

Booker and Its Impact on Antitrust Sentencing: Practical Implications for Corporate Antitrust Counsel



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On January 12, 2005, the US Supreme Court handed down a pair of landmark decisions that could fundamentally shift the balance of power for corporations facing criminal antitrust investigations from the Department of Justice (“DOJ”). In *United States v. Booker* and *United States v. Fanfan*, the Supreme Court, reversing more than 20 years of federal sentencing practices, held that the US Sentencing Guidelines (“USSG”) may no longer mandate judges to enhance sentences beyond the statutory maximum unless the predicate facts supporting such enhancements are first proved by a jury beyond a reasonable doubt, or admitted by defendant.

For many years, the USSG has served as the bedrock of virtually all criminal antitrust sentences for the DOJ. However, *Booker* and *Fanfan* now require the DOJ to allege *and* prove, beyond a reasonable doubt, every factual predicate that justifies a sentence beyond the statutory maximum under the Sherman Act — a potentially significant strategic advantage heretofore unavailable to corporate defendants facing substantial criminal penalties under the Sherman Act.

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Overview of Antitrust Sentencing at DOJ

To determine what types of corporate defendants may potentially benefit most from these landmark rulings, a brief, albeit generalized, overview of the DOJ’s sentencing practices is useful. In most cases, the DOJ first determines the defendant’s “volume of affected commerce,” which generally equals the total US sales volume by defendant for the duration of the alleged cartel (e.g., \$200 million). Then, the DOJ, under § 2R1.1(d)(1) of the USSG, establishes 20% of that volume as its “base fine” (e.g., \$40 million). Next, the DOJ establishes

the defendant's "culpability score" (e.g., +8), based on a number of qualitative factors enumerated under § 8C2.5 of the USSG, including the nature of the offense, the degree of involvement in the conspiracy, and the level of cooperation with the DOJ. Under § 8C2.6, this culpability score dictates the minimum and maximum "multipliers" (e.g., 1.6 to 3.2) to apply to the base fine to calculate the USSG fine range (e.g., \$64 million to \$128 million). For defendants accruing high culpability scores, therefore, their base fines can often double or even quadruple to reach a substantially higher USSG fines range than originally anticipated. In the context of plea agreements, the DOJ regularly recommends, and the judge approves mostly without question, a proposed USSG fines range.

When the proposed USSG range *exceeds* the Sherman Act maximum of \$100 million (or \$10 million for conduct alleged to have taken place before 2004, when the maximum was raised to \$100 million), the DOJ routinely justifies these higher fines by invoking the so-called alternative-fines provision under 18 U.S.C. § 3571(d). § 3571(d) authorizes a fine up to twice the pecuniary gain or twice the pecuniary loss attributable to the alleged cartel activities. Because the DOJ has adopted a contestable interpretation that § 3571(d) authorizes a fine that equals twice the gain derived by, or twice the loss caused by, the *entire* cartel (*not* just the defendant), the 3571(d)-derived fines, even assuming a nominal 5 to 10% overcharge by the entire cartel and doubling that amount, has nearly always surpassed the recommended USSG range. Faced with the choice of either accepting the DOJ's proposed USSG plea offer or challenging the basis of the § 3571(d) fine in court and thereby potentially being subject to a much higher fine, virtually all corporate defendants thus far have opted to pay the recommended fine.

Practical Impact of *Booker* for USSG Fines Below Sherman Act Maximum

In theory, one could argue that *Booker*, by making the USSG application merely advisory for judges, notably weakened the leverage of the DOJ in fine negotiations with corporate defendants. In practice, however, counsel advising corporate defendants

should continue to consider the extent to which the USSG will continue to serve as a rough benchmark for judges. First and foremost, the DOJ is likely, and has indicated its intention on numerous occasions post-*Booker*, to continue to seek USSG sentences in courts. Moreover, federal judges, while no longer strictly bound by the USSG, may still take the Guidelines into account, and absent good reasons, they may feel hard pressed to depart far from the USSG fine range. For these reasons, it is important for corporate counsel *not* to presume or overestimate in every instance the greater negotiating leverage afforded by *Booker*.

On the other hand, the post-*Booker* sentencing regime does make it possible for corporate defendants to challenge USSG-based fines, particularly in federal Circuits where judges have gained much greater latitude to depart from the USSG. For example, recent opinions by the Third Circuit and the Sixth Circuit – in *United States v. Davis* and *United States v. Oliver* respectively — strongly suggest that they intend to vest their lower courts with considerable discretion to depart from the USSG for cases affected by *Booker*.

Indeed, the impact of *Booker* is beginning to unfold in different jurisdictions to produce varying levels of USSG discretion. The most recent data by the US Sentencing Commission show that judges in three federal Circuits — namely, the Second, the Third, and the Ninth — have departed from the USSG significantly more than other Circuits since *Booker*. Additionally, the Second and the Third Circuits have also shown active, frequent downward departures from the USSG in nearly 20 to 25 percent of all relevant cases post-*Booker*. In those Circuits where judges have gained significant freedom under *Booker*, corporate defendants may now be able to (a) present individual facts and circumstances to judges that truly warrant lower departures from the USSG guidance; or (b) present economic evidence to receptive judges that challenges the very presumption of the "20 percent rule" ("base fine" provision) under § 2R1.1(d)(1) as lacking empirical foundation. Because the 20 percent rule under the USSG simply presumes that the overcharge by the defendant is a constant 10% of the affected commerce, judges who consider such blank

presumption ill-suited for particular cases may also depart from the base fine stipulated by the USSG.

Practical Impact of *Booker* for 3571(d) Fines Above Sherman Act Maximum

The level-playing advantages afforded by *Booker* are most valuable for corporate defendants facing fines that are predicated on § 3571(d) and hence fall above the Sherman Act maximum. This is because *Booker* now requires that the DOJ affirmatively allege and prove, beyond a reasonable doubt, that twice the gain or twice the loss derived from the cartel equals or exceeds the recommended USSG fine. This is an extremely difficult burden of proof for the DOJ. Litigating and demonstrating a precise gain or loss effectively turns a § 3571(d) hearing into a full-blown civil antitrust damages trial — one of the most lengthy and complicated of all civil proceedings, with the criminal standard of proof to top it all off. In addition, § 3571(d) makes the statute inapplicable to sentencing if its application “would unduly complicate or prolong the sentencing process.” Given the enormous evidentiary complexity associated with a § 3571(d) hearing, corporate defendants may also be able to persuade the judge to apply this exception and close the hearing altogether.

While the new standard of proof mandated by *Booker* has the potential to improve the strategic position of all corporate defendants, some corporate defendants may be particularly better suited to challenge DOJ’s fines under the new regime than others. In particular, corporate defendants that meet one or more of the following criteria may have greater chances than others of prevailing against the DOJ in a § 3571(d) evidentiary hearing: (a) a significant share of the volume of commerce in question; (b) high culpability scores and multipliers; (c) no significant downward departures under the USSG; and (d) high exposure to treble damages in follow-on civil litigation.

The following example may be helpful in illustrating this point. Suppose the volume of affected commerce for a corporate defendant during the cartel period is \$200 million (while the volume of commerce from all conspirators is \$600 million), leading to a “base

fine” of \$40 million under the USSG. However, if the defendant also has high multipliers, say from 2.0 to 4.0, with little or no significant downward departures, the ultimate USSG-mandated fines would range roughly from \$80 to \$160 million. Post-*Booker*, however, to justify this high fine, the DOJ will likely require the defendant to agree and stipulate in plea agreements that the fine derived under § 3571(d) would exceed this USSG fine range; and the defendant waives its right to challenge this calculation in a sentencing proceeding. However, such stipulation necessarily leads to the defendant’s admission that (a) the gross gain or loss from the entire cartel amounts, at a minimum, to \$80 million, which translates to a cartel overcharge of more than 13.0% — an exceedingly tall order for anyone to prove beyond a reasonable doubt in court; and (b) given that the defendant’s volume of commerce comprised approximately 33.0% of the entire cartel, the defendant has in effect stipulated that its portion of the overcharge amounts to \$26.4 million. Therefore, the treble damages to which the defendant is likely subject in civil proceedings could, at a minimum, amount to nearly \$80 million. Both are significantly harmful admissions that the defendant may clearly want to avoid.

The calculus of benefits for challenging the DOJ fines under § 3571(d) improves progressively as the volume of affected commerce for the corporate defendant constitutes a larger portion of the entire cartel. When the defendant’s share nears 50 percent of the total volume of commerce in the above example, the defendant, based on the same calculus, now effectively concedes that its overcharge to consumers constitutes 20.0% of its total sales, and its civil treble damages amount, at a minimum, to \$180 million — both exceedingly difficult to be proven beyond a reasonable doubt by prosecutors. In this instance, a *Booker*—based challenge may well be justified in the absence of other significant downward departures.

While *Booker* undeniably confers significant advantages for challenging fines above the Sherman Act maximum, there are several notable risks that corporate counsel should also consider before choosing to litigate a § 3571(d) case. First, the

DOJ, rightly concerned at the specter of increased § 3571(d) challenges, has taken the position that it will *not* entertain legal challenges either to “the gain or loss” under § 3571(d) or the “20 percent rule” under § 2R1.1(d)(1) until *after* the conclusion of its investigations. This likely forces the defendant to move to the “end of the line” among co-conspirators and forgo most or all inducements that the DOJ has in store, including (a) an offer to carve out fewer executives from non-prosecution, (b) favorable plea dispositions; (c) business certainty, and (d) an opportunity to limit the scope of charges or the volume of commerce pursuant to U.S.S.G. §1B1.8. Second, the DOJ, aware that their chances of proving hefty fines beyond a reasonable doubt are dim, may offer additional downward departures or revise its multipliers designed to make the assessment of benefits for § 3571(d) challenges much trickier. While the offer of additional inducements by the DOJ will certainly be one beneficial byproduct of *Booker*, it could also complicate counsel’s decision to challenge excessive fines under § 3571(d). Notwithstanding the clear advantages conferred by *Booker*, corporate counsel need also be mindful of these potential risks.

Conclusion

Booker has fundamentally altered the basic balance of power that has existed between corporate antitrust defendants and the DOJ for many years. While *Booker* is likely to strengthen the defendant’s strategic position in both plea negotiations and

litigation challenging fines — particularly in those federal Circuits in which judges have gained notable discretion post-*Booker*, the precise impact of *Booker* and the role it plays in the corporate defendant’s decision to challenge fines will depend heavily upon particular facts of each case as well as the DOJ’s likely strategic postures that are designed to reduce incentives for such challenges. Moreover, given these uncertainties, some lawmakers and enforcement officials have even supported for legislation that either institutes minimum fines under the USSG, or otherwise negates *Booker* entirely. Until such scenarios unfold, however, corporate counsel making the critical decision whether to challenge criminal fines imposed by the DOJ should continue to carefully consider potential strategic options afforded by *Booker*.

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