

The Indirect Bump: Indirect Commerce and Corporate Cartel Plea Agreements

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Over the past few years, the U.S. Department of Justice Antitrust Division has continued to enter into plea agreements with corporate antitrust defendants which include record-level fines. Since the start of its 2012 fiscal year, the Antitrust Division has reached plea deals with twelve corporate defendants and has secured fines totaling almost \$650 million.¹ A majority of these plea agreements (and more than \$600 million of the fines) were secured as part of the Antitrust Division's ongoing investigation into the automotive parts industry which the Division has described as "the largest criminal investigation the division has ever pursued."²

In order to determine a corporate antitrust defendant's fine, the Antitrust Division has explained that it utilizes the United States Sentencing Guidelines in negotiating plea agreements.³ Although calculating the fine under the Sentencing Guidelines is a multi-step process, the first and most significant step is calculating a "base fine" based on a defendant's "volume of affected commerce." However, a constant source of debate has been exactly what commerce the Antitrust Division will include in its fine calculation and whether sales of goods or services outside of the United States would be included as affected commerce in the Division's fine calculation.

The automotive parts investigation has provided an opportunity to learn more about what commerce the Antitrust Division will include in fine calculations in the context of negotiating plea agreements. Specifically, during the plea and sentencing hearing for Furukawa Electric Company, the Antitrust Division explained in some detail the commerce that is included as affected commerce for calculating the fine range under the Sentencing Guidelines and the commerce that is used to increase the fine within that range. This second category of commerce relates to products that are not directly sold in the U.S., but are sold abroad and imported into the United States (i.e., indirect commerce). As a result, some have come to call the process of using indirect commerce to increase a defendant's fine within the Sentencing Guidelines range an "indirect bump." This article will describe the general Sentencing Guidelines fine calculation process for corporate antitrust defendants, the Antitrust Division's recently stated position on direct and indirect commerce, and how the Division's use of the "indirect bump" has been incorporated for defendants in the automotive parts investigation.⁴

1 Gibson, Dunn & Crutcher LLP, 2012 Year-End Criminal Antitrust & Competition Law Update 4 (Jan. 7, 2013).

2 Sharis A. Pozen, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks at the Brookings Institution (Apr. 23, 2012) ("measured by the potential volume of commerce involved").

3 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Division, U.S. Department of Justice, Antitrust Sentencing in the Post-Booker Era: Risks Remain High For Non-Cooperating Defendants 6 (Mar. 30, 2005).

4 This article will not discuss the issue of whether the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, provides a basis for completely excluding commerce from the Sentencing Guidelines. For further discussion of this issue, see Laura S. Shores, *The Starting Point: Negotiating "Volume of Commerce" with the Antitrust Division*, ABA Section of Antitrust Law Cartel & Crim. Prac. Committee Newsl., Feb. 2012.

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I. Sentencing Guidelines Fine Calculation

The Sentencing Guidelines serve as a starting point for a District Court in calculating a corporation's fine and are a factor a District Court should consider when determining the ultimate fine at sentencing.⁵ To determine a corporation's fine as part of a plea agreement for an antitrust offense, the Antitrust Division has generally used three basic inputs: (1) the "volume of commerce attributable to the defendant," (2) the defendant organization's Culpability Score, and (3) any cooperation discount earned by the defendant as determined by the Antitrust Division.

a. Volume of Commerce

The first step in determining a corporate antitrust defendant's fine under the Sentencing Guidelines is to calculate the base fine. Generally, the base fine for an organizational defendant is determined by Section 8C2.4 of the Sentencing Guidelines.⁶ However, sentences for antitrust offenses are "singled out for special treatment," and corporate antitrust defendants "must deal with specific guidelines for antitrust offenses rather than the organizational guidelines."⁷ Specifically, Section 8C2.4(b) explains that "special instructions for organizational fines" in Chapter 2 of the Sentencing Guidelines "shall be followed, as appropriate."

Section 2R1.1 of the Sentencing Guidelines contains the instructions for sentencing defendants guilty of bid-rigging, price-fixing and market allocation agreements among competitors.⁸ Under this section, a corporate antitrust defendant's base fine is "20 percent of the volume of affected commerce."⁹ The Sentencing Guidelines do not clearly define what commerce should be included as "affected commerce" for this calculation. Rather, Section 2R1.1 merely states that "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."¹⁰ As noted above, exactly what commerce should be included has been a continued source of debate.¹¹

The Antitrust Division has previously offered some explanation of what commerce it will include in calculating volume of commerce. For example, the Antitrust Division has stated that its policy is "to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme."¹² However, the Antitrust Division has otherwise not previously given "clear, generally applicable guidance" regarding

5 Hammond, *supra* note 4; see also *United States v. Cossey*, 632 F.3d 82, 87 (2d Cir. 2011).

6 See Jed S. Rakoff & Jonathan S. Sack, *Federal Corporate Sentencing: Compliance and Mitigation* § 7.05[1][a] n.5 (rev. ed. 2009).

7 Rakoff & Sack, *supra* note 7, at § 7.01.

8 See also U.S. Sentencing Guidelines Manual § 2R1.1(c), cmt. (Background) (2004) ("The agreements among competitors covered by this section are almost invariably covert conspiracies . . . that are so plainly anticompetitive that they have been recognized as illegal per se . . .").

9 U.S.S.G. § 2R1.1(d)(1). This percentage is derived from U.S. Sentencing Commission's estimation that the "average gain from price-fixing is 10 percent of the selling price" and conclusion that "the loss from price-fixing exceeds the gain." U.S.S.G. § 2R1.1, cmt. n.3 (Application Notes); see also Rakoff & Sack, *supra* note 7, § 7.05[1][a].

10 U.S.S.G. § 2R1.1(b)(2).

11 See, e.g., Melissa H. Maxman & Elizabeth L. Holdefer, *Volume of Commerce and Criminal Sentences for Antitrust Violations—Alternative Interpretations in the Air Cargo Fuel Surcharge Cases*, *The Antitrust Source*, August 2011; James H. Mutchnik, et al., *The Volume of Commerce Enigma*, *The Antitrust Source*, June 2008; Laura S. Shores, *supra* note 5.

12 Brief for the United States and the FTC as Amici Curiae at 8-9, *Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) (denying cert.) (No. 00-1842), 2002 WL 32157022; see also Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions* 14-15 n.28 (Mar. 2, 2006) ("[T]he Division . . . will consider only a defendant's domestic sales in calculating a defendant's volume of affected commerce under U.S.S.G. §§2R1.1(d)(1) and 8C2.4(a)-(b).").

what commerce the Division will include as affected commerce.¹³ Thus, the first step in calculating a corporate antitrust defendant's fine can be summarized by the following formula:

Step 1

Volume of Commerce x 20% = Base Fine

b. Culpability Score

After the base fine is determined, the next step is to determine minimum and maximum multipliers to apply to the base fine which are generated based on a defendant's "culpability score." The multipliers are then used to determine the Sentencing Guidelines fine range.

A corporate antitrust defendant's culpability score is set by several factors listed in the Sentencing Guidelines. Specifically, Section 8C2.5 of the Sentencing Guidelines explains that to determine an organization's culpability score, start with five points and then adjust upward or downward based on the applicability of several listed factors.¹⁴ Culpability score factors that are often relevant include the size of the defendant organization involved in the criminal activity, the defendant's prior history, any obstruction of justice, and acceptance of responsibility and cooperation by the defendant.¹⁵

Once the culpability score is established, the multipliers are derived from a table in Section 8C2.6 of the Sentencing Guidelines.¹⁶ The base fine is multiplied by both the minimum and maximum multipliers to calculate the Sentencing Guidelines fine range. For purposes of the plea agreement, the resulting Sentencing Guidelines fine range minimum is the more relevant number, as the ultimate fine is generally based on this amount.

The second step in calculating a corporate antitrust defendant's fine under the Sentencing Guidelines, therefore, can be summarized by the following formula:

Step 2

Base Fine x Minimum Multiplier = Guidelines Fine Range Minimum

Base Fine x Maximum Multiplier = Guidelines Fine Range Maximum

c. Cooperation Discount

The Antitrust Division has explained that a cooperating corporate defendant "that substantially advances an investigation can expect to receive a plea agreement that recommends a substantial assistance departure pursuant to [Sentencing Guidelines Section] 8C4.1."¹⁷ For a defendant that

13 Mutchnik, et al., *supra* note 12, at 6. If the Antitrust Division truly seeks to promote "consistency, fairness, and transparency in sentencing," Hammond, *supra* note 4, at 6, it should not leave the task of explaining its fine calculation process for plea agreements to articles like this one. Rather, the Antitrust Division should itself put forth a clear and detailed explanation of the Sentencing Guidelines fine calculation process it will generally use.

14 U.S.S.G. § 8C2.5; see also Rakoff & Sack, *supra* note 7, at § 7.01[1][b].

15 U.S.S.G. § 8C2.5(b)-(g).

16 The base culpability score of 5 results in multipliers of 1.00 and 2.00. U.S.S.G. § 8C2.6. The lowest possible multiplier for an antitrust offense is 0.75, which would apply to a culpability score of 3 or lower. *Id.* at § 2R1.1(d) (2). The effect of this floor is to ensure that there is a minimum fine of 15% of the volume of affected commerce. See Rakoff & Sack, *supra* note 7, at § 7.01[1][c]. The highest possible multipliers are 2.00 and 4.00, which apply for culpability scores of 10 or more. U.S.S.G. § 8C2.6.

17 Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* 5 (Mar. 29, 2006).

is “second-in,” the average “cooperation discount” ranges from 30% to 35% off the Sentencing Guidelines fine range minimum.¹⁸ Companies that subsequently come forward and cooperate may also qualify for a cooperation discount by providing substantial assistance to the Antitrust Division in its investigation. However, discounts for subsequent cooperators “will be lower, often substantially lower, than the second-in company” and may be applied to some point above minimum within the Sentencing Guidelines fine range.¹⁹

Once the Antitrust Division has determined the cooperation discount, the Sentencing Guidelines fine range starting point (the minimum for second-in companies) is reduced by that amount, which results in the final Sentencing Guidelines fine to be paid by the defendant as part of the plea agreement, subject to court approval. This last step in calculating a corporate antitrust defendant’s Sentencing Guidelines fine can be summarized by the following formula:

Step 3

Guidelines Fine Range Starting Point x (100% – Cooperation Discount) = Guidelines Fine

II. United States v. Furukawa Electric Company, Ltd.

On September 29, 2011, the Antitrust Division announced that Furukawa Electric Company had “agreed to plead guilty and to pay a \$200 million fine for its role in a criminal price-fixing and bid-rigging conspiracy involving the sale of parts to automobile manufacturers.”²⁰ The plea agreement was the first corporate agreement announced by the Antitrust Division as part of its automotive parts investigation.

Furukawa’s plea and sentencing hearing was held on November 14, 2011 before U.S. District Court Judge George Caram Steeh of the Eastern District of Michigan.²¹ At the hearing, the government provided the court with an explanation of how the proposed fine for Furukawa was determined.²²

The government explained that the Antitrust Division believed that there were “three categories of commerce” for the automotive parts industry.²³ The first category included products “manufactured in the United States, sold in the United States to automakers here in the U.S. who are installing these parts into their cars.”²⁴ This is traditional direct commerce, and the government explained that this category of commerce was included as affected commerce in the overall calculation.²⁵ The second category of commerce included products “that were manufactured abroad . . . [and] were then sold into the United States and installed in cars here in the U.S.”²⁶

18 *Id.*

19 *Id.* at 5-6.

20 Press Release, U.S. Dept. of Justice, Furukawa Electric Co. Ltd. and Three Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy (Sept. 29, 2011). Furukawa manufactures and supplies automotive wire-harnesses, which are “electrical distribution systems used to direct and control electronic components, wiring and circuit boards in cars.” *Id.*; see also Plea Agreement, *United States v. Furukawa Elec. Co. Ltd.*, No. 11-cr-20612 (E.D. Mich. Nov. 14, 2011), ECF No. 10.

21 Minute Entry, *United States v. Furukawa Elec. Co. Ltd.*, No. 11-cr-20612 (E.D. Mich. Nov. 14, 2011).

22 Transcript, *United States v. Furukawa Elec. Co. Ltd.*, No. 11-cr-20612 (E.D. Mich. Nov. 14, 2011), ECF No. 12.

23 *Id.* at 19:24-20:1.

24 *Id.* at 20:1-4.

25 *Id.* at 20:5.

26 *Id.* at 20:6-9.

This category can be called “direct import commerce” and was also included as affected commerce in the overall calculation.²⁷

The third category of commerce, which the government noted was “a little more complicated,” included products which were “manufactured abroad, [then] sold to automakers abroad, [and] installed in cars abroad that are ultimately destined for the U.S. and U.S. consumers.”²⁸ This third category is a clear example of indirect commerce. The government explained that the Antitrust Division’s view is that it could have included indirect commerce as affected commerce in the overall calculation, but it did not do so in calculating Furukawa’s fine.²⁹

Thus, for Step 1 discussed above, the Antitrust Division calculated the volume of commerce used to determine the base fine by including both a defendant’s direct commerce and direct import commerce and excluding indirect commerce. The key distinction between the first two categories (direct commerce and direct import commerce) and the third category (indirect commerce) is the location where the product was sold. If the defendant sold a product to a customer in the U.S., whether directly from an entity in the U.S. or from an entity abroad, those sales were included in determining the volume of commerce. However, if the defendant sold the product to a customer abroad and the customer installed the defendant’s product into a final product that was shipped to and sold in the U.S., those sales were excluded when determining the volume of commerce.

III. The Indirect Bump

a. The Antitrust Division’s Use of Indirect Commerce

Although the Antitrust Division did not include indirect commerce in its calculation of the volume of commerce, at the Furukawa hearing, the government made clear that the third category of commerce was used as an “upward adjustment” to the Sentencing Guidelines fine.³⁰ As the government explained, the Antitrust Division “felt that the guidelines fine was understating the seriousness of the offense” because indirect commerce was not included in determining the volume of commerce.³¹ Thus, the Antitrust Division included an “upward adjustment” of the fine, within the Sentencing Guidelines range, that “correlates with the percentage of the business that the defendant had that falls into category three.”³²

In February 2012, Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division, summarized the government’s statements at the Furukawa hearing and further clarified how the Antitrust Division has used indirect commerce to calculate fines for corporate defendants in the automotive parts investigation.³³ Hammond explained that the Antitrust Division “took [indirect commerce] into account when determining a starting point for the cooperation discount for the defendants who negotiated pleas with the DOJ.”³⁴ Hammond added that “the upward adjustment correlates with the

27 *Id.* at 20:9-11.

28 *Id.* at 20:12-15.

29 *Id.* at 20:16-18.

30 *Id.* at 21:2.

31 *Id.* at 20:24-21:2.

32 *Id.* at 20:21-21:4.

33 Scott D. Hammond, Remarks at the ABA/IBA International Cartel Workshop, GCR Cartel Roundtable, Global Competition Review 18 (Feb. 2012).

34 *Id.* Hammond’s statement also indicates that the Antitrust Division has applied (and will apply) this methodology for all of the plea agreements in the automotive parts investigation. On May 2012, Judge Steeh confirmed that a consistent formula has been used to calculate corporate fines in the automotive parts investigation. See Transcript at 18:9-17, *United States v. G. S. Electech, Inc.*, No. 12-20215 (E.D. Mich. May 16, 2012), ECF No. 10 (“the formula that was employed . . . for determining an appropriate fine is consistent with other [corporate plea] agreements”).

percentage of [indirect commerce] as compared to the two other categories. The greater the [indirect] commerce in proportion to the first two categories of commerce, the higher the starting point in the guideline range.”³⁵

The government’s statements at the Furukawa hearing and Hammond’s explanations are in line with previous statements on the potential use of indirect commerce by the Antitrust Division. The Antitrust Division has explained that, under the Sentencing Guidelines, “foreign sales” could be accounted for in two ways by either “determining the volume of commerce under [Section] 2R1.1(d)(1) based on worldwide (U.S. and foreign) sales affected by the violation” or “treating [foreign sales] as an aggravating factor requiring an upward adjustment in the Sentencing Guidelines calculation pursuant to [Section] 5K2.0.”³⁶ Additionally, the Antitrust Division has explained that it has used foreign sales to adjust the fine upward in at least two previous plea agreements.³⁷ However, with the statements regarding Furukawa’s fine, the Antitrust Division has explained in greater detail how it currently incorporates indirect commerce to calculate the upward adjustment in the automotive parts investigation.³⁸

b. Fine Calculation with Indirect Bump

The government’s explanation at the *Furukawa* hearing and Hammond’s statements did not explicitly describe how the Antitrust Division has exactly incorporated the indirect bump into the Sentencing Guidelines fine calculation. However from those statements, it is clear that the Antitrust Division’s use of indirect commerce results in a few additional steps in calculating a corporate antitrust defendant’s Sentencing Guidelines fine in the automotive parts investigation. After the base fine is calculated using a volume of commerce amount that includes a defendant’s direct commerce and direct import commerce (Step 1) and the Sentencing Guidelines fine range is determined (Step 2), the next step is to calculate the amount of the upward adjustment within the Sentencing Guidelines fine range to account for indirect commerce. This upward adjustment is the indirect bump.

In order to calculate the indirect bump, indirect commerce is compared with the other categories of commerce to determine the percentage of the defendant’s relevant business which was indirect. To determine this percentage, the amount of defendant’s indirect commerce is divided by the sum of three categories of commerce – direct commerce, direct import commerce, and indirect commerce – or the defendant’s global commerce. This results in a different third step in calculating a corporate antitrust defendant’s fine under the Sentencing Guidelines and can be summarized by the following formula:

35 Hammond, *supra* note 34.

36 Gary R. Spratling, Deputy Ass’t Att’y Gen., Antitrust Division, U.S. Department of Justice, Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases 16 (Mar. 4, 1999); see also Hammond, *supra* note 13, at 14-15 n.28.

37 Amici Curiae Brief, *supra* note 13, at 10 (citing, for example, Plea Agreement, *United States v. HeereMac, v.o.f.*, No. 97-CR-0869 (N.D. Ill. Dec. 22, 1997) and Plea Agreement, *United States v. Roquette Freres, No. CR 97-00356* (N.D. Cal. Dec. 17, 1997)). The *HeereMac* and *Roquette Freres* plea agreements used an alternative method account for foreign sales. Spratling, *supra* note 37, at 16-17.

38 Hammond has also explained the methodology the Antitrust Division used for plea agreements in the air cargo investigation to account for “U.S. in-bound shipments,” which appears to be similar to the approach the Division is using in the automotive parts investigation. Mutchnik, et al., *supra* note 12, at 6 (explaining that the Division used the percentage of inbound commerce to total commerce as an upward adjustment within the Sentencing Guidelines fine range (citing Scott D. Hammond, Sentencing Issues in Today’s Global Economy (Mar. 26, 2008)). However, the applicability of that approach for incorporating indirect commerce was not made clear until the Furukawa sentencing hearing.

New Step 3

$\text{Indirect Commerce} / \text{Global Commerce} = \text{Indirect Bump}$

After the indirect bump percentage is calculated, it is applied to the Sentencing Guidelines fine range starting point to determine the bumped-up fine within the Sentencing Guidelines fine range. Thus, the fourth step in calculating a corporate antitrust defendant's fine under the Sentencing Guidelines with the indirect bump can be summarized by the following formula:

Step 4

$\text{Guidelines Fine Range Starting Point} \times (100\% + \text{Indirect Bump}) = \text{Bumped-Up Fine}$

The last step in calculating the Sentencing Guidelines fine remains essentially the same. However, instead of reducing the Sentencing Guidelines fine range starting point, the cooperation discount determined by the Antitrust Division reduces the bumped-up fine calculated in Step 4. As a result, the final step in calculating a corporate antitrust defendant's fine can be summarized by the following formula:

Step 5:

$\text{Bumped-Up Fine} \times (100\% - \text{Cooperation Discount}) = \text{Guidelines Fine}$

IV. Conclusion

Although the possibility of the Antitrust Division incorporating indirect commerce into a fine as part of a plea agreement is not new, at the *Furukawa* plea and sentencing hearing the Division provided greater transparency on how indirect commerce has been used in calculating fines in the automotive parts investigation. At the same time, the Antitrust Division has remained consistent in its position that indirect commerce could be included as affected commerce used to calculate the base fine. However, for purposes of plea agreements in the automotive parts investigation, the Antitrust Division has indicated that it will calculate fines consistently and only use indirect commerce for an upward adjustment to the Sentencing Guidelines fine. It is not clear whether the Antitrust Division has or will apply the indirect bump outside of the automotive parts investigation, but its use here should serve as a guide both for future plea agreement negotiations and for companies considering the costs and benefits of cooperating.