
3. Criminal Price-Fixing Prosecutions

Sentencing Guidelines

Antitrust Law

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Sentencing Guidelines: Organizations

- General approach
 1. Set a base fine for each count
 2. Determine culpability score
 3. Use culpability score to determine minimum and maximum multipliers
 4. Apply multipliers to base fine to create the *Guidelines fine range* of minimum and maximum fines
 5. Consider additional statutory factors
 - a. Section 3553 factors
 - b. Section 3572 factors
 6. If appropriate, make motion for Downward Departure from the Guidelines range
 7. Recommend sentence
- Guidelines apply separately for each count

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*¹
 - This was a sentence recommendation based on a plea agreement
 - Step 1: Determine base fine
 - Greatest of:
 - a. the amount determined by the offense level
 - i. Start with a “Base Offense Level” of 12
 - ii. Add additional points based on volume of commerce involved (2R1.1(b)(2))
 - b. the pecuniary gain to the organization from the offense, *or*
 - c. the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly
 - Practically, in antitrust cases the third alternative is almost always the one applied
 - Produces the largest fine range, since USSG presumes loss equal to 20% of the *volume of affected commerce* (USSG § 2R1.1(d)(1) & Application Note 3)
 - Basis: Commission assumed—
10% overcharge, *plus*
10% for harm to customers that were priced out of the market (very loose)
 - In practice, the presumption is almost conclusive
 - See USSC § 2R1.1 Application Note 3

¹ United States v. Kayaba Industry Co., No. 1:15-cr-00098 (S.D. Ohio indictment filed Sept. 16, 2015).

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 1: Determine base fine

Used Method c

Guidelines Calculation		
1	Base Fine (20% of \$324 million (Volume of Affected Commerce) (§ 2R1.1(d)(1) & § 8C2.4(b)))	\$64.8 million

- This was a sentence recommendation based on a plea agreement
 - The volume of affected commerce resulted from an agreement of the parties supported by evidence provided by the defendant
 - Did not need to be found by a jury under *Booker*

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 2: Determine culpability score
 - Based on a point system with a starting point and upward and downward adjustments
 - Start with culpability score of 5 (§ 8C2.5(a))

Guidelines Calculation		
1	Base Fine (20% of \$324 million (Volume of Affected Commerce) (§ 2R1.1(d)(I) & § 8C2.4(b))	\$64.8 million
2	Culpability Score	
	i. Base (§ 8C2.5(a))	5

- Adjustments to base culpability score
 - Upwards adjustments
 - Downward adjustments

Sentencing Guidelines: Organizations

■ *Application 1: Kayaba Industry Co. in the Shock Absorber case*

□ Step 2: Determine culpability score

■ Upwards adjustments

a. Involvement in or Tolerance of Criminal Activity (§ 8C2.5(d))

- Size of the organization (by number of employees), *and*
- Whether there was involvement or willful ignorance on the part of high-level management or pervasive tolerance of the offense throughout the organization

Employees	Adjustment
Greater than 5000	+5
Greater than 1000 but less than 5000	+4
Greater than 200 but less than 100	+3
Greater than 50 but less than 200	+2
Greater than 10 but less than 50	+1



Here, size > 5000 employees + high-level involvement = +5 points

b. Previous related criminal history (§ 8C2.5(d))

Here, none → +0 points

c. Whether the organization willfully obstructed or impeded the investigation (§ 8C2.5(e))

Here, none → +0 points

Total upwards adjustment = +5

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 2: Determine culpability score

Guidelines Calculation		
1	Base Fine (20% of \$324 million (Volume of Affected Commerce) (§ 2R1.1(d)(I) & § 8C2.4(b))	\$64.8 million
2	Culpability Score	
	i. Base (§ 8C2.5(a))	5
	ii. Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5
	iii. Prior History (§ 8C2.5(c))	0
	iv. Violation of Order (§ 8C2.5(d))	0
	v. Obstruction of Justice (§ 8C2.5(e))	0

Upward adjustments

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 2: Determine culpability score
 - Downward adjustments
 - a. Existence of an effective compliance program and for self-reporting of the violation (§ 8C2.5(f))
 - Here, none → -0 points
 - b. Cooperation with the investigation & acceptance of responsibility (§ 8C2.5(g)(2))
 - Here, cooperation → -2 points

Total downwards adjustment = -2

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 2: Determine culpability score

Guidelines Calculation			
	1	Base Fine (20% of \$324 million (Volume of Affected Commerce) (§ 2R1.1(d)(I) & § 8C2.4(b))	\$64.8 million
	2	Culpability Score	
Upward adjustments	i.	Base (§ 8C2.5(a))	5
	ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5
	iii.	Prior History (§ 8C2.5(c))	0
	iv.	Violation of Order (§ 8C2.5(d))	0
	v.	Obstruction of Justice (§ 8C2.5(e))	0
Downward adjustments	vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0
	vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g)(2))	-2
		Total Culpability Score:	8

Net total culpability score = 8

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 3: Use culpability score to determine minimum and maximum multipliers (§ 8C2.6)

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

Note: Lower bound on minimum multiplier in antitrust cases is 0.75 (§ 2R1.1(d)(2))

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 4: Apply multipliers to base fine to create *Guidelines fine range* of minimum and maximum fines

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

Base Fine = \$64.8 million
Apply multipliers:

Guidelines range:
\$103.68 million - \$207.36 million

Note: Lower bound on minimum multiplier in antitrust cases is 0.75 (§ 2R1.1(d)(2))

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 5: Apply additional statutory factors—Section 3553 factors (selected)¹
 1. The history, characteristics, and cooperation of the defendant (§ 3553(a)(1)):
 - Here:
 - No prior history of being charged with a crime
 - Defendant’s cooperation in the investigation was timely and complete
 - Defendant “has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct”
 2. The seriousness of the offense (§ 3553(a)(2)(A)):
 - Here:
 - Antitrust offenses are very serious crimes
 3. Deterrence and protecting the public from further crimes of the defendant (§3553(a)(2)(B)-(C)):
 - Ensure recommended fine provides adequate general and specific deterrence
 - Here:
 - Defendant has implemented new antitrust compliance policy
 4. The need to provide to provide the defendant with educational training, medical care, or other correctional treatment (§3553(a)(2)(D))
 - Unlikely to ever apply in antitrust cases (as opposed, for example, to drug cases)

¹ 18 U.S.C. § 3553 (imposition of a sentence).

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 5: Apply additional statutory factors—Section 3553 factors (selected)
 5. The kinds of sentences available (§ 3553(a)(3))
 - Here, for a corporation only criminal fines
 6. The kinds of sentence and the sentencing range under the Sentencing Guidelines in effect on the date on which the defendant is sentenced (§ 3553(a)(4))
 7. Any pertinent policy statement issued by the Sentencing Commission (§ 3553(a)(5))
 8. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (§ 3553(a)(6))
 9. The need to provide restitution to any victims of the offense (§ 3553(a)(7))

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 5: Apply additional statutory factors—Section 3572 factors¹
 1. Preventing recurrence of the offense—Compliance (§ 3572(a)(8))
 - Here:
 - Complied fully with the investigation once contracted by the DOJ
 - Instituted policies to ensure that it would not violate the antitrust laws again
 - Senior management fully committed to make compliance a top priority
 - Provides for training, testing, prior approval of contacts with competitors, certifications by employees of independent pricing and no exchange of information with competitors, anonymous hotline reporting, proactive monitoring and auditing, and discipline of employees who violate the policy
 2. Discipline of culpable actions (§ 3572(a)(8))
 - Here:
 - Two high-ranking employees who were personally involved were demoted and no longer have sales responsibility
 - Lower level employees may also have been disciplined

¹ 18 U.S.C. § 3572 (imposition of a sentence of fine and related matters).

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 5: Apply additional statutory factors—Section 3572 factors (con't)
 3. The defendant's financial position (§ 3572(a)(1))
 - Here:
 - Defendant is solvent and has agreed to pay recommended fine within 15 days of the final judgment
 4. Other relevant Section 3572 factors captured in Guidelines calculations:
 - Pecuniary loss inflicted on others (§ 3572(a)(3))
 - Need to deprive defendant of illegally obtained gains (§ 3572(a)(5))
 5. Restitution (§ 3572(a)(4))
 - Unnecessary in most antitrust cases since victims may sue for treble damages

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 6: Motion for Downward Departure from the Guidelines range (Guidelines § 8C4.1)
 - Factors
 - The significance and usefulness of the defendant's assistance
 - The nature and extent of the defendant's assistance
 - The timeliness of the defendant's assistance

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Step 7: Recommend sentence
 - \$62 million fine
 - Against Guidelines range of \$103.68 million to \$207.36 million
 - No order of restitution
 - Typical in antitrust actions in light of the availability of civil treble damage actions
 - No term of probation
 - Fine to be paid in full 15 days after final judgment
 - Defendant has already instituted and is fully committed to a new compliance program
 - \$400 “special assessment” required by 18 U.S.C. § 3013(a)(2)(B)
 - Special assessment (of varying amounts) is made on every person for each count of a federal offense on which it is convicted
 - Contributed by law to the Crime Victims Fund (a separate account in the Treasury Department)
 - Recommended sentence was accepted and ordered by the court

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Probation
 - Note that the court did not order probation in *Kayaba*, but it could have
 - Corporations may be sentenced to probation¹
 - If imposed, must be for a minimum of one year²
 - Cannot be for a term longer than five years³
 - Sentencing Guidelines call for probation as a means of ensuring that—
 1. Convicted corporations comply with their obligations to pay a fine or special assessment
 2. Make restitution
 3. Establish a compliance program
 4. Perform community service, or
 5. Comply with the court's remedial orders⁴
 - Mandatory condition
 - The only mandatory condition of corporate probation that the corporation not engage in any further criminal conduct⁵

¹ U.S.S.G. § 8D1.1(a)(7); 18 U.S.C. § 3551(c).

² U.S.S.G. § 8D1.2(a)(1); 18 U.S.C. § 3561(c)(1) (for felonies).

³ U.S.S.G. § 8D1.2(a); 18 U.S.C. § 3561(c) (for felonies).

⁴ U.S.S.G. §§ 8D1.1(a)(1), (2), (3).

⁵ 18 U.S.C. § 3563(a)(1), U.S.S.G. § 8D1.3(a)(1).

Sentencing Guidelines: Organizations

- *Application 1: Kayaba Industry Co. in the Shock Absorber case*
 - Probation
 - Failure to comply with conditions of probation: the court may—
 - resentence the corporation,
 - extend the term of its probationary period, *or*
 - impose additional probationary conditions.¹

¹ 18 U.S.C. § 3565(a); U.S.S.G. § 8F1.1.

Sentencing Guidelines: Organizations

- *Application 2: AUO and AUOA in the TFT-LCD cartel case*¹
 - Step 1: Determine base fine and total culpability score

		Guidelines Calculation	AUO	AUOA
1		Base Fine (20% of \$2.34 billion (Volume of Affected Commerce) (§ 2R1.1(d)(I) & § 8C2.4(b)) ²)	\$486 million	\$486 million
2		Culpability Score		
Upward adjustments	i.	Base (§ 8C2.5(a))	5	5
	ii.	Involvement in or Tolerance of Criminal Activity (§ 8C2.5(b)(1))	5	1
	iii.	Prior History (§ 8C2.5(c))	0	0
	iv.	Violation of Order (§ 8C2.5(d))	0	0
	v.	Obstruction of Justice (§ 8C2.5(e))	0	3
Downward adjustments	vi.	Effective Program to Prevent and Detect Violations of Law (§ 8C2.5(f))	0	0
	vii.	Self-Reporting, Cooperation, and Acceptance of Responsibility (§ 8C2.5(g)(2))	0	0
	Total Culpability Score:		10	9

¹ Superseding Indictment, *United States v. AU Optronics Corp.*, No. 3:09-CR-00110 (N.D. Cal. filed June 10, 2010).

² In its sentencing memorandum, the government, supported by an expert economic declaration, claimed that the volume of affected commerce was \$2.34 billion. The defendants argued for a lower number. There was no jury finding on the volume of affected commerce (although there was a jury finding on the gain to the conspirators of \$500 million).

Sentencing Guidelines: Organizations

- *Application 2: AUO and AUOA in the TFT-LCD cartel case*
 - Step 2: Find multipliers and apply them to base fine to find Guidelines range (§ 8C2.6)

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

Base Fine = \$486 million

Multipliers:

← AUO: 2.0 – 4.0

← AUOA: 1.8 – 3.6

Guidelines range:

AUO: \$936 million - \$1.872 billion

AUOA: \$843.4 million - \$1.684 billion

Recommendations:

	AUO	AUOA
DOJ	\$1 B	\$0
Probation	\$0.5B	\$0
Defendant	\$0.285 B	\$0

Note: The alternative fines provision provides a maximum penalty of twice the gain or twice the loss resulting from the illegal activity. The jury in its verdict found that the gain from the illegal conspiracy was at least \$500 million. Therefore, the maximum fine would be \$1 billion, whatever the Guidelines range. Since the government used the Guidelines range only to argue for a sentence within a range set independently by statute, the jury did not need to make a finding on the volume of affected commerce.

Sentencing Guidelines: Compliance Programs

- “Effective compliance and ethics program” (for line 2(vi))
 - Sentencing Guidelines permit a three-point reduction in culpability score if the defendant had an “effective compliance and ethics program” in place at the time of the offense¹
 - To have an “effective compliance and ethics program,” the organization must—
 1. exercise due diligence to prevent and detect criminal conduct; and
 2. otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law²
 - DOJ historical approach
 - Not to recommend any reduction in the culpability score for the existence of an antitrust compliance program
 - Leniency program already rewards effective compliance programs
 - Organizations that do not detect and self-report violations do not have effective compliance programs
 - Often because high-level employees are in, or at least tolerating, price-fixing activities

¹ USSG § 8C2.5(f)(1).

² USSG § 8B2.1(a). Further detail is provided in Sections 8B2.1(b) and (c).

Sentencing Guidelines: Compliance Programs

- DOJ has started to credit compliance programs as of 2015
 - First in cases¹
 - Now in a formal policy (as of July 2019)²
 - Desirable attributes:
 - Fully commits senior management to make compliance a top priority
 - Provides for training and testing of senior management and all sales personnel
 - Requires prior approval of contacts with competitors and active monitoring of follow-up reports on any contracts
 - Requires certifications by employees of independent pricing and no exchange of information with competitors
 - Provides for anonymous hotline reporting of possible violations
 - Provides for discipline of employees who violate the policy

¹ See United States Sentencing Memorandum and Motion for a Downward Departure Pursuant to United States Sentencing Guidelines § 8C4.1, *United States v. Kayaba Industry Co.*, No. 1:15-cr-00098-MRB (S.D. Ohio Oct. 5, 2015); see also Plea Agreement ¶ 13, *United States v. Barclays PLC*, No. 3:13-cr-00077-SRU (D. Conn. May 20, 2015) (noting that Barclays and the United States agreed upon the fine amount “considering, among other factors, the substantial improvements to the defendant’s compliance and remediation program to prevent recurrence of the charged offense”).

² U.S. Dep’t of Justice, Antitrust Div., *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019); see Makan Delrahim, Ass’t Att’y Gen., Antitrust Div., *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs*, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement, New York, NY (July 11, 2019).

Sentencing Guidelines: Individuals

- Sentencing Commission objectives
 1. Increase frequency of prison terms
 - Guidelines provide for confinement of almost all individual violators
 2. Increase average length of imprisonment
 3. Fines tend to be small, reflecting a primary emphasis on imprisonment

Sentencing Guidelines: Individuals

- Imprisonment
 1. Begin with base offense level of 12
 - Increased from 10 in 2005
 2. Add additional points for
 - a. Bid-rigging (1 point)
 - b. Volume of defendant's affected commerce (up to 16 points)
 - c. Obstruction of justice (2 points)
 - d. Other aggravating factors (including degree of involvement in conspiracy)
 3. Subtract points for
 - a. Minor involvement in conspiracy (2 to 4 points)
 - b. Defendant's acceptance of responsibility (2 points)
 4. Determine sentencing range from total offense level

USSG § 3B—Role in the Offense
USSG § 3C—Obstruction
USSG § 2R1.1—Antitrust Offenses
USSG ch. 5 pt. A (Sentencing Table)

Sentencing Guidelines: Individuals

- Application: Hsuan Bin Chen and Hui Hsiung (aka Kuma) in the *TFT-LCD* cartel case
 - Imprisonment calculation: Step 1—Calculate total offense level

Guidelines Calculation		
a	Base Offense Level (§ 2R1.1(a))	12
b	Volume of Affected Commerce (§ 2R1.1(b)(2)(G)) (More than \$1.5 billion) ¹	+16
c	Total Adjusted Offense Level	28
d	Victim-Related Adjustments (§ 3A)	+0
e	Role in the Offense Adjustments (§ 3B)	+4
f	Obstruction Adjustments (§ 3C)	+0
g	Acceptance of Responsibility (§ 3 E1.1(a) and (b))	+0
h	Total Offense Level	32
i	Criminal History Category (§ 4A1.1)	I

Volume of Commerce Adjustments		
(A)	More than \$1,000,000	add 2
(B)	More than \$10,000,000	add 4
(C)	More than \$40,000,000	add 6
(D)	More than \$100,000,000	add 8
(E)	More than \$250,000,000	add 10
(F)	More than \$500,000,000	add 12
(G)	More than \$1,000,000,000	add 14
(H)	More than \$1,500,000,000	add 16

USSG § 2R1.1(b)(2)

¹ “[T]he 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.” USSG § 2R1.1(b)(2).

Sentencing Guidelines: Individuals

- Imprisonment
 - Imprisonment calculation: Step 2—Apply total offense level to obtain sentencing range

Individual Sentencing Ranges

Offense Level	Months
25	57-71
26	63-78
27	70-87
28	78-97
29	87-108
30	97-121
31	108-135
32	121-151
33	135-168
34	151-188

Guidelines range



But since the Sherman Act provides only for maximum of 120 months, the Guidelines range is 120 months

Sentencing Guidelines: Individuals

■ Fines

- USSG set Guidelines fine range to be from 1% to 5% percent of the affected volume of commerce, but not less than \$20,000¹
 - Guidelines range: \$23.4 million - \$117 million (1% and 5% of \$2.34 billion)
 - Within the maximum set by the alternative fines provision
 - Twice the gain or loss resulting from the illegal activity
 - Guidelines presume that the overcharge is 20% of the affected commerce
 - But above Sherman Act maximum of \$ 1 million
 - DOJ elected to charge under the Sherman Act maximum
- Considerations²
 - Role in the offense
 - Degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement)
 - If the defendant lacks the ability to pay the guideline fine, the court should impose community service in lieu of a portion of the fine
 - The community service should be equally as burdensome as a fine

¹ USSG § 2R1.1(c)(1).

² USSG § 2R1.1 Application Note 2.

Sentencing Guidelines: Individuals

- Sentence recommendations

	Chen		Hsiung	
	Prison	Fine	Prison	Fine
Guidelines	120 m	\$23.4 m - \$117 m	120 m	\$23.4 m - \$117 m
DOJ	120 m	\$1 m	120 m	\$1 m
Probation	120 m	\$0.5 m	120 m	\$0.5 m
Defendant	< 7 m	\$0.03 m	< 7 m	
Court	36 m	\$0.2 m	36 m	\$0.2 m

Sentencing Guidelines: Cooperation

- The Guidelines provide for departures from the Guidelines range when the defendant has provided substantial assistance to the authorities
 - Organizations—nonexclusive factors¹
 - Significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered
 - Nature and extent of the defendant’s assistance
 - Timeliness of the defendant’s assistance
 - Individuals—nonexclusive factors²
 - Above factors plus—
 - Truthfulness, completeness, and reliability of any information or testimony provided by the defendant
 - Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance

¹ USSG § 8C4.1.

² USSG § 5K1.1.