

Criminal Remedies Discussion Outline

Note: Italicized text is based on the questions on which the Commission requested comment from the public.

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

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

- No change to the Sentencing Guidelines is needed with respect to distinguishing between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the Department of Justice (“DOJ”) limits criminal enforcement to hard-core cartel activity as a matter of both historic and current enforcement policy.
- No change to the Sentencing Guidelines is needed with respect to distinguishing between different types of antitrust crimes for the reason stated above, but the AMC should endorse and recommend continued discretionary limitation of criminal prosecution by DOJ to hard-core cartel activity.
- Recommend amending the Sentencing Guidelines to add a statement clarifying that the Guidelines apply only to hard-core cartel activity.
- Recommend amending the Sentencing Guidelines to add an upward adjustment in the culpability score for organizations that take a leadership role in a cartel.

B. *The Sentencing Guidelines use 20% of the volume of commerce affected as the basic method of distinguishing the severity of antitrust violations. See United States Sentencing Commission, Guidelines Manual § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for distinguishing the severity of offenses? If not, what other measure(s) would provide a more appropriate method for the Guidelines to distinguish the severity of violations?*

- Recommend that the 20 percent proxy (or presumption) and volume of commerce measure provide a reasonable basis for reflecting the severity of antitrust violations, and no change to the Sentencing Guidelines is needed.
- Recommend that the 20 percent proxy should be eliminated from the Sentencing Guidelines, and the government should be required to prove the actual amount of pecuniary loss in setting the base fine.
- Recommend that the Sentencing Guidelines should be amended to make explicit that the 20 percent proxy may be rebutted by proof that the overcharge was lower or higher.
- Recommend that the 20 percent proxy should be reduced.
- Recommend that the 20 percent proxy should be increased.
- Recommend that the Sentencing Commission should reevaluate and explain the rationale for the 20 percent proxy, including both the assumption of an average overcharge of ten percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.

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

A. *Should “twice the gross gain or twice the gross loss” as provided in Section 3571(d) be calculated based on the gain or loss from all co-conspirator sales or on only the defendant’s sales?*

- Recommend no change to the statute; the interpretive question should be left to the courts.
- Recommend amending Section 3571(d) to provide that it applies to loss caused by an entire antitrust conspiracy.
- Recommend amending Section 3571(d) to provide that it applies to loss caused by the particular antitrust defendant.

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

- Recommend no change to the statute or Sentencing Guidelines; the interpretive question should be left to the courts.
- Recommend amending the Guidelines to require use of actual gain or loss, if proven under Section 3571(d), for calculation of the Guidelines fine range.