an individual, such as section 3B1.1 (increase for aggravating role in the offense); 3B1.2 (decrease for mitigating role in the offense); 3C1.1 (increase for obstruction of justice); chapter 3, part D—sections 3D1.1 through 3D1.5—(adjustments for multiple counts); 3E1.1 (decrease for acceptance of responsibility); 5K1.1 (decrease for substantial assistance to authorities); and 5C1.1 (explains when imprisonment is required as opposed to community service or probation).

### **3.2 Guidelines provisions for corporate defendants**

8. The Guidelines provisions for the determination of corporate fines are set forth in Guideline 2R and Chapter 8. The process begins with determining the base fine, which in antitrust cases is 20 percent of the defendant's volume of commerce (*see* Guidelines 2R1.1(d)(1) and 8C2.4(a)-(b)). Then, under Chapter 8, the corporate fine is determined by 1) calculating a culpability score for the corporation based on the number of employees, involvement of high-level officials, prior history of violations, any obstruction of justice, cooperation and acceptance of responsibility, etc. (*see* Guideline 8C2.5); 2) using the culpability score to determine minimum and maximum multipliers (*see* Guideline 8C2.6); and 3) multiplying the minimum and maximum multipliers by the base fine to determine the fine sentencing range (*see* Guideline 8C2.7).

9. Note that in lieu of determining loss caused by the cartel conduct, the Guidelines instead use a figure of 20% of the volume of affected commerce as the base figure for computing fines. The volume of commerce includes affected sales during the duration of the conspiratorial conduct. In addition, because "the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases," the Guidelines specify an upward adjustment to the fine level for those cases.

### **3.3 Interaction of Guidelines ranges and statutory maximums**

10. The Guidelines sentencing ranges interact with the statutory or alternative maximum sentences in the sense that the ranges are limited or capped by the statutory maximum sentences. For example, if a Guidelines range for an individual antitrust defendant is \$500,000 to \$2.5 million, that range is limited by the Sherman Act individual statutory maximum of \$1 million and the Guidelines range would become \$500,000 to \$1 million. If, however, twice the gain or loss from the offense was in excess of \$1 million, for example if twice the gain or loss was \$2 million, then the Guidelines range would be \$500,000 to \$2 million.

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30, 2005), <http://www.justice.gov/atr/public/speeches/208354.pdf>. 18 U.S.C. § 3553(a) sentencing factors include: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed— (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training . . . or other correctional treatment in the most effective manner; (3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (4) the need to provide restitution to any victims of the offense.

#### **4. Role of Leniency and Settlements**

11. The Division's Corporate Leniency Program<sup>5</sup> offers the promise of full immunity -- no criminal conviction, no criminal fine, and no jail time for a cooperating company and its employees -- only to the first company to report a criminal antitrust violation and to meet the other conditions of the Program. A company and its culpable executives that lose the race for full immunity under the Division's Leniency Program may face substantial penalties, including corporations paying stiff fines and culpable executives going to jail for up to ten years as well as paying a fine. However, in the U.S., corporate and individual cartel participants that lose the race for leniency may still obtain lesser sentencing recommendations by pleading guilty to criminal charges, entering into plea agreements with the Division, and cooperating with the Division's investigation.

#### **5. Ability to Pay Issues**

12. The Guidelines for corporate fines contain provisions that take into account a defendant's financial condition. Under the Guidelines, if the imposition of a Guidelines fine would substantially jeopardize the viability of a company, then it must be reduced. When the Division determines an appropriate fine for a company, it typically looks at what a company can pay immediately. If it cannot pay the appropriate fine immediately, then it considers an installment schedule with interest. If it determines that the company cannot pay the determined fine over time, then it considers whether the company could make the installment payments without interest. If the company is still not capable of paying the fine over the installment period, even without interest, then the Division may recommend a reduced fine to the court. A company claiming an inability to pay must open its financial books to the Division, which has its own financial experts review the company's financial records.

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<sup>5</sup> See <http://www.justice.gov/atr/public/criminal/leniency.html>.

## ANNEX. SECTION 2R1.1 OF THE UNITED STATES SENTENCING GUIDELINES

§2R1.1

GUIDELINES MANUAL

November 1, 2012

## PART R - ANTITRUST OFFENSES

**§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors**

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics
- (1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.
  - (2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

<u>Volume of Commerce</u> (Apply the Greatest)	<u>Adjustment to Offense Level</u>
(A) More than \$1,000,000	add <b>2</b>
(B) More than \$10,000,000	add <b>4</b>
(C) More than \$40,000,000	add <b>6</b>
(D) More than \$100,000,000	add <b>8</b>
(E) More than \$250,000,000	add <b>10</b>
(F) More than \$500,000,000	add <b>12</b>
(G) More than \$1,000,000,000	add <b>14</b>
(H) More than \$1,500,000,000	add <b>16</b> .

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

- (c) Special Instruction for Fines
- (1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than \$20,000.
- (d) Special Instructions for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.
  - (2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.
  - (3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods

or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1, 3(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Chapter Three (Adjustments).—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.
2. Considerations in Setting Fine for Individuals.—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.
3. The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. 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). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.
4. Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.
5. It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.
6. Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an

*unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.*

7. *In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

Background: *These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.*

*The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect.*

*Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.*

*Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well.*

*The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging.*

*Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than \$20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the*

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GUIDELINES MANUAL

**§2R1.1**

*Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.*

*The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 211 and 303); November 1, 1991 (see Appendix C, amendments 377 and 422); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 674); November 1, 2005 (see Appendix C, amendment 678).