

# ANTITRUST

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SAN FRANCISCO, CA

NOVEMBER 15, 2018

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# Connecting the Dots: Tracing the DOJ's Inclusion of Indirect Commerce in Auto Parts Criminal Penalties

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BY MICHELLE BURTIS, DANIEL K. OAKES,  
AND MARY BETH SAVIO

**A**FTER AN UNPRECEDENTED RUN spanning at least seven years, the U.S. Department of Justice's international criminal investigations into collusion in the auto parts industry appear to have largely concluded. What began with dawn raids of several auto parts manufacturers in Detroit in February 2010 and led to plea agreements pertaining to a handful of auto parts, quickly expanded into "the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct."<sup>1</sup> All told, the DOJ charged 48 companies and 65 executives with price fixing, bid rigging, and other anticompetitive conduct that involved more than 50 different automotive parts.<sup>2</sup> Of that group, 46 companies—the majority being Japanese component parts manufacturers—entered plea agreements and all together agreed to pay more than \$2.9 billion in criminal fines.

The auto parts investigations are important not just because they set a new high-water mark for DOJ enforcement efforts, but also because they form a large set of plea agreements that may be compared to each other to analyze the DOJ's criminal fining policy. Indeed, from "amnesty plus" to "penalty plus" to obstruction of justice to inability to pay, the various auto parts plea agreements display an example of nearly everything in the DOJ's policy toolkit.<sup>3</sup> The set of agreements make a dataset worthy of examination, particularly with regard to whether the sentencing outcomes are

consistent, both across the various investigations and with the DOJ's stated policies.

While there are many potential topics for examination, we focus our attention here on one of the main drivers of criminal antitrust fines: the volume of commerce (VOC) considered by the DOJ to have been affected by the conspiracy and used as a basis in the determination of the fine. Though the DOJ is frequently criticized for a general lack of transparency in calculating affected VOC,<sup>4</sup> the auto parts cases viewed together shed additional light on the DOJ's methodology of accounting for a controversial type of "indirect" sales potentially affected by conspiratorial agreements. As far as we are aware, these cases are the first to explicitly detail the DOJ's treatment of such indirect sales. However, the DOJ's methodology is not intuitive and so far has not been explained or rooted in any clearly articulated policy statement.

## The Need for Transparency in Leniency-based Criminal Cartel Enforcement.

The DOJ has led enforcement agencies around the world in bringing cartel activity—self-concealing and difficult to detect by its very nature—to light by instituting leniency programs that provide incentives for self-reporting and cooperation. These programs are based upon the pillars of transparency and predictability in enforcement. Corporations considering whether to self-report violations or cooperate with DOJ investigations must weigh the costs and benefits of doing so almost entirely *ex ante*. Without a high degree of predictability in the treatment to be received from enforcement agencies and the ultimate sentencing outcome, a potential cooperator cannot adequately assess the significant consequences attached to its choices. Uncertainty would tend to decrease the willingness of corporations and culpable individuals to cooperate, and would limit the effectiveness of the leniency program. Indeed, the DOJ has often reiterated the importance of transparency in every aspect of its policy and practice, from investigation and charging decisions to plea negotiation.<sup>5</sup>

Transparency and guidance are arguably most necessary regarding the calculation of criminal cartel fines. At least conceptually, cartel fines levied by the DOJ (in both the negotiated and the charged contexts) should be predictable because they are based on the formulaic approach set forth in the U.S. Sentencing Commission Guidelines (USSG).<sup>6</sup> However, while the USSG approach is clearly outlined, the inputs into those formulas are not described in the same detail and, historically, the DOJ has not fully explained how it determines those inputs.

## Role of Volume of Commerce in the Operation of the Sentencing Guidelines

The initial input driving the calculation of criminal antitrust fines is the VOC "attributable to the defendant." Under USSG § 2R1.1, the "base fine" is calculated as "20 percent of the volume of affected commerce."<sup>7</sup> It is notable that, for

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the sake of simplicity and to reduce the burden on the court, the USSG uniformly imposes the assumption of a 10 percent overcharge resulting from the conduct.<sup>8</sup> (Note however that the USSG commentary also makes room to account for circumstances where the actual overcharge substantially differs.) After the base fine is calculated, it is then increased by minimum and maximum multipliers (determined by the USSG “culpability score”) to create a range.<sup>9</sup> Finally, after selecting the appropriate level within the range at which to peg the fine, the DOJ may seek upward and/or downward departures based on mitigating or aggravating factors.<sup>10</sup> For example, cooperating companies that provide “substantial assistance in the investigation or prosecution of another organization” can obtain reductions of the overall fine.

Though the steps laid out in the USSG are simple enough to follow, there remains a significant gap in guidance regarding the fining process. Despite its obvious importance in driving the magnitude of the ultimate fine, the USSG provides no substantive guidance in defining what is (and what is not) to be included in the calculation of VOC. The relevant section of the USSG states only that the VOC “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.”<sup>11</sup> And because the vast majority of U.S. criminal enforcement actions have resulted in negotiated plea agreements, case law interpreting the USSG definition is scant and the outcomes are conflicting.<sup>12</sup> The case law that does exist focuses primarily on whether commerce that did not experience the price effect intended by the conspiracy is properly excluded in the calculation of “affected” sales. As one court has noted, “Sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense.”<sup>13</sup>

### Direct vs. Indirect Commerce

In this context, one of the most important recurring issues is the treatment of sales potentially affected by collusion that were not made directly by a conspirator to purchasers in the United States. “Direct” sales—sales to purchasers in the U.S. of domestically-produced products and foreign-produced imported products (“domestic” and “direct import” sales, respectively)—are the paradigmatic form of affected VOC under the Sherman Act. Inclusion of conspiracy-affected direct sales in the VOC is uncontroversial.

However, as further discussed below, the DOJ’s treatment of “indirect” sales is more questionable. “Indirect” sales could encompass, for example, a foreign defendant’s sales of products to a buyer located outside of the United States which are later incorporated as inputs to other products destined to be sold in the U.S.

Indirect sales of this type have two notable characteristics. First, sales of the price-fixed products are made by foreign companies to foreign companies. Second, to the extent any domestic sales are affected by the conspiracy, U.S. consumers

are not impacted by an overcharge on the price-fixed part itself, but rather by an overcharge on the purchase price of a product incorporating the price-fixed product as an input. For example, domestic sales would be impacted where the overcharge on a foreign-produced and sold auto part was passed through to U.S. consumers by the increased price of a domestically-sold automobile.

At one time, cartel fines were largely based solely on direct commerce.<sup>14</sup> But for at least two decades, the DOJ has also sought to account for affected foreign, indirect commerce by incorporating additional fining penalties based on the rationale that “the amount of U.S. commerce affected by a defendant in an international cartel understates the seriousness of the defendant’s role in the offense and, therefore, the impact of the defendant’s conduct on American businesses and consumers.”<sup>15</sup> Early DOJ guidance suggested that indirect commerce could be accounted for in one of two ways: (1) adjusting the baseline volume of commerce under the USSG to account for worldwide sales affected by the violation; or (2) treating sales outside of the United States as an aggravating factor requiring an upward adjustment in the Sentencing Guidelines calculation. In practice, the DOJ appears to have settled largely on the latter.<sup>16</sup>

But while the DOJ’s intention to account for indirect sales has been clear, it has not provided an overarching framework to address many pertinent questions, such as: how it assesses the impact of foreign sales on U.S. commerce; when it will seek to account for such sales in a fine; how it will set the magnitude of the fine given such sales; and how it will avoid the double-counting of commerce as international cartel enforcement continues to rise.

### Treatment of Indirect Commerce in the Auto Parts Cases

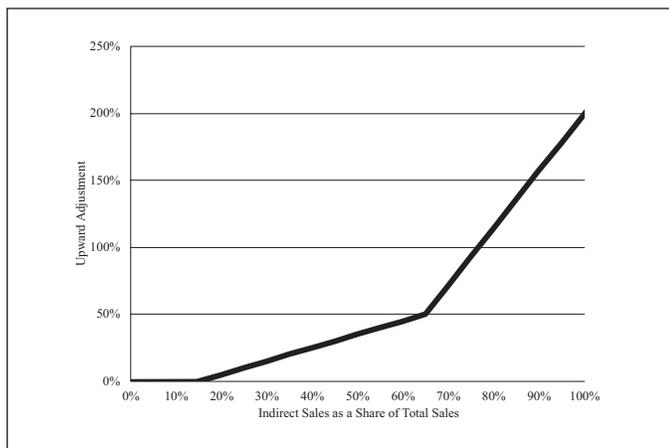
Despite this lack of guidance and other questions about its propriety,<sup>17</sup> indirect sales played a prominent role in criminal fine determinations in the auto parts cases. Indeed, of the 33 defendants analyzed in this article,<sup>18</sup> 19 defendants—nearly half of all pleading companies—experienced an increased fine because of indirect commerce penalties. That indirect commerce would so often impact conspiracies involving component parts sold predominantly by Japanese manufacturers to automakers worldwide is not entirely surprising given the global nature of automobile supply and sales channels. What is of greater interest, of course, is the DOJ’s methodology in calculating the upward adjustment in fines, which accounted in several cases for significant portions of the total fines of the affected defendants.

In general, the DOJ’s upward adjustment depends on the amount of indirect sales relative to the defendant’s direct sales (including both domestic and direct import sales). Specifically, the DOJ method stitches together the treatment of indirect sales within three different ranges. In the first range, if indirect sales account for 15 percent or less of total sales (where total sales include both direct and indirect sales),

**Table 1. Illustration of DOJ's Treatment of Indirect Sales**

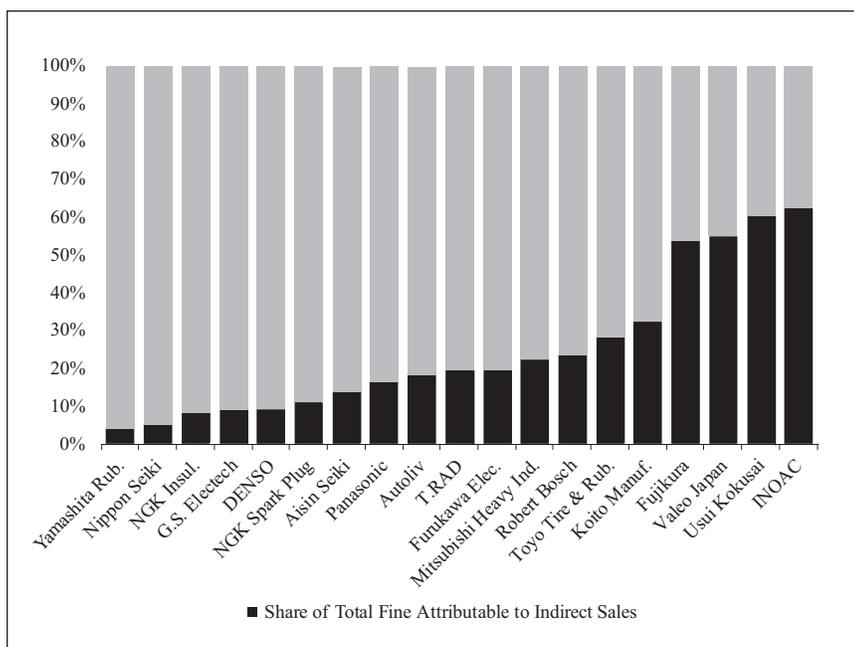
|        | USSG Minimum Fine | Indirect Sales and Percentage of Total Sales | Calculation of Upward Adjustment | Total Fine |
|--------|-------------------|--|----------------------------------|------------|
| Firm 1 | \$16.80           | \$10 (14%)                                   | 0%                               | \$16.80    |
| Firm 2 | \$16.80           | \$40 (40%)                                   | 40% – 15% = 25%                  | \$21.00    |
| Firm 3 | \$16.80           | \$180 (75%)                                  | 50% + 4.2856 * (75% – 65%) = 93% | \$32.40    |

**Graph 1. Graphical Illustration of DOJ's Treatment of Indirect Sales**



no upward adjustment is applied and indirect sales do not affect the DOJ's fine calculation at all. In the second range, if indirect sales are between 15 percent and 65 percent of total sales, the Guidelines' fine is adjusted upward by that per-

**Graph 2. Share of Total Criminal Fine Attributable to Indirect Sales by Auto Parts Defendant**



centage less 15 percentage points.<sup>19</sup> In the third range, if indirect sales account for more than 65 percent of total sales, the upward adjustment to the fine begins to increase significantly, and is calculated with the following formula:

$$50\% + 4.2857 * (\text{Percentage of Indirect Sales} - 65\%).^{20}$$

To illustrate, Table 1 shows how the DOJ's methodology would account for varying levels of indirect sales. The Table assumes three hypothetical firms, all with total conspiracy-affected direct sales equal to \$60 million, and minimum and maximum culpability multipliers under the USSG of 1.4 and 2.8, respectively, resulting in a fine in the range between a minimum of \$16.8 million and a maximum of \$33.6 million.<sup>21</sup> In particular, Table 1 shows the method by which the DOJ would adjust the minimum fine (and by implication also the maximum fine or any fine in between) for different levels of indirect sales. When indirect sales are relatively low (less than 15 percent of total sales), the DOJ methodology produces no upward adjustment in the fine. When indirect sales are somewhat higher at 40 percent of total sales, the upward adjustment increases the fine (based on the low end of the USSG range) by 25 percent to \$21.0 million. Finally, when indirect sales account for a substantial percentage of total sales, here assumed to be 75 percent, the upward adjustment is 93 percent, increasing the total fine to \$32.4 million.

A graphical illustration of the DOJ's methodology is shown in Graph 1. The line on the graph shows the relationship between the percentage of indirect sales and the corresponding percentage upward adjustment. As described above, when indirect sales are a relatively low percentage of total sales, there is no upward adjustment (shown by the segment of the line that is horizontal at a level of zero). But as indirect sales grow relative to total sales, the upward adjustment increases (the two upward sloping line segments). The slope of the line is steeper when indirect sales account for a larger portion of total sales, indicating that the upward adjustment increases more quickly at those levels. Also notice that, as the percentage of indirect sales approaches 100 percent of total sales, an

upward adjustment equal to 200 percent of the unadjusted base fine results. That is, there is an upper bound, equal to 200 percent, to the upward adjustment of the fine for indirect sales.

Across the auto parts cases, indirect sales contributed to the overall fines in varying degrees. Graph 2 below shows, for each of the 19 defendants for which indirect commerce caused an upward adjustment in its fine, the share of the total fine that was attributable to indirect sales. This number ranged from 4 percent and 62 percent of the total fine.

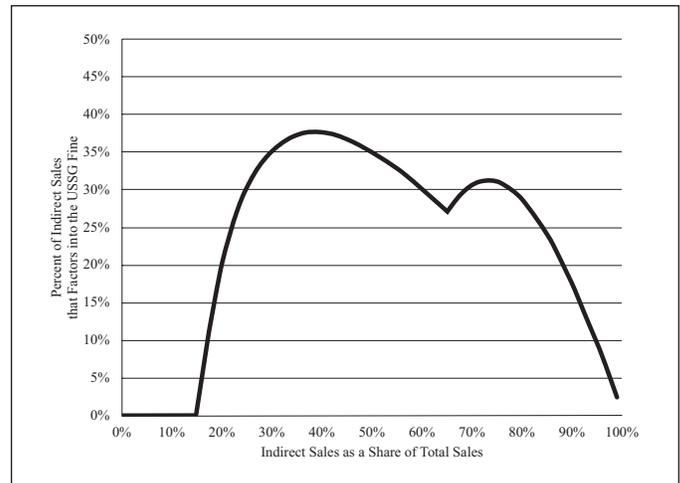
### Implications of DOJ Methodology

There are several notable features of the DOJ methodology, three of which we note here. Of particular interest are the handful of defendants whose indirect commerce was greater than 65 percent of the total sales, thus yielding the largest upward adjustments. INOAC Corp. had direct sales of only \$4.5 million, the second lowest of all pleading auto parts defendants. However, its indirect sales were \$51.0 million, accounting for more than 90 percent of total sales.<sup>22</sup> The resulting upward adjustment to its fine was 165 percent, increasing the fine from within a range of \$1.3 million to \$2.5 million (the minimum and maximum of the USSG range) to \$3.4 million, before accounting for any subsequent downward adjustment.<sup>23</sup> This substantial increase illustrates that the DOJ's treatment of indirect commerce can drive a defendant's ultimate fine even *higher than* the top of the unadjusted USSG range before accounting for any downward adjustment—in INOAC's case roughly 33 percent higher. Three other defendants experienced upward adjustments above 100 percent based on high indirect sales: Fujikura Ltd. (with an upward adjustment of 115 percent), Valeo Japan Co. Ltd. (121 percent), and Usui Kokusai Sangyo Kaisha, Ltd. (Usui) (151 percent).<sup>24</sup>

Second, for indirect commerce, the formula systematically generates a relatively lower impact on the fine than the impact the same amount of direct commerce would have. This is due to two main reasons: (1) the treatment of indirect commerce as a muted upward adjustment as opposed to being included dollar-for-dollar in the baseline VOC, and (2) the total impact of indirect commerce on the fine being effectually capped at 200 percent of direct commerce. To illustrate, consider the fine of INOAC, discussed above. Had the DOJ considered all of INOAC's \$56.0 million total sales as baseline VOC, the resulting fine would have been nearly \$11 million,<sup>25</sup> instead of the actual fine of \$2.4 million.

Third, compared to the dollar-for-dollar effect of direct sales, the largest effect of indirect sales on the fine is at most 38 cents on the dollar. That is, a defendant who is attempting to estimate a potential fine could consider the sum of direct sales and 38 percent of indirect sales as VOC in the USSG fine calculation. That effect, however, is not constant—it changes as the ratio of indirect sales to total sales varies. Graph 3 below illustrates the relationship. The DOJ methodology produces a somewhat unusual (and unex-

**Graph 3. Relationship Between Percentage of Indirect Sales and Percentage of Indirect Sales that Factors into USSG Fine Calculation**



plained) result: the impact on the fine of a dollar of indirect commerce first rises, then falls, and then rises and falls again as the indirect sales increases as a percentage of total sales. The maximum amount, 38 percent, occurs when indirect sales account for approximately 40 percent of total sales.

The DOJ's decision to account for indirect sales as a muted upward adjustment to the VOC (rather than as part of VOC) might reflect the fact that cost changes, including overcharges, may not be passed through fully (or even at all) in higher prices to indirect purchasers, and that determining the extent of any pass-through can be highly complex. Those realities are reflected in both the law and in economic theory. Since *Illinois Brick*,<sup>26</sup> indirect purchasers have been prevented from bringing federal civil antitrust claims at least in part as a result of such considerations. Moreover, those legal limitations are complemented by economic theory that recognizes prices may be "rigid," or "sticky," and in certain circumstances would not respond to changes in economic variables, such as a potential overcharge to a component part.<sup>27</sup> Such rigidity implies that component part cost changes may not affect the final price, which indicates a lack of pass-through of alleged overcharges. A lack of pass-through seems especially likely in industries like the auto parts industry, where the value of many of the individual components used in an automobile constitute only a very small percentage of the value of an entire automobile. If the overcharge was not passed through to American consumers or businesses, there would be no "impact of the defendant's conduct on American businesses and consumers" and no reason to adjust the fine.

### Additional Transparency Is Necessary

Given the DOJ's stated commitment to enforcement transparency, it is noteworthy that the DOJ's indirect commerce methodology was not revealed in a speech or other policy statement. Rather, as far as we are able to tell, practitioners

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were left to piece together the DOJ's methodology from disparate plea agreements, sentencing memoranda, and hearing transcripts from enforcement actions spanning years.

In fact, the formula used for cases with the largest percentages of indirect commerce only first surfaced in the sentencing memorandum for INOAC filed in January 2016—in the relatively late days of the auto parts investigation. Given the unusually large upward adjustment imposed in that case, the DOJ may have felt compelled to more fully specify its sentencing process to the court than it had in prior cases. Importantly, the DOJ justified the use of its fining formula by simply stating that the method had been used for sentencing determinations in prior auto parts cases.<sup>28</sup> But the cases cited by the DOJ in INOAC either involved lower levels of indirect sales (where the high-end formula would be inapplicable) or failed to detail the methodology used. In other words, the DOJ support for the validity of its formula was simply its prior use of the (previously unspecified) formula.

Consistency is, of course, crucial to achieving fairness in the sentencing of similarly situated defendants. However, given that negotiation plays a defining role in the outcome of most criminal enforcement actions, the lack of transparency allows the DOJ to set and justify its own precedent simply by convincing an early-in corporation to agree to such an approach, one which will have follow-on effects for all other companies investigated. Moreover, it appears that the treatment of indirect commerce in the auto parts cases has differed from the treatment in other investigations.<sup>29</sup> In subsequent cartel investigations, such as the capacitors investigation, the DOJ has continued to account for indirect sales in the calculation of fines.<sup>30</sup> However, based on the available public information, it is unknown whether the methodology is the same as that used in the auto parts actions.

While it is commendable that this methodology has been made public at all, additional guidance is needed. The mathematical precision of the calculation suggests the formula was designed with a particular purpose in mind. But the DOJ has not yet explained how or why it settled on the particulars of its methodology, justified its inflection points or limits, or provided a legal or economic policy supporting it.

### **Can Indirect Commerce Be Anchored by . . . Indirect Commerce?**

Practitioners searching for clues on the DOJ's indirect commerce enforcement policy run into additional issues that generate confusion. In particular, the lack of clarity in plea-related documents appears to further blur the already fuzzy lines between what constitutes direct and indirect commerce.

For example, the plea-related documents of Usui raise a question about whether the DOJ has expanded its enforcement to cases where there is no direct commerce at all that can anchor the criminal plea in the Sherman Act. Usui experienced a large 151 percent upward adjustment to its fine because its affected indirect sales accounted for 89 percent of

its total affected sales.

The Information filed on November 8, 2016 states that Usui and its co-conspirators sold steel tubes “in the United States for installation in vehicles and engines manufactured and sold in the United States.”<sup>31</sup> This seems to imply straightforward, direct U.S.-to-U.S. affected sales, by at least some co-conspirators. However, the sentencing memorandum filed on December 19, 2016 says nothing about Usui's involvement in this type of direct sales.

Instead, the affected VOC for purposes of USSG § 2R1.1(d)(1) includes only parts “sold to [the foreign OEM] *in Japan* for export to the United States and installation in vehicles and engines manufactured and sold in the United States.”<sup>32</sup> The sale and delivery of parts in Japan (even if destined for transfer by the foreign OEM to its U.S. subsidiary for later incorporation) would itself seem to constitute *indirect* commerce, not direct commerce. Yet those sales were accounted for in the volume of commerce, and then in addition, from that basis, the government added a significant upward adjustment for a much larger volume of sales to OEMs in Japan whose automobiles were later imported into and sold in the United States. It may be too early to tell whether this case signals a shift in DOJ enforcement. At a minimum, the lack of clarity in describing the language has the potential to send imprecise signals.

### **Conclusion**

Given the potentially significant effect of indirect commerce on a defendant's sentencing, the recent disclosure of the DOJ's fining methodology in the auto parts cases is an important revelation. However, many other questions arise:

- Why did the DOJ settle on this methodology?
- Will the DOJ use the same methodology going forward, either with respect to future component cartel investigations or more broadly?
- At what point does the effect of “indirect” sales become too attenuated to affect a plea agreement, and is there room for defendant companies to marshal evidence to show lack of price effect during plea negotiations?
- Are definitions of “direct” sales (including “domestic” and “direct import” sales) malleable enough to include what have traditionally been “indirect” sales made in another country, as the Usui case suggests?

One thing seems clear: the auto parts plea agreements suggest that the DOJ will continue including indirect sales in cartel fines, at least until that practice is tested in court. While disclosure of the DOJ's fining methodology is a key step, further transparency is necessary going forward. Companies and practitioners should not be left to retrospectively “connect the dots” of outcomes in prior investigations to divine the DOJ's enforcement policy. ■

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<sup>1</sup> U.S. Dep't of Justice, Criminal Program Update 2012 (Spring 2012), <https://www.justice.gov/atr/criminal-program-update-2012>.

- <sup>2</sup> Press Release, U.S. Dep't of Justice, Antitrust Div., Kiekert AG to Plead Guilty to Bid Rigging Involving Auto Parts (Mar. 7, 2017), <https://www.justice.gov/opa/pr/kiekert-ag-plead-guilty-bid-rigging-involving-auto-parts>.
- <sup>3</sup> The tail end of the investigation has even produced a relative rarity: a criminal trial. In November 2017, Tokai Kogyo Co., Ltd. and Green Tokai Company Co. Ltd., were found not guilty of violating Section 1 of the Sherman Act after a three-week jury trial. See *United States v. Tokai Kogyo Co. Ltd.*, 1:16-cr-00063-TSB, Verdict Form, ECF No. 234 (S.D. Ohio Nov. 29, 2017).
- <sup>4</sup> 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*, ANTITRUST SOURCE (Aug. 2011), [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/aug11\\_maxman\\_7\\_26f.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug11_maxman_7_26f.authcheckdam.pdf); James H. Mutchnik, Christopher T. Casamassima & Brenton A. Rogers, *The Volume of Commerce Enigma*, ANTITRUST SOURCE (June 2008), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Jun08\\_Mutchnik6\\_26f.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun08_Mutchnik6_26f.pdf); Laura S. Shores, *The Starting Point: Negotiating "Volume of Commerce" with the Antitrust Division*, ABA CARTEL & CRIM. PRAC. COMMITTEE NEWSL. (Feb. 2012). [https://www.americanbar.org/content/dam/aba/publications/antitrust\\_law/at307000\\_newsletter\\_201202.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at307000_newsletter_201202.authcheckdam.pdf).
- <sup>5</sup> Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All* (Oct. 17, 2006), <https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all>.
- <sup>6</sup> Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants* (Mar. 30, 2005), <https://www.justice.gov/atr/speech/antitrust-sentencing-post-booker-era-risks-remain-high-non-cooperating-defendants>.
- <sup>7</sup> USSG § 2R1.1. The DOJ recently discussed its justification for the calculation of the base fine. Letter to the U.S. Sentencing Commission from the U.S. Dep't of Justice, Criminal Division (July 29, 2014), <https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>. For additional commentary on the USSG approach, see Michelle M. Burtis & Bruce H. Kobayashi, *Regarding the Optimality of Cartel Fines*, ABA CARTEL & CRIMINAL PRACTICE COMM. NEWSL. (Spring 2017); Julia Schiller, Ian Simmons & Angela Thaler Wilks, *Towards Convergence: The Volume of Affected Commerce under the U.S. Sentencing Guidelines and Impact Analysis under the Clayton Act*, 18 GEO. MASON L. REV. 987 (2011).
- <sup>8</sup> See Burtis et al., *supra* note 7.
- <sup>9</sup> USSG §§ 8C2.5 (calculating culpability score on based on aggravating or mitigating factors, such as size of the corporation, involvement or knowledge of high-level executives, engagement in obstruction of justice, prior similar violations, and cooperation and acceptance of responsibility); 8C2.6; 8C2.7.
- <sup>10</sup> See USSG §§ 8C4.1–8C4.11.
- <sup>11</sup> USSG § 2R1.1(b)(2).
- <sup>12</sup> *Compare United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995) (finding that VOC "includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price") with *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83 (2d Cir. 1999) (finding that an unsuccessful conspiracy that fails to affect a market price "has affected no sales within the meaning of the Guidelines") and *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000) (creating a rebuttable presumption that all sales are affected by the conspiracy).
- <sup>13</sup> *Andreas*, 216 F.3d at 678.
- <sup>14</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae at 8–10, *Statoil ASA v. HeereMac V.O.F.*, 534 U.S. 1127 (2002) (No. 00-1842) ("[I]n all but two of the dozens of international cartel cases prosecuted . . . fines obtained by the government were based solely on domestic commerce."), <http://www.usdoj.gov/atr/cases/f9800/9844.pdf>.
- <sup>15</sup> Gary R. Spratling, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., *Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases 15–16* (Mar. 4, 1999), <https://www.justice.gov/atr/file/518591/download>.
- <sup>16</sup> Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., *Charting New Waters in International Cartel Prosecutions* (Mar. 2, 2006) ("In practice, the Division has used foreign sales only as an aggravating factor requiring an increase in the fine. Moreover, the Division has since announced that it will consider only a defendant's domestic sales in calculating a defendant's volume of affected commerce under USSG §§2R1.1(d)(1) and 8C2.4(a)–(b).") (citations omitted), <https://www.justice.gov/atr/file/518446/download>.
- <sup>17</sup> We note that there are significant concerns about whether the DOJ has legal authority to include indirect sales in its fine calculations at all. While the full implications are beyond the scope of this article, the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, removes from the scope of the Sherman Act such foreign-to-foreign sales, and only brings back into the scope of the Sherman Act sales that meet certain criteria. The DOJ has asserted that the FTAIA does not apply to criminal sentencing. See, e.g., Letter from DOJ to Hon. Susan Illston, No. 3:07-md-01827, ECF No. 2146 (N.D. Cal. Nov. 15, 2010). But no court has agreed with that assertion. See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 825 (7th Cir. 2015) ("If price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies."). Moreover, establishing the requisite "direct, substantial, and reasonably foreseeable" effect on domestic commerce may be complex. Even if it can be shown that overcharges were passed through to U.S. buyers, this does not equate to a distortion of competition or the competitive process in the U.S., which is a prerequisite for establishing a legal claim under the second prong of the FTAIA's test regarding domestic effects. See, e.g., Leon B. Greenfield, Steven F. Cherry, Perry A. Lange & Jacquelyn L. Stanley, *Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach*, ANTITRUST, Spring 2015, at 18; see also Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. 93 (2017).
- <sup>18</sup> The analyses in this article omit defendants whose fines were determined differently than other defendants due to the defendant's inability to pay or because the defendant was found to be more culpable than other defendants: Bridgestone Corp., Hitachi Automotive Systems Ltd. (shock absorbers), Alpha Corp., Mitsuba Corp., and Nishikawa Rubber Co. Ltd. The analyses in this article also omit defendants for whom publicly-available information is incomplete, including: Aisan Industry Co. Ltd., Hitachi Metals, Ltd., Toyoda Gosei Co. Ltd., Continental Automotive Electronics LLC, Corning International Kabushiki Kaisha, Maruyasu Industries Co., Ltd., Omron Automotive Electronics Co. Ltd., Sanden Corp., and Yamada Manufacturing Co., Ltd.
- <sup>19</sup> For example, in the Yamashita sentencing memorandum, the DOJ explained that because indirect sales accounted for approximately 19.3% of total sales, the lower end of the fine range, \$11.48 million was adjusted upward by 4.3% to \$12 million. *United States v. Yamashita Rubber Co. Ltd.*, No. 3:13-cr-00439, Sentencing Mem., ECF No. 21 (N.D. Ohio May 1, 2015). See, e.g., *United States v. Toyo Tire & Rubber Co., Ltd.*, No. 3:13-cr-00529, Sentencing Mem., ECF No. 38 (N.D. Ohio May 21, 2015).
- <sup>20</sup> *United States v. INOAC Corp.*, No. 2:15-cr-00052, Sentencing Mem., ECF No. 40 (E.D. Ky. Feb. 6, 2017) [hereinafter *INOAC Sentencing Mem.*]; *United States v. Usui Kokusai Sangyo Kaisha, Ltd.*, No. 1:16-cr-00106, Sentencing Mem., ECF No. 12 (S.D. Ohio Dec. 19, 2016).
- <sup>21</sup> For all three firms, the base fine is 20% of the volume of commerce (\$60 million) or \$12 million, and using the 1.4 and 2.8 multipliers for culpability, the range of fines, before indirect sales are taken into account and before any other adjustments, is \$16.8 million to \$33.6 million.
- <sup>22</sup> See *INOAC Sentencing Memo*, *supra* note 20, at 6. The ultimate fine was reduced by 30% to \$2.4 million based on INOAC's substantial assistance provided to the government. *Id.*
- <sup>23</sup> *Id.* As noted above, the DOJ may seek a downward adjustment to a defendant's fine based on mitigating factors. For example, cooperating companies that provide substantial assistance in the investigation of another organization that has committed an offense can obtain reductions in their overall fine.
- <sup>24</sup> See *United States v. Fujikura Ltd.*, No. 2:12-cr-20254, Sentencing Mem., ECF No. 13 (E.D. Mich. Apr. 13, 2015); *United States v. Valeo Japan Co.*

Ltd., No. 2:13-cr-20713, Sentencing Hearing Tr., ECF No. 11 (E.D. Mich. Dec. 9, 2013); *United States v. Usui Kokusai Sangyo Kaisha, Ltd.*, No. 1:16-cr-00106, Sentencing Mem., ECF No. 12 (S.D. Ohio Dec. 19, 2016) [hereinafter *Usui Sentencing Mem.*].

<sup>25</sup> Both of these values account for a 30% downward adjustment for cooperation that was factored into INOAC's fine calculation. For example, the \$11.0 million in this example is calculated as \$56.0 million VOC \* 20% \* 1.4 minimum multiplier \* (1 - 30% downward departure for cooperation) = \$11.0 million.

<sup>26</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The DOJ has recently raised the possibility that it could seek to overturn *Illinois Brick* in order to seek recovery of damages for taxpayers in price-fixing cases. See Charles McConnell, *DOJ Looks at Overturning Illinois Brick*, GCR (Jan. 24, 2018).

<sup>27</sup> See, e.g., DENNIS W. CARLTON, *The Theory and the Facts of How Markets Clear: Is Industrial Organization Valuable for Understanding Macroeconomics?*, in *HANDBOOK OF INDUSTRIAL ORGANIZATION* 916 (Richard Schmalensee & Robert D. Willing, eds., 2d ed. 1990) ("The previous examples show that the relationship of price changes to cost changes varies with the shape of the demand curve and therefore it is not possible to make any general statements about the variance of price in relation to the variance of cost based upon whether a market is competitive or monopolized. Moreover, since we know that oligopolies run the spectrum from almost competitive industries to almost monopolized industries, the simple theories do not allow any differential predictions of price flexibility for (large cost changes) that depend solely on the degree of competitiveness of the market.")

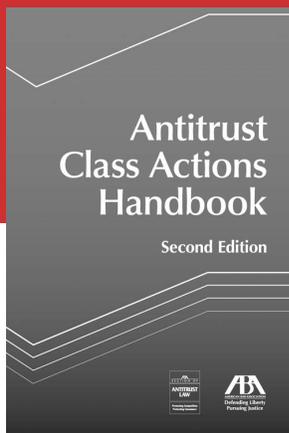
<sup>28</sup> See INOAC Sentencing Mem., *supra* note 20, at 5 (citing Fujikura, Valeo, Yamashita, Toyo Tire, and Bridgestone as examples where upward adjustment used to account for indirect sales); *id.* at 6 (citing Fujikura and Valeo as prior cases applying the high-end indirect sales formula).

<sup>29</sup> Explanations from DOJ officials regarding the methodology used in the air cargo investigation appear to differ from the method used in the auto parts investigations. See Mutchnik, *supra* note 4, at 6; Scott D. Hammond, *Sentencing Issues in Today's Global Economy*, Speech Before the ABA Section of Antitrust Law (Mar. 26, 2008).

<sup>30</sup> See, e.g., *United States v. Elna*, No. 4:16-cr-00365, Second Supp. Sentencing Mem. at 9-10, ECF No. 49 (N.D. Cal.) ("The government has used consistent principles to determine what should be included in the calculation of volume of affected commerce, using sales of standalone capacitors to the United States as a starting point. The consistent approach taken by the government extends to the upward adjustment within the guidelines fine range that represents the value of electrolytic capacitors sold outside the United States, but incorporated into personal desktop and laptop computers sold in the United States under five major U.S. brands (Dell, HP, Apple, IBM, and Gateway)."); *United States v. Rubycon Corp.*, No. 4:16-cr-00367-JD, Sentencing Mem. at 13, ECF No. 5 (N.D. Cal. Sept. 7, 2016) ("Specifically, an upward adjustment of \$4.6 million is warranted to account for the value of electrolytic capacitors sold outside the United States, but incorporated into personal desktop and laptop computers sold in the United States under major U.S. brands.")

<sup>31</sup> *United States v. Usui Kokusai Sangyo Kaisha, Ltd.*, No. 16-cr-00106, Information, ECF No. 2 (S.D. Ohio Nov. 8, 2016).

<sup>32</sup> *Usui Sentencing Mem.*, *supra* note 24, at 4 (emphasis added). See also *Plea and Sentencing Mem. of Defendant Usui Kokusai Sangyo Kaisha, Ltd.*, No. 16-cr-00106-SJD, ECF No. 24 (S.D. Ohio Apr. 4, 2017) (stating that products at issue sold to "automobile manufacturers in Japan . . . Defendant Usui-Japan did not manufacture [products] in the U.S. and . . . did not sell [products] to automobile manufacturers in the United States.")



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