

# U.S. Sentencing Commission Weighing Recommendation to Increase Criminal Antitrust Penalties

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In June, the **United States Sentencing Commission**, which is appointed by the President to make recommendations to Congress on the criminal penalties for the violation of federal law, issued a request for comments regarding whether the guidelines for calculating **antitrust fines** should be modified. Currently, corporate fines for cartel price fixing are calculated on a sliding scale, tied to the amount of the “overcharge” imposed by the violators, with the standard maximum fine under the Guidelines for a corporation capped at \$100 million and, for an individual, capped at \$1 million. The deadline for such comments was July 29, and the views expressed on the issue varied considerably.

Contending that the current Guidelines do not provide an adequate deterrent to antitrust violations, the **American Antitrust Institute** urged the Commission to recommend an increase in the fines for cartel behavior. The AAI stated that the presumption in the Guidelines that antitrust cartels, on average, “overcharge” consumers for goods by 10% is greatly understated, and thus should be corrected to reflect more accurate levels. Pointing to economic studies and cartel verdicts, the AAI suggests that the median cartel “overcharge” is actually in excess of 20%, and therefore the presumption should be modified in the Guidelines. If adopted, the AAI’s proposal would double the recommended fines under the Guidelines for antitrust violations.

Perhaps surprisingly, the DOJ responded to the Commission’s Notice by stating that it believes that the current fines are sufficient, and that no increase in antitrust fines is warranted at this time. The DOJ indicated that the 10% overcharge presumption provides a “predictable, uniform methodology” for the calculation of fines in most cases, and noted that the Guidelines already permit the DOJ to exceed the fine levels calculated using the 10% overcharge presumption in some circumstances. Specifically, the DOJ noted that the alternative sentencing provisions of 18 USC 3571 already permit it to sidestep the standard guidelines and seek double the gain or loss from the violation where appropriate. Notably, the DOJ utilized this provision in seeking a \$1 billion fine from AU Optronics in a 2012 action, although the court declined the request, characterizing it as “excessive”. The court did, however, impose a \$500 million fine, an amount well in excess of the cap under the standard antitrust fine guidelines.

Finally, D.C. Circuit Court of Appeals Judge Douglas Ginsburg and FTC Commissioner Joshua Wright offered a completely different view on the issue in comments that they submitted to the Sentencing Commission. Suggesting that fines imposed on corporations seem to have little deterrent

effect, regardless of amount, they encouraged the Commission to instead recommend an increase in the individual criminal penalty provisions for antitrust violations. Notably, they encouraged the Commission not only to consider recommending an increase in the fines to which an individual might be subjected (currently capped at \$1 million), but also to recommend an increase in the prescribed range of jail sentences for such conduct (which currently permit for imprisonment of up to 10 years).

The Commission will now weigh these comments and ultimately submit its recommendations to Congress by next May. If any changes are adopted by Congress, they would likely go into effect later next year. Stay tuned.

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National Law Review, Volume IV, Number 246

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