



The American Antitrust Institute

July 8, 2013

United States Sentencing Commission  
One Columbus Circle, NE,  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

*Attention Public Affairs - Priorities Comment*

Dear U.S. Sentencing Commission:

We are writing pursuant to the Commission's Federal Register Notice of Proposed Priorities and Request for Public Comment, in which the Commission is seeking public comment on proposed priority policy issues for the amendment cycle ending May 1, 2014.<sup>1</sup>

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Our mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. We promote the vigorous use of antitrust as a vital component of national and international competition policy.<sup>2</sup>

We are writing to urge the Commission to reconsider a crucial empirical finding it made in 1987 that has become a lynchpin of the formula it uses to calculate fines for antitrust offenses. The 2012 Guidelines Manual, Chapter Two - Offense Conduct, Part R - Antitrust Offenses, Section 2R1.1, Commentary 3, reads as follows:

"3. The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price.... The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.... "<sup>3</sup>

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<sup>1</sup> [http://www.uscc.gov/Legal/Federal\\_Register\\_Notices/20130530\\_FR\\_Proposed\\_Priorities.pdf](http://www.uscc.gov/Legal/Federal_Register_Notices/20130530_FR_Proposed_Priorities.pdf)

<sup>2</sup> Founded in 1998, AAI is a 501(c)(3) tax exempt Washington, D.C. corporation. For more information see <http://antitrustinstitute.org>

<sup>3</sup> See [http://www.uscc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/2r1\\_1.htm](http://www.uscc.gov/Guidelines/2012_Guidelines/Manual_HTML/2r1_1.htm)

Commentary 3 also explains why this 10 percent figure is doubled to account for a number of factors before it is included in the fine determination calculations.<sup>4</sup> This Commentary also notes that in special cases a different overcharge amount can be used,<sup>5</sup> but in practice the Commission almost always uses 10 percent.<sup>6</sup>

This 10 percent presumption has been in the Sentencing Guidelines since their inception<sup>7</sup> and to our knowledge the Commission has never seriously re-examined this estimate. Although we do not know how the Commission arrived at 10 percent, when the Commission was in the process of formulating these Guidelines the then-Assistant Attorney General for Antitrust, Douglas Ginsburg, stated in a Hearing before the Sentencing Commission that "price fixing typically results in price increases, that has harmed the consumers in a range of 10 percent of the price...."<sup>8</sup> We know of no other estimates presented to the Commission at that time, and the Commission might well have accepted and used AAG Ginsburg's estimate.

In recent years, however, a number of large-scale empirical studies have re-examined this issue. These studies usually have determined that price fixing raises prices by significantly more than 10 percent on average. For example, a recent examination of several hundred economic studies by John M. Connor and Robert H. Lande, "Cartels as Rational Business Strategy: Crime Pays," 34 *Cardozo Law Review* 427, 456-57 (2012) (attached) contains a meta-analysis of the results of a huge number of cartel overcharge estimates published by economists in scholarly publications. Connor and Lande found 1,517 useful estimates of cartel overcharges in more than 200 publications that analyzed cartels that operated in 381 markets. The median average cartel overcharge for all types of cartels and time periods was 23.3 percent.<sup>9</sup> The authors reported no significant trend in cartel markups over time. Indeed, the median for price-fixing episodes ending since 2000 was virtually the same: 22.5 percent. The mean of the average overcharge figures was 49 percent; much higher than the median figure due to the presence of some extremely large overcharges in their sample.<sup>10</sup>

Connor and Lande also used a very different method to calculate average and median cartel overcharges by searching for and averaging final verdicts in litigated United States cartel cases. Because government enforcers are not usually required to calculate the actual overcharges in their cartel cases (the Department of Justice usually instead relies on the Sentencing Guidelines' 10 percent presumption)<sup>11</sup> and because almost every private antitrust suit for damages settles or is

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 *Tulane L. Rev.* 513, 524 (2005). Lande is a Director of the American Antitrust Institute and Connor is a Senior Fellow.

<sup>7</sup> *Id.* at 524-26.

<sup>8</sup> See *Sentencing Options: Hearing Before the United States Sentencing Commission* (July 15, 1986), in *United States Sentencing Commission: Unpublished Public Hearings 1986*, at 15 (1988).

<sup>9</sup> See John M. Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime pays," 34 *Cardozo Law Review* 427, 456 (2012). This article won the Jerry S. Cohen Award for Best Antitrust Scholarship of 2012. Note that this sample contains hundreds of zero overcharges (i.e., ineffective cartels).

<sup>10</sup> *Id.*

<sup>11</sup> Price fixing is illegal regardless whether, or the extent to which, defendant affected prices, because the agreement to fix prices is illegal. For this reason the amount that prices changed, or even whether prices were affected at all, is not normally calculated in a criminal antitrust case. *Id.* at 551

dismissed before an overcharge can be calculated by a neutral observer and made part of the public record of the case,<sup>12</sup> there are a surprisingly small number of litigated cartel verdicts. The authors were only able to find 25 litigated final cartel verdicts to analyze. These cartels were found to have had median overcharges of 22%, and average overcharges of 31 percent.<sup>13</sup> Thus, the two approaches yield very similar median cartel overcharges of approximately 23 percent and 22 percent overall. The average results were 49 percent for the economic studies and 31% for the verdicts.

When the Commission formulated its estimate that price fixing on average raises prices by 10 percent it did so on the basis of the best evidence available in the years prior to 1987.<sup>14</sup> But the evidence that has accumulated during the past 25 years strongly suggests that this estimate is significantly low. The 10 percent presumption is of course a crucial underpinning of antitrust fine calculations. Raising it to 20 percent, for example, would double the amounts in the recommended antitrust fine range. In total, antitrust fines have been between \$338 million and \$1.472 billion per year since 2005.<sup>15</sup> Doubling the 10 percent presumption would result in a considerable increase in the funds available to the Crime Victim's fund, for compensating victims of violent crimes, as well as lead to more nearly optimal deterrence of price fixing and other cartel behavior.<sup>16</sup>

The subject of antitrust fines is consistent with the 4th tentative priority the Commission listed in its Notice of Proposed Priorities: "Continuation of its work on economic crimes....". For all these reasons, the American Antitrust Institute requests the U.S. Sentencing Commission to re-examine the 10 percent overcharge presumption contained in Section 2R1.1 of the Guidelines. We believe this presumption should at least be doubled.<sup>17</sup>

Respectfully submitted,



Albert A. Foer  
President  
American Antitrust Institute

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<sup>12</sup> *Id.* For a discussion of settlement in this context, and why settlement amounts are likely to be an extremely unreliable guide as to the size of the underlying cases' overcharges see *id.*

<sup>13</sup> *Id.* at 556.

<sup>14</sup> There is evidence that the post World-War-II years up to the mid 1970s were years during which overcharges were at historic lows – 40% below average (See Connor & Lande, *supra* note 6, at 513 at Table 4, row 4). Therefore, the 10% average overcharges calculated by the DOJ in the 1980s could have been accurate for the time, but the period observed was atypical.

<sup>15</sup> See U.S. Department of Justice, Antitrust Division Workload Statistics FY 2003-2012, available at <http://www.justice.gov/atr/public/workload-statistics.html>

<sup>16</sup> For a more detailed analysis of the issue of the optimal deterrence of cartels see Connor & Lande, *supra* note 9.

<sup>17</sup> The Guidelines currently presume the "average" gain from price fixing is 10%, and the corresponding "average" overcharges computed in the Connor/Lande samples are 31% and 49%. Accordingly, our recommendation that the Commission double the 10% presumption is conservative.