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The American
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COMMENTS OF THE AAI WORKING GROUP ON CRIMINAL REMEDIES

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INTRODUCTION

These are the comments of a Working Group on Criminal Remedies established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by John M. Connor (Purdue University) and the other members are Kenneth Adams (Dickstein, Shapiro), Albert A. Foer (AAI), and Robert H. Lande (University of Baltimore).

We are aware that the Sentencing Guidelines are, since *Booker*[1], merely advisory for the federal judiciary, but we understand that many judges have continued to give them considerable deference.[2] In 2005 in *U.S. v. Wilson*[3] the District Court of Utah noted that reliance on the Sentencing Guidelines "…is the only way to avoid unwarranted sentencing disparity." Moreover, the Antitrust Division of the U.S. Department (DOJ) has post-*Booker* continued to employ the

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[1] See *United States v. Booker*, 125 S. Ct. 738 (2005).

[2] Besides the voluntary U.S. sentencing guidelines, courts are required to follow about nine sentencing factors in 18 U.S.C. § 3553(a) (mandating attention to the seriousness of the crime, deterrence, restitution to the victims, protection from recidivism, unwarranted sentencing disparity, and other factors).

[3] 255 F. Supp. 2d 1269, 1271 (D. Utah 2005).

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Guidelines in all phases of cartel prosecutions.[4] It is possible that the AMC may wish to prepare recommendations should Congress decide to reinstate sentencing guidelines in a constitutionally acceptable manner.

1. DIFFERENTIATION IN CULPABILITY OF ANTITRUST VIOLATIONS

A. *Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability?*

Yes, but some fine-tuning is justified. Reliable empirical studies of the relationship of culpability factors to the degrees of antitrust injuries should be regularly consulted to adjust the culpability factors. Reconsideration of the number of culpability factors and the number of points is consistent with the goals of antitrust remedies. As former FTC Chairman Robert Pitofsky states:

> "The antitrust remedies system must continue to promote the principal goals of antitrust: to deter anticompetitive conduct, adjusting for the fact that much illegal conduct is not detected, and to recover illegal gains from the violators and restore them to the victims."[5]

In this Comment we focus on the deterrence objective of antitrust.

In the present guidelines for organizations issued by the United States Sentencing Commission (USSC), bid-rigging conspiracies are deemed to be an aggravating factor in sentencing of price-fixing violations. However, new

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[4] See Scott D. Hammond, Antitrust Sentencing in the Post-*Booker* Era: Risks remain High for Non-Cooperating Defendants, Address before the American Bar Association Section of Antitrust Law, Washington, DC (March 30, 2005).

[5] Robert Pitofsky, Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies, 91 GEORGETOWN L.J. 169, 170 (2002).

research findings that examined a large number of overcharges achieved by private cartels fail to support the Guidelines' assumption that bid-rigging conspiracies are more injurious than regular price-fixing schemes.[6] If anything, the opposite was true. The Guidelines also assume that "the average level of mark-up due to price fixing may tend to decline with the volume of commerce."[7] This same research failed to confirm that cartels with large affected commerce were less effective at raising prices than smaller cartels.[8] Therefore, bid-rigging and small economic size of a cartel would appear to be poor candidates for aggravating factors. [9]

The current Guidelines for price-fixing violations omit some potentially relevant aggravating factors. For example, the role of an organization within a cartel is not mentioned. It would seem reasonable to impose greater punishment on a company with a leadership role, either by initiating a collusive agreement or by punishing cartel deviants. These are aggravating factors in the European Commissions' notice on cartel fining guidelines.[10]

Similarly, the principal mitigating factor mentioned in the U.S. Guidelines is the degree of cooperation offered by a defendant. This factor has to some extent been superseded by the DOJ's Corporate Leniency and Leniency-Plus

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[6] John M. Connor and Robert H. Lande, How High Do Cartels Raise Prices? TULANE L. R. (forthcoming 2006). An earlier version is available as John M. Connor and Robert H. Lande, "How High Do Cartels Raise Prices? Implications for Reform of Sentencing Guidelines," Working Paper 04-01, American Antitrust Institute (August 2004). [http://www.antitrustinstitute.org/]

[7] 15 U.S.C. Section 1, Application note 4.

[8] Id.

[9] Technically, small cartel size is in a section that that appears to recommend that large cartels receive fines at the lower end of the fine range. This advice seems to run contrary to the aggravating factor (up to 5 culpability points) of involvement of high officers in large companies (more than 10, 50, 200, 2000, or 5000 employees).

programs. Moreover, it is now DOJ policy to reward second and third cooperators with substantial "downward departures" from the Guidelines' fine ranges.[11] These may or may not be wise policies. However, policies based on an organization's position in line for leniency are not explicitly sanctioned by the Guidelines, nor have the recommended degrees of downward departure been studied to our knowledge.

The USSG Guidelines are at present directed only at criminal violations of the antitrust laws. In practice, the Antitrust Division of the U.S. Department of Justice (DOJ) prosecutes only naked conspiracies as criminal matters. Somewhat more than 90% of all price-fixing violations pursued by the DOJ are brought as criminal suits. Some putatively naked conspiracies are filed as civil suits because prosecutors judge that the evidence available might not meet the standard of proof for a criminal conviction. Other alleged Section 1 Sherman Act violations and virtually all Section 2 cases have historically been brought as civil matters, which are not addressed by the Guidelines. This Working Group is of the opinion that there is little reason to depart from DOJ practice and to try Section 2 cases as criminal matters.

Periodic reassessment of the culpability factors in the USSC Guidelines is a painstaking task that may require a more multidisciplinary approach by the USSC's staff. The USSC may need additional resources to get the job done well.

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[10] See Wils, Wouter P.J. The Commission's New Method for Calculating Fines in Antitrust Cases. 23 EUROPEAN L R (1998): 252-263.

[11] See Gary R.Spratling, The race for Amnesty in International Antitrust, 16 INTL. ENFORCEMENT L. REPORTER (April 2000).

B. Does the volume of commerce [specified in § 2R1.1] provide an adequate measure for setting fines?

No. The Guidelines' formula for calculating the base fine in overt collusion convictions is a poor proxy for setting fines that will achieve either special or general deterrence of future cartel activity.

The Sentencing Guidelines' reliance on a rule that multiplies a company's volume of affected commerce by 20% follows from the USSG's assumption that the average cartel overcharge is 10% of affected commerce. It is likely that the doubling of the base fine to 20% of affected commerce was incorporated into the Guidelines in order to move remedies closer to optimal sanctions.[12]

While a 10% average mark-up no doubt was based on the best information available at the time the Guidelines were first formulated, more recent research casts doubts on the reasonableness of the 10% assumption. Mean average cartel overcharges as ascertained by a survey of more than 200 social-science studies with more than 600 observations shows that the average overcharge exceed 40%; however, because overcharge rates are highly

[12] Optimal deterrence principles apply to the net harm caused by cartels and take into consideration the probability of detection and prosecution. Net harm includes the dead-weight loss as well as the overcharge. Moreover, the USSC seems to appeal to the umbrella effects of market power as a justification for the doubling. The full quotation reads: "The loss from price-fixing exceeds the gain because, *inter alia*, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher price. 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 Section 8C2.4 (a) (3)." 15 U.S.C. Section 1 Application note 3. The probability of detection for clandestine cartels is widely believed to be low – probably less than one-third. *See* Gary R. Spratling, *Detection and Deterrence*, 69 GEO. WASH. L. REV. 798, 817-23 (2001).

positively skewed, the median average is 25%.[13] Less than one-fifth of all cartels have historically exhibited long-run price increases of 10% or less. Similar results came from a survey of final verdicts in United States collusion case, an average median overcharge of 21.6%, and an average mean overcharge of 30.0%.[14] Moreover, the 10% assumption is especially inappropriate for cartels with foreign corporate members. International cartels have comprised a majority of DOJ cartel prosecutions since the late 1990s. International cartels not only present greater evidentiary and jurisdictional challenges for successful prosecution, but also they consistently achieve higher price increases than do domestic cartels. While our social science survey found that the median overcharge for all types of cartels has been an average of 25%, it was 17-19% for domestic cartels and 30-33% for international cartels. It is for these reasons that, if a sales-based calculation for fines is to be retained, a doubling or tripling of the assumed overcharge seems justified.

[13] John M. Connor and Robert H. Lande, How High Do Cartels Raise Prices?, TULANE L. R. (forthcoming 2006).

[14] Id. at Section IV

2. THE CALCULATION OF CARTEL FINES

A. Should the calculation of price-fixing gains or losses be based on all coconspirator' sales on only the defendant's sales?

Using a cartel's total *U.S.* affected sales (the sum of all coconspirators' sales) to calculate price-fixing gains or losses would have some enforcement advantages, but we recommend that such calculations be based on only the defendant's *global affected sales.*[15]

If U.S. fines are to be based on U.S. collusion-affected sales, calculating the base fine on the coconspirators' affected sales would improve considerably the bargaining power of the DOJ in guilty-plea negotiations. Using total cartel affected commerce in the United States is the "alternative sentencing" approach used by the DOJ since *Booker* in those instances when a defendant's fine under the Guidelines exceeds the Sherman Act statutory limit.[16] This procedure is appealing because it offers symmetry with the criterion of joint and several liability that is applied in civil treble-damage suits. Joint and several liability serves conservation of judicial and prosecutorial resources in the context of private suits by encouraging out-of-court settlements instead of civil litigation. In an analogous fashion, by making each defendant responsible for the cartel's total

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[15] Global affected sales is the volume of commerce in the product or service subject to the conspiracy for the duration of the conspiracy calculated without regard to geographic boundaries.

[16] A defendant in a cartel case is liable for twice the gain or twice the loss caused by the cartels as a whole under 18 U.S. C. § 3571(d). Adoption of the alternative sentencing approach is discussed in Hammond (supra note 4). At least three cartelists have accepted fines calculated

affected sales, public prosecutors will be able to extract guilty-plea and cooperation agreements more quickly and in a higher share of instances than if defendants' fines are based on only their own affected sales. Basing fines on coconspirators' affected sales would be especially effective in moving closer to optimal deterrence when a defendant is a diversified firm and the cartelized product is a small share of a defendant's total sales across all product lines. Success in obtaining guilty-plea agreements also reduces the resources needed for litigation of criminal allegations. Moreover, it is much worse from society's perspective if a company enters into a cartel with many large competitors than if it enters into a cartel with a few smaller firms.

However, a major disadvantage of coconspirators' sales as the basis of determining fines is the palpable lack of proportionality between the harm inflicted by defendant and the severity of recommended fines. In most cartels the conspirators vary greatly in sales size. Histories of cartels typically find that the largest members of cartels tend to be the ringleaders in two senses.[17] They frequently initiate the formation of conspiracies, and they often take major responsibility for enforcement of the agreement. As is recognized in the Guidelines' handling of culpability scores, larger organizations bear greater responsibility for the harm generated by price-fixing schemes. Smaller members of cartels may be coerced to participate.

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using twice the cartel's U.S. overcharges since 2005 (Hynix in the DRAMs cartel; DuPont Dow Elastomers in polychloroprene rubber; and Bayer Corp. in polychloroprene rubber).

[17] See, for example, John M. Connor, GLOBAL PRICE FIXING (2001), George W. Stocking and CARTELS IN ACTION (1946, 1947).

A second disadvantage is that the DOJ must have a reasonable estimate of the cartel's U.S. overcharges. This estimate must be prepared quickly and may not be the product of cutting-edge statistical methods. Better estimation procedures will add considerable time to prosecutions and will be burdensome to DOJ staff. The amount stipulated in the plea agreement in some cases may be the result of negotiations; if defendants successfully reduce the publicly stated overcharge, plaintiffs in treble-damage suits will be short-changed.

We noted earlier that international cartels are particularly difficult to detect and deter. In the context of the base fine calculations, we also note that the Guidelines are silent on the *geographic* scope of the sales to be used. To assist in deterrence of international cartels with multijurisdictional sales, we believe it is appropriate to define the defendant's affected commerce on a global basis. The DOJ already considers global sales for the purpose of calculating the culpability multiplier.[18] Such a practice would help U.S. fines compensate for the near-absence of cartel fines in jurisdictions outside North America and Western Europe.[19] Using a defendant's global sales preserves proportionality and helps target deterrence toward international cartels. Also, fines based on global sales would bring U.S. fining practices more closely in harmony with EU practice.[20]

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[18] BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE, In the Supreme Court of the United States No. 00-1842 , *STATOIL ASA, PETITIONER v. HEEREMAC V.O.F., ET AL.* (states that global sales were used for culpability scores only in two international cartel cases, but never for base fine calculation).

[19] See John M.Connor, "Global Antitrust Prosecutions of Modern International Cartels," 4 J. INDUSTRY, COMPETITION, AND TRADE 239 (2004).

[20] Since 1960 the European Commission and most Member States of the EU have used 10% of global corporate sales in all lines of business in the year preceding the fine decision as the cap on cartel fines. However, we do not recommend abandoning affected (cartelized line of business) sales to compute U.S. fines. Nor do we suggest that the EC's cartel fining procedures be adopted. See Harding and Joshua

A more expansive affected-sales criterion will in some instances raise the Guidelines' fine ranges to heights so dizzying that a defendant's financial future is in jeopardy. In cartel cases, the possibility that fines may cause bankruptcy is worrying because most cartels are formed in industries that are already highly concentrated. Exit of one firm might substantially increase the probability of tacit collusion or cartel recidivism. Prosecutors and jurists have been sensitive to failing-firm cases in the past by granting downward departures to imperiled firms. Also we note an increased use of installment payments for fines in such cases. Moreover, there is some empirical evidence that ability to pay cartel fines may be an overblown concern.[21] We see no reason to change this customary policy, but would encourage the DOJ to make more transparent its criteria for requesting downward departures on fines for financially weak defendants.

B. *How should fines above the statutory maximum (currently $100 million) be calculated?*

There is an unresolved tension between the Sherman Act statutory maximum fine and the maximum fine that results from application of § 3571(d), the so-called "alternative sentencing provision." From an optimal deterrence standpoint, a multiple of the harm caused is to be preferred in principle to a rough proxy for that harm. The Sentencing Guidelines specify no rule for when to apply the double-the-harm[22] rule in place of the "20%-of-sales" rule. In the

[21] See Catherine Craycraft, Joseph L. Craycraft, and Joseph C. Gallo, Antitrust Sanctions and a firm's Ability to Pay, 12 REVIEW OF INDUSTRIAL ORGANIZATION (1997): 171-183.

[22] Double the "net harm to others" is always greater than double the gain in antitrust violations.

Commentary to § 2R1.1, the Guidelines only offer the following rather imprecise guidance:

> "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"

In addition, in cases where organizational fines optimally should rise above $100 million, statutory limits prevent proportionality in sentencing of defendants. Similarly, one can argue that even limits based on percentages of defendants' sales can cause sentencing inequities. Absolute or percentage fine maxima discriminate against specialized companies below the cap while favoring diversified companies with large revenues.[23]

Since January 2005 the DOJ has been applying the alternative sentencing provision whenever the organizational fine under the Guidelines exceeds the statutory cap of $100 million for recently disbanded cartels (or $10 million for cartels that ended prior to June 22, 2004).[24] However, if a defendant exercises its right to a trial, application of § 3571(d) requires a sentencing hearing during which reasonable estimates of actual harm must be presented. Perhaps as a result, jurists have been reluctant to apply the double-the-harm rule in antitrust

[23] See Maks, J.A.H., M.P. Schinkel, and I.A.M. Bos, Perverse Incentive Effects on Bounding Fines for Infringements of Competition Law: the Dutch Case, paper presented at the Amsterdam Center for Law and Economics Conference *Remedies and Sanctions in Competition Policy,* Amsterdam, 17-18, February, 2005. [http://www.kernbureau.uva.nl/acle/object.cfm/objectid=F07DE744-C1D1-4F2E-76EEB31F7FA5B9F]

[24] Fifty million dollars is one-half the current statutory maximum multiplied by the minimum culpability multiplier or 0.75. Above the $37.5-million threshold, fines theoretically can be larger under the alternative sentencing provision than under the Sentencing Guidelines. In practice, most cartel defendants deserve culpability scores of 2.0 to 4.0, which imply overcharge thresholds of $100 to $200 million. See also Hammond (supra note 4).

proceedings.[25] For some time fines based on the double-the-harm standard have been raised in guilty-plea negotiations by prosecutors, but because no corporate cartelist has yet been convicted at trial under § 3571, defendants may justifiably discount such threats as mere bluster.[26]

Our proposal in 2.A. above to rely primarily on the Sentencing Guidelines, but substitute global affected sales in place of U.S. affected sales, would obviate the need for imposing fines based on § 3571. In practice nearly all of the cases where fines will exceed the statutory limit of $100 million are likely to be international cartels with substantial non-U.S. affected commerce.

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[25] We are aware of no such cases for corporate defendants and only one successful application to an individual, the conviction at trial of A. Alfred Taubman in *U.S. v. Christies' et al.*

[26] *See* Tara L. Reinhart, Nathan J. Muyskens & Christopher E. Tierney, *Facing the Facts After Blakely, Booker, and Fanfan*, THE ANTITRUST SOURCE, Jan. 2005, *available at* http://antitrustsource.com