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## Professional Perspective

# No More Bumps in the Road: The DOJ's No "Piling On" Policy Should Eliminate Indirect Commerce "Bumps" in International Cartel Investigations

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The U.S. Department of Justice recently **announced** a new policy that discourages all federal prosecutors from "piling on" with "unfair duplicative penalties" by instructing prosecutors to coordinate with and consider fines by foreign enforcers for the same misconduct. Understanding that "[m]odern business operations regularly span jurisdictions and borders," the new policy is designed to enhance relationships with law enforcement around the globe, "discourage disproportionate enforcement," and "achieve reasonable and proportionate outcomes in major corporate investigations." The Department of Justice included this new policy in the **Justice Manual**, which applies to all federal prosecutors, including Antitrust Division prosecutors.

This policy creates a subtle, yet significant, change from the Division's previous approach to calculating fines under the United States Sentencing Guidelines ("Guidelines"). The Division has long **publicly stated**, "[i]t is the policy of the United States to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme … ." Commendably, for almost **twenty** years, the Division has typically not included foreign commerce in determining the Base Fine, despite the incentive for prosecutors to obtain ever-greater fines.

However, although the Division would not use foreign commerce in calculating the Base Fine under the Guidelines, foreign commerce could still factor into the ultimate fine recommendation in other ways. For example, the Division has used foreign commerce—meaning, commerce related to a transaction that took place wholly outside the United States—as an aggravating sentencing factor by including an upward adjustment within the Guidelines' recommended sentencing range (often referred to as a "**bump**") or seeking an upward **departure**.

The Division included these bumps in recent high-profile international cartel investigations, including air cargo, automotive parts, and capacitors. These bumps have a significant impact on corporate fines—potentially increasing fines by tens of millions of dollars.

Where foreign competition authorities are also actively investigating and prosecuting the same conduct, which is becoming increasingly more common in international cartel investigations, these bumps can lead to multiple jurisdictions levying considerable penalties based on the same commerce—thus creating unfair duplicative fines. Accordingly, in light of this new policy "discouraging unfair duplicative penalties," where a foreign competition authority is actively investigating the same conduct, the Division should end its practice of using bumps that take foreign sales into account in a corporation's fine.

## 1. Calculating Corporate Antitrust Fines

In order to understand how bumps work, it is first necessary to understand the Guidelines analysis a court must use to calculate a corporation's fine. This analysis comes primarily from guidance in Chapter 8 (Sentencing of Organizations) of the Guidelines Manual.

The starting point, and the driver of the ultimate fine, is the Base Fine, which is calculated as twenty percent of the "volume of affected commerce." The Base Fine is then subject to a minimum and maximum multiplier based upon the "Culpability Score" of the organization, which then results in a minimum and maximum "Guidelines Range" for sentencing. The Culpability Score is determined using the factors enumerated in U.S.S.G. § 8C2.5. For an antitrust offense, depending on the resulting Culpability Score, the multipliers can range from as low as .75 to as high as 4.00. For example, if the volume of affected commerce is $100 million, then the Base Fine is $20 million, the minimum possible Guidelines fine is $15 million, and the maximum possible Guidelines fine is $80 million, with the actual minimum and maximum Guidelines Range determined by the Culpability Score.

The court then determines the appropriate fine using its discretion, informed by the Guidelines Range and factors in U.S.S.G. § 8C2.8. The court may depart down from the Guidelines Range due to various factors, including substantial assistance to authorities (often referred to as the "cooperation discount"). The court may also apply a variance, up or down, based on factors listed in 18 U.S.C. § 3553(a). Overall, the four most important factors in determining a corporation's Guidelines fine are: (1) the volume of affected commerce (or Base Fine); (2) the Culpability Score; (3) the starting point within the Guidelines Range; and (4) any cooperation discount. Below is a simplified three-step equation to help illustrate the Guidelines' fine calculation:

- Step 1: Calculate the Base Fine. (20% x Affected Commerce= Base Fine)
- Step 2: Determine the low and high Culpability Score multipliers, and then multiply them by the Base Fine in order to calculate the Guidelines Range. (The range from (Base Fine x low multiplier) to (Base Fine x high multiplier) = Guidelines Range)

 

- Step 3: Determine a starting point within the Guidelines Range and subtract any cooperation discount in order to calculate the ultimate fine. (Guidelines Range – cooperation discount = Guidelines fine)

The Division has historically not included foreign commerce when calculating the volume of affected commerce in Step 1, nor directly considered it when calculating the Guidelines Range in Step 2. Rather, the bump has occurred at Step 3. As explained further below, in a number of cases, the Division has taken foreign commerce into account and decided to use a higher starting point within the Guidelines Range as a result, leading to a higher fine recommendation to the court.

## 2. Brief Overview of the Law Governing Foreign Commerce

The Division has long been cautious about how it approaches foreign commerce, recognizing that foreign conduct can constitute a Sherman Act violation within the Division's jurisdiction only in very limited circumstances. The Supreme Court **held** twenty-five years ago that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." However, the precise extraterritorial application of the Sherman Act remains unsettled. The source of much of that ambiguity is the Foreign Trade Antitrust Improvements Act of 1982 ("**FTAIA**"). Using a series of exceptions and exclusions, Congress passed the FTAIA to clarify when U.S. antitrust law applies to foreign conduct. Since its enactment, though, courts have struggled to interpret the FTAIA and to reach a consensus on its exact application. The FTAIA ordinarily exempts foreign conduct, except conduct related to imports, from the Sherman Act unless the "conduct has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Essentially, under the FTAIA, the Sherman Act does not reach "commercial activities taking place abroad, unless those activities adversely affect domestic commerce" or "imports to the United States" in a sufficient **degree**.

For cases involving foreign or indirect commerce—meaning products produced and first sold abroad that ultimately end up in the U.S. through circuitous sales channels or as a component of a finished product—the FTAIA may **exclude** such commerce from the volume of affected commerce used to determine the Base Fine under the Guidelines. Indeed, there is no circuit court case directly supporting the proposition that foreign or indirect sales can be used to determine volume of affected commerce. The applicable Guidelines provision, U.S.S.G. § 2R1.1, and the accompanying comments and background are also silent regarding the application of the FTAIA or whether the volume of affected commerce applies only to domestic commerce. However, the Office of General Counsel for the U.S. Sentencing Commission **indicates** the FTAIA "may control the determination of volume of commerce."

## 3. The Division's Use of Foreign or Indirect Commerce Bumps

The Division long ago publicly stated in its amicus brief in *Statoil v. Heerema* that "[i]t is the policy of the United States to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme . . . ." Moreover, the Division has also **stated** that cooperation discounts for early cooperating companies are taken "off the bottom of the Guidelines fine range." True to its word, the Division has typically not included foreign or indirect commerce in determining the Base Fine for a company. In some recent, high-profile investigations, however, the Division has accounted for foreign or indirect sales in plea agreements for cooperating corporations by including an upward adjustment within the Guidelines Range—the foreign or indirect commerce bump. Essentially, the Division will still calculate the Guidelines Range without regard to foreign or indirect commerce, but it will depart from its usual practice of recommending a fine at the bottom end of the Guidelines Range.

Notable examples of this bump include some of the Division's largest international cartel investigations (automotive parts, air cargo, and capacitors). For example, in the air cargo investigation, the Division **chose** to account for sales occurring entirely outside the United States by increasing the starting point within the Guidelines Range. In that investigation, the conduct involved price-fixing of air cargo shipments both inbound to, and outbound from, the United States.

Although the "inbound" shipments were ultimately destined for the U.S., the affected commercial activity actually took place exclusively abroad—the affected service (shipping goods to the United States) was purchased abroad by foreign companies. Therefore, the air cargo shipment was arguably not import commerce because it was a service provided to a foreign firm in a foreign country—where the affected transaction was typically paid for and took place. Conversely, the sales of outbound shipping services took place in the United States and primarily affected U.S. companies and consumers shipping goods to locations outside the United States. In that investigation, the Division only **used** outbound, domestic commerce to determine the volume of affected commerce for the Base Fine. The Division, however, **included** a foreign commerce bump by taking the percentage of inbound services sold from the combined inbound and outbound sales and using that percentage to increase the starting point within the Guidelines. In certain circumstances, this foreign commerce bump could add tens of millions of dollars to a fine.

Likewise, in recent international cartel investigations related to component parts, the Division included a similar bump to account for the sale of foreign manufactured components that occurred entirely outside the United States because the final integrated products (e.g., automobiles, computers, cell phones, or other electronics) were ultimately sold in the United States by an unaffiliated company.

The Division used the same analysis to determine the volume of affected commerce and an indirect commerce bump in both the automotive parts and capacitors investigations. As described at the first corporate sentencing hearing in the automotive parts investigation, the Division **considered** "three categories of commerce" for determining the fine. The first category was non-contentious, classic, domestic commerce—products manufactured and sold in the United States. The second category was products manufactured abroad and imported directly into the United States by the guilty party for integration into a car manufactured and sold in the United States. The second category was considered by the Division to be clear import commerce, which, as discussed previously, is excluded from FTAIA analysis.

The third category of commerce relates to products "manufactured abroad, sold to automakers abroad, [and then] installed in cars abroad that are ultimately destined for the U.S. and U.S. consumers." The Division did not include this commerce in determining the volume of affected commerce, but it did use this indirect commerce as a bump to increase the starting point within the Guidelines Range. Similar to the air cargo example, in order to determine the starting point within the Guidelines Range, the Division **devised** a formula that correlates with the percentage of indirect commerce as compared to the other categories of commerce.

For both types of investigations, component parts and services, the Division's justification for the foreign or indirect commerce bump was based on the need for the sentence to reflect the seriousness of the offense, provide just punishment, and afford adequate deterrence, pursuant to U.S.S.G. § 8C2.8. In the automotive parts plea hearings, without explanation, the Division **stated** that without the bump, "the Guidelines fine was understating the seriousness of the offense." In the air cargo matters, the Division **included** a statement in the plea agreements asserting "that a Guidelines fine calculation that fails to account for cargo shipments into the United States affected by the conspiracy . . . would understate the seriousness of, and the harm caused to U.S. victims by, the offense and would not provide just punishment." The Division did not explain, in either case, why the fines without the bumps would understate the seriousness of the offense or not provide just punishment.

It is instructive that the Division did not use "inbound shipments" or "category three commerce" to determine a cooperating company's Base Fine in these investigations. Indeed, in the international cartel investigations discussed in this section, the Division accepted volume of commerce calculations with which it expressly disagreed. Potentially implicit in these Guidelines calculations and policy pronouncements is that the Division is concerned that a court might disagree that the Base Fine should include foreign or indirect commerce, particularly if, at sentencing, the government cannot prove that the price of the good or service sold in the U.S. was affected by the conduct. Indeed, by including the commerce as a bump on the back end, instead of in the Base Fine on the front end, the Division may be able to avoid having to prove that the foreign conduct had the requisite effect on U.S. commerce.

## 4. Increased Enforcement and Cooperation Regarding International Cartels by the United States and Foreign Competition Enforcement Agencies

The potential for duplicative piling-on by the Division is real and growing as a result of increasing enforcement by foreign competition agencies. Under almost any measure, the Division has been wildly successful in obtaining significant corporate fines. In the past ten years alone, the Division has obtained more than **$10 billion** in criminal fines and penalties. An astonishing number, to say the least. The Sherman Act imposes a maximum criminal fine of $100 million, which may be increased to twice the pecuniary gain by the conspirators or twice the pecuniary loss to the victims of the crime. Indeed, the Division has obtained dozens of fines greater than $100 million, primarily from foreign corporations involved in international cartels.

The Division, however, is no longer the only dominant anti-cartel enforcer in the world. In recent years, the European Commission and European national competition authorities have **convicted** significantly more companies than the Division for cartel conduct. Moreover, cartel convictions and fines by national competition authorities in Asia, Africa, and Latin America have grown markedly and are **growing** at a faster pace than convictions and fines in the United States or Europe.

 

Indeed, in the last fifteen years, the Division has accounted for less than twenty percent of cartel fines **worldwide**. The following chart contains select examples of significant deterrent penalties imposed by foreign competition authorities in international cartel investigations where the Division prosecuted the same cartel and cooperated with a foreign competition authority. By almost any measure, the following representative fines are significant and deterrent.

| Country/Authority | Fine Amount | Company | Investigation |
|---|---|---|---|
| Australia | $20 million | Qantas | Air Cargo |
| Brazil | $57 million | Whirlpool S/A | Compressors |
| Canada | $30 million | Yazaki | Auto Parts |
| European Commission | $363 million | Air France-KLM | Air Cargo |
| Japan | $58 million | NSK Ltd. | Auto Parts / Bearings |
| Korea | $59 million | Denso Corp. | Auto Parts |
| Mexico | $6.8 million | Whirlpool | Compressors |

Beyond levying significant deterrent fines, foreign competition authorities are routinely coordinating investigations with their U.S. counterparts in international cartel investigations. The Division has previously **disclosed** cooperation in international cartel investigations with Australia, Brazil, Canada, the European Commission, Japan, Korea, Mexico, New Zealand, Switzerland, and the United Kingdom. Moreover, the Division has formal cooperation **agreements** with more than a dozen foreign antitrust authorities. This type of inter-agency investigative cooperation is commonplace between the Division and its international colleagues.

Coordination of corporate resolutions between the Division and its foreign counterparts has been less frequent, or at least less apparent, than the cooperation related to investigative aspects. The Division, however, has publicly **acknowledged** at least one instance of coordination between foreign authorities regarding corporate resolutions. In that matter, the Division and the Canadian Competition Bureau ("CCB") identified affected sales of products manufactured in the United States and then shipped to Canada for assembly into the final integrated product, which was then imported into the United States. The CCB agreed to not bring an enforcement action against the company in Canada because the Division **included** the relevant sales in the volume of affected commerce for purposes of calculating the company's fine in the U.S.

This outcome occurred because the CCB **concluded** that the cartel "primarily targeted the United States" and the CCB agreed with the Division that the U.S. fine ($130 million) was an effective remedy in the United States and Canada. As **stated** by then-Deputy Assistant Attorney General Brent Snyder, that "resolution is only the most recent and visible example of cooperation that routinely occurs between the Competition Bureau and U.S. Department of Justice."

Notably, this coordination did not reduce the fine in the United States; query whether the Division would have forgone prosecution in the opposite situation. Indeed, the Division has never publicly announced a similar act of prosecutorial discretion. Under the new policy against piling-on, however, such coordination and restraint by Division should become more common.

## 5. The New No "Piling Policy" Appropriately Discourages the Division from Using Foreign or Indirect Commerce to Affect a Corporate Fine

When announcing this new policy, Deputy Attorney General Rod Rosenstein **said**: "The moral is that the solutions of the past are not necessarily the right solutions today. Circumstances change. We should be willing to reconsider our assumptions."

He could not be more correct. Previously, because certain foreign competition authorities were not well-positioned to obtain deterrent penalties, in order for a corporate fine to provide sufficient deterrence, the Division may have had a policy justification to account for foreign or indirect commerce. Circumstances have changed, however, because foreign antitrust regulators are obtaining significant deterrent fines in international cartel investigations. With jurisdictions around the globe penalizing companies based on their own domestic commerce, if the Division uses that same commerce to determine the U.S. fine, then the result is an "unfair duplicative fine."

The Division should therefore reconsider its use of bumps to take foreign or indirect commerce into account when determining corporate fines. Eliminating these bumps will help achieve the objective of the **policy**: "[t]he aim is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties." Indeed, cooperation and close relationships among antitrust enforcers has the potential to help agencies advance matters on similar timelines, while harmonizing fine methodologies to avoid needlessly burdensome and inconsistent fines. Cooperation can also spread best practices of due process and fundamental fairness regarding penalties, which benefits all companies under investigation, regardless of where domiciled or being investigated. Conversely, imposing penalties based on foreign commerce may lead to concerns of encroachment on a foreign country's sovereignty, further reducing cooperation and eroding the aims of this policy.

The Division is no longer "the competition police officer for the **world**." Foreign competition authorities are levying ever-greater fines, and it is not for the Division to determine what is a sufficient or deterrent fine in another country. Similar to how the CCB handled the matter previously described, where an international cartel targets foreign or indirect commerce, the Division should generally defer to the country "primarily targeted" by the conduct. Accordingly, this new policy provides clear, generally applicable guidance—in international cartel investigations involving multiple jurisdictions, the Division should coordinate penalties with foreign competition authorities to avoid unfair duplicative penalties. In almost all cases, that means abandoning the use of foreign or indirect commerce bumps.



 