

# What Goes Up, Doesn't Come Down: The Absence of the Mitigating-Role Adjustment In Antitrust Sentencing

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A single point can make the difference between winning and losing, passing and failing, and, in the context of antitrust prosecutions, jail and freedom. The more than 250 individuals who have been sentenced to jail for their involvement in antitrust conspiracies know what a difference a point can make, particularly those prosecuted in recent years. From 2000 to 2010, the average number of months of incarceration for antitrust defendants has tripled (i.e., increased from ten months to thirty months).

One of the means the Department of Justice's Antitrust Division uses to bump up jail sentences is the "aggravating-role adjustment" in the U.S. Sentencing Guidelines Manual.<sup>1</sup> That adjustment allows the Division to add points to an individual defendant's sentencing calculation when he or she plays a more significant role in the alleged offense relative to other participants. A review of recent prosecutions reveals that the aggravating-role adjustment has increased the Guidelines' sentencing range 60 to 80 percent for some individuals.<sup>2</sup> The review also reveals that the Antitrust Division has used the aggravating-role adjustment in roughly 50 percent of all individual prosecutions in recent years. In the marine hose investigation, the Antitrust Division used the aggravating-role adjustment in seven of the nine instances in which an individual defendant pled guilty.

Yet, it appears that the Antitrust Division has *never* used the corollary "mitigating-role adjustment."<sup>3</sup> The mitigating-role adjustment allows the Antitrust Division to subtract points from an individual defendant's sentencing calculation when he or she plays a less significant role in the alleged offense relative to other participants. While the commentary to the Guidelines and case law suggest using a portion of the mitigating-role adjustment "infrequently," this does not mean "never."<sup>4</sup> Ignoring the mitigating-role adjustment contradicts the purpose of the Guidelines, leads potentially to significant disparities in sentencing, is patently unfair to some antitrust defendants, and, in some instances, handicaps the Antitrust Division's enforcement efforts.

## U.S. Sentencing Guidelines—Offense Role Adjustments

The Guidelines' role-adjustment provisions are intended to "serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense

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<sup>1</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2010).

<sup>2</sup> The review comprised the Antitrust Division's prosecutions in the following industries: Vitamins (1998–2000), Graphite Electrodes (1998–2001), Marine Hose (1999–2007), DRAM (2004–2006), Air Transportation (Cargo, Passenger) (2007–2011), Liquid Crystal Displays (2009–2012), and Auto Parts (varies). The 60–80 percent increase in the sentencing range does not necessarily correlate to the same percentage increase in the actual sentence because most prosecutions end in a negotiated plea agreement. However, the sentencing range often serves as the starting point in plea negotiations.

<sup>3</sup> U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

<sup>4</sup> *Id.* cmt. n.4 ("It is intended that the downward adjustment for a minimal participant will be used infrequently.").

conduct.”<sup>5</sup> They do this by setting forth varying increases and decreases to a “Base Offense Level” based on the size and scope of the criminal activity and the defendant’s particular role in the activity. The Base Offense Level for antitrust offenses starts at twelve (for price-fixing and market-allocation offenses) or thirteen (for bid-rigging offenses). It then is adjusted up or down based on a number of factors (e.g., volume of commerce affected, the defendant’s acceptance of responsibility, and the number of counts). One of those factors is the defendant’s role in the alleged offense.

The aggravating-role provision,<sup>6</sup> on the one hand, can increase a defendant’s Base Offense Level by two to four points depending on the criminal activity and the defendant’s role relative to other participants.<sup>7</sup> It is designed to address “concerns about relative responsibility.”<sup>8</sup> The mitigating-role adjustment, on the other hand, can decrease the Base Offense Level of a defendant who is “substantially less culpable than the average participant.”<sup>9</sup> The mitigating-role adjustment operates to decrease the offense level as follows:

- (1) If the defendant was a “minimal” participant in any criminal activity, decrease by four levels.
- (2) If the defendant was a “minor” participant in any criminal activity, decrease by two levels.
- (3) If the defendant’s participation falls between “minimal” and “minor,” decrease by three levels.

The Guidelines’ commentary explains, albeit in sparse detail, how the mitigating-role adjustment should be applied. The commentary states that the “minimal” participant adjustment (four level decrease) is reserved for “defendants who are plainly among the least culpable of those involved in the conduct of a group.”<sup>10</sup> It elaborates that the “defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.”<sup>11</sup>

The “minor” participant adjustment (two level decrease), is one who is substantially less culpable than the average participant and “who is less culpable than most other participants, but whose role could not be described as minimal.”<sup>12</sup> The commentary provides no explanation of culpability considerations for the defendant who falls between “minimal” and “minor.”

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<sup>5</sup> OFFICE OF THE GENERAL COUNSEL, U.S. SENTENCING COMMISSION, AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS PRIMER §§ 3B1.1 & 3B1.2, Apr. 2012, at 1 [hereinafter Guidelines Adjustments Primer], available at [http://www.usc.gov/Legal/Primers/Primer\\_Role\\_Adjustment.pdf](http://www.usc.gov/Legal/Primers/Primer_Role_Adjustment.pdf).

<sup>6</sup> U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

<sup>7</sup> Specifically, the aggravating-role provision states: “(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described [above], increase by 2 levels.” U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 3B1.1.

<sup>8</sup> *Id.* cmt. background.

<sup>9</sup> *Id.* § 3B1.2, cmt. n.3(A).

<sup>10</sup> *Id.* at cmt. n.4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at cmt. n.5.

Finally, the commentary states that the downward adjustment for a “minimal participant will be used infrequently;” it provides no instruction on how often to apply the downward adjustment for “minor” participants or those who fall between “minor” and “minimal.”<sup>13</sup>

Infrequent or not, nothing suggests that the Antitrust Division can ignore the adjustment entirely. Yet, canvassing the Antitrust Division’s prosecutions reveals that it has never used the mitigating-role adjustment in an antitrust criminal case.<sup>14</sup> It seems unlikely that there have been no individual defendants who played a minor or minimal role in all the cases prosecuted by the Division.

### Why The Antitrust Division Should Use The Mitigating-Role Adjustment

Whatever the reason the Antitrust Division has ignored the mitigating-role adjustment in prosecuting antitrust conspiracies, we believe that the adjustment should not be ignored. Indeed, there are several reasons why the Antitrust Division should apply the mitigating-role adjustment: (1) it is the law, (2) it is only fair to individual defendants, (3) it serves the Guidelines’ primary objective of ensuring the sentence fits the defendant’s culpability, and (4) it is simply good enforcement policy.<sup>15</sup>

#### ***It Is the Law: The Antitrust Division Cannot Cherry-Pick the Guidelines’ Provisions***

While it is not mandatory for a court to sentence an individual defendant under the Guidelines, it is mandatory for a sentencing court to consider the Guidelines when determining the sentence to impose.<sup>16</sup> Prosecutors, therefore, are responsible for considering and presenting the Guidelines’ recommended sentence. Indeed, the U.S. Attorney’s Manual (USAM) instructs prosecutors to assist the court in making sentencing recommendations.<sup>17</sup> The USAM further instructs that “sentencing recommendations should be consistent with the [Guidelines] for sentencing antitrust violations.”<sup>18</sup> Thus, it is common for Antitrust Division prosecutors to present the Guidelines’ calculation in sentencing reports and plea agreements.

In presenting the Guidelines’ calculation, prosecutors must apply them as a “cohesive and integrated whole,” not piecemeal.<sup>19</sup> In other words, prosecutors are not allowed to cherry-pick the Sentencing Guidelines’ provisions.<sup>20</sup> And, the Guidelines advise that *all* of its provisions should be applied.<sup>21</sup> The Guidelines further instruct that the role adjustments (both of them) be applied after

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<sup>13</sup> *Id.* at cmt. n.4.

<sup>14</sup> We found only a few instances when the Antitrust Division used the mitigating-role adjustment, but none of those instances involved antitrust conspiracies (i.e., price fixing, bid rigging, market allocation agreements). These instances involved charges like wire fraud and obstruction.

<sup>15</sup> To be clear, we are not advocating that the mitigating-role adjustment be used to increase the number of individuals that the Antitrust Division prosecutes; we are advocating that the Division use the adjustment for prosecuting those it targets under current standards (i.e., those the Division has already carved out of plea agreements or otherwise seeks to indict).

<sup>16</sup> 18 U.S.C. §§ 3553(a)(4), (a)(5); *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”).

<sup>17</sup> U.S. ATTORNEY’S MANUAL, Title 9, § 27.710, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm#9-27.710](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.710).

<sup>18</sup> *Id.* Title 7, § 5.613.

<sup>19</sup> *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990).

<sup>20</sup> See, e.g., *United States v. Lawrence*, 916 F.2d 553, 555 (9th Cir. 1990); see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 1B1.11(b)(2) (“The Guidelines Manual in effect on a particular date shall be applied in its entirety.”).

<sup>21</sup> U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 1B1.1(a) (setting forth the order in which all provisions of the Manual should be applied).

determining the base offense level.<sup>22</sup> By employing only the aggravating role adjustment, the Antitrust Division is ignoring this mandate.

***It Is Only Fair: It Would Help Eliminate Sentencing Disparity***

By employing only the aggravating-role adjustment, the Antitrust Division is also creating a disparity in sentencing: sentencing ranges go up but cannot go down for an individual’s role. Defendants who play only a minor or minimal role in a conspiracy are treated similarly to defendants who play a more significant role. The effect of not accounting for the difference is significant.

Consider, for example, that the DOJ has targeted three individuals for prosecution in an investigation of a price-fixing conspiracy. The three individuals work for separate companies, all of which have already entered into plea agreements and now are in separate plea negotiations with the DOJ. The three individuals are similarly situated by all accounts except that the first (Dan) played an “aggravating” role in the alleged conspiracy, the second (Jim) played a “mitigating” (minimal) role, and the third (Nancy) played a role that does not qualify as “mitigating” but also did not qualify as “aggravating,” i.e., Nancy’s role would not qualify for either adjustment.

Under the Antitrust Division’s current practice, Jim and Nancy could easily have the same sentence despite having different levels of culpability. The Guidelines calculation would be as follows (assuming all three defendants accepted responsibility, all are employed by companies with volume of commerce (VOC) affected between \$250 and \$500 million, and all fall within the first criminal history category of the sentencing table):

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	<b>Dan</b> (aggravating role)	<b>Jim</b> (mitigating role)	<b>Nancy</b> (neither role)
<b>Base Offense Level</b>	12	12	12
<b>VOC Adjustment</b>	+10	+10	+10
<b>Role Adjustment</b>	+3	None	None
<b>Accept Adjustment</b>	-3	-3	-3
<b>Offense Level</b>	<b>22</b>	<b>19</b>	<b>19</b>
<b>Sentence Range (mos.)</b>	<b>41–51</b>	<b>30–37</b>	<b>30–37</b>

Under the Antitrust Division’s current practice, Jim and Nancy would have the same recommended sentence (30–37 months). But, if the Division used the mitigating (minimal) role adjustment for Jim, his offense level would decrease by four points (for a total of fifteen), which results in a sentencing range of 18–24 months, instead of 30–37 months. In other words, Jim’s sentencing range increases by one year (or 67 percent) by not accounting for his mitigating role.<sup>23</sup>

This disparity is only highlighted by adjusting the assumptions (all of which are well within the realm of possibility). Say, for example, that Dan and Nancy work for companies that had VOC affected between \$10 million and \$40 million, and Jim works for a company with a VOC affected between \$500 million and \$1 billion, but Jim otherwise plays a “minor” or “minimal” role. In individual prosecutions the DOJ uses the VOC attributed to the individual’s employer to calculate the

<sup>22</sup> *Id.* (“Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.”)

<sup>23</sup> Again, the recommended sentence does not necessarily represent the time served by antitrust defendants. The time served is typically negotiated as part of a plea agreement (and determined by a sentencing court) or determined solely by a sentencing court in the event of a conviction. Even so a defendant who played a relatively minimal role would certainly appreciate starting the negotiations or sentencing determination at one year below what he or she would face under the current practice.

sentencing range, not the VOC attributed to the conspiracy as a whole; therefore, under current practice, the calculation would be:

	<b>Dan</b> (aggravating role)	<b>Jim</b> (mitigating role)	<b>Nancy</b> (neither role)
<b>Base Offense Level</b>	12	12	12
<b>VOC Adjustment</b>	+4	+12	+4
<b>Role Adjustment</b>	+3	None	None
<b>Accept Adjustment</b>	-3	-3	-3
<b>Offense Level</b>	<b>16</b>	<b>21</b>	<b>13</b>
<b>Sentence Range (mos.)</b>	<b>21–27</b>	<b>37–46</b>	<b>12–18</b>

Under this hypothetical, Jim would likely face a sentence range that is over one year greater than Dan's sentence (16–19 months more) and over two years greater than Nancy's sentence (25–28 months more), despite having the least culpability. This undoubtedly would lead to a greater incarceration period for Jim even though Jim played a relatively lesser role in the conspiracy than both Dan and Nancy. Furthermore, Nancy would be eligible to serve her sentence, in part, under home detention or supervised release because her Offense Level puts her in a different category of sentencing under the Guidelines (i.e., Zone C category under USSG § 5C1.1), whereas Jim could only serve his sentence by imprisonment.

While these hypotheticals are meant only to illustrate the disparities that can occur by ignoring the mitigating-role adjustment, they are not far-fetched examples. Antitrust conspiracies tend to involve a variety of defendants with significantly different roles. The mitigating-role adjustment provides one means of recognizing these variances and eliminating potential sentencing disparities.

***It Is Meant To Be: Role Adjustments Are Intended for Offenses Involving Varied Roles and Culpability***

The Sentencing Commission may have had antitrust offenses in mind when it considered the role adjustments, particularly the antitrust conspiracies prosecuted in recent years. The Antitrust Division tends to prosecute conspiracies that span several years and involve several large multinational companies with complex organizational structures. Conspiracies in which these companies engage typically require numerous people at various levels in the organization playing various roles. The Guidelines therefore must have a means for accommodating the varied conduct and culpability. The role adjustments do just that: "Together, §§ 3B1.1 and 3B1.2 serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct."<sup>24</sup>

The Guidelines' Commentary instructs courts to consider a defendant's role relative to the other participants in the criminal activity to determine whether a defendant receives a mitigating-role adjustment. Some courts look to the defendant relative to other participants in the criminal activity at issue; some courts look to the defendant relative to the typical participant in that criminal activity. Under either approach, it is not uncommon for antitrust defendants to have significantly different roles justifying the Division's use of the mitigating-role adjustment. Consider the following:

<sup>24</sup> Guidelines Adjustments Primer, *supra* note 5, at 1.

- An individual attended only one meeting of an alleged cartel that met several times a year over the course of several years. Under the Division's current practice, this individual would be held to the same sentencing standard as the individual who attended every meeting.
- An individual with no pricing authority is instructed to exchange pricing information for purposes of executing a price-fixing conspiracy. This individual would be held to the same sentencing standard as the individual who instructs the exchange and who makes pricing decisions.
- A manager is aware of a conspiracy entered into by her employees and does not seek to stop it, but otherwise plays no role in its formation or execution. This individual would be held to the same sentencing standard as her counterpart manager at another company who was aware of the conspiracy, helped form it, and played an active role in executing it.

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Depending on the facts of the conspiracy charged, all of these individuals may very well deserve the same sentence. Yet, each individual had very different levels of participation. And under current practice, the Antitrust Division would not use the mitigating-role adjustment to account for the varying roles these individuals played. The mitigating-role adjustment, even if used sparingly, could provide one means for acknowledging the differences. Nothing in the Guidelines suggests that the adjustment should not be used; indeed, it is difficult to identify another type of offense to which it more appropriately applies.<sup>25</sup>

***It Is Good Policy: The Number of Plea Agreements Is Likely to Increase***

The Antitrust Division handicaps itself by ignoring the mitigating-role adjustment because the Division could use the adjustment as an additional tool for negotiating plea agreements. It is not uncommon for individuals the Division targets to argue that their minor role (relative to others) is a reason not to prosecute them. Individuals who take this position are more likely to fight the Division's allegations at trial. In fact, the Antitrust Division tends to have less success at trial against individual defendants "farther removed" from the conspiracy.<sup>26</sup> Three times in the last four years the Division has failed to convict individuals who played arguably less culpable roles in the alleged conspiracy.<sup>27</sup> The mitigating-role adjustment could be the Division's fix for these cases. If the Division employed a means to recognize this relative culpability, i.e., the mitigating-role adjustment, then individuals might be more likely to enter into plea agreements rather than fight the allegations in court.

The Division has acknowledged that it usually tries the "tougher cases" because most individuals playing a significant role in the conduct plead before trial. Scott Hammond, Deputy Assistant

<sup>25</sup> The mitigating-role adjustment is commonly used in drug offense cases, most often in relation to the sentencing of drug "runners," i.e., those used to transport drugs (and nothing more). While drug cartels can involve complex factual situations with individuals playing significantly different roles, antitrust conspiracies also can, and often do, present similar complex issues of relative culpability.

<sup>26</sup> One of the more notable losses came at the trial of Francesco Scaglia in the marine hose investigation. Mr. Scaglia was a product manager for Manuli Rubber Industries SpA, a company that pled guilty to the conspiracy and agreed to pay a fine of \$2 million. At trial, the evidence revealed that Mr. Scaglia attended one meeting of the conspiracy (in the eight years the conspiracy was in place), that he did not really understand what the meeting was about until he was there, and that he did not actively engage in the meeting (he sat there and did not leave for fear he would look like a "crazy boy" for announcing that he was leaving). The jury acquitted Mr. Scaglia.

<sup>27</sup> In the recent trial against AU Optronics and several executives, the Division won conviction of AU Optronics and two of its top executives but failed to convict three "lower-level" employees who were arguably less culpable. In February 2008, a court declared a mistrial in the Division's prosecution of Gary Swanson in the DRAM investigation after the jury returned ten to two in favor of acquittal. In November 2008, Val Northcutt was acquitted in the same marine hose investigation as Mr. Scaglia.

Attorney General in charge of criminal prosecutions, has stated that the Division intends to hold more individuals accountable, and in doing so, he recognized that “[a]s you try to hold more individuals accountable, you [bring] cases against people farther removed . . . . The tougher cases go to trial.”<sup>28</sup> Some of those “farther removed” from the heart of the conspiracy may well be “minor” or “minimal” participants, almost by definition. The mitigating-role adjustment may be the answer to these “tougher cases” because it could save the Division the costs and risks associated with trying them.

### **Potential Reasons Why the Antitrust Division Does Not Use the Mitigating-Role Adjustment Today**

The Antitrust Division has not explained why it does not use the mitigating-role adjustment in its prosecutions, nor is there much commentary on the issue. It is simply accepted as standard practice and left (mostly) unquestioned. We offer a few potential reasons for why this may be so.

First, it may be that the individuals qualifying for the mitigating-role adjustment are never subject to prosecution in the first place. In other words, the Division offers the individuals who would otherwise qualify an opportunity to walk (usually in return for cooperation against other defendants), and thus there is no need to employ the adjustment. While this may be true for most individuals who are found to play lesser roles in the alleged conspiracies prosecuted, we do not believe it is true for all. As noted above, the conspiracies being prosecuted involve varied roles and participants and it is unlikely that no one targeted for prosecution has ever qualified for a downward adjustment. To be clear, the mitigating-role adjustment should not be used to increase the number of individuals that the Antitrust Division prosecutes; we are advocating that the Division use the adjustment for prosecuting those it targets under current standards, i.e., those it seeks to indict or carve out of plea agreements.

Second, there may be a concern that applying the mitigating-role adjustment, even infrequently, would open the door for all defendants to argue for lesser sentences under the adjustment. The Division would then need to expend the resources necessary to defend against these arguments. In other words, it may be much easier to stick to a blanket refusal policy, rather than open a perceived Pandora’s Box. But easy does not make good policy. And, if it did, it would be easier for the Division to negotiate plea agreements, rather than litigate, which it could do more often if it employed the mitigating-role adjustment.

Third, there could be a concern that using the mitigating-role adjustment would lead to lesser sentences on average overall, which would decrease the incentives for individuals to cooperate during an investigation—i.e., the mitigating-role adjustment will decrease the average individual sentence and thus decrease the deterrent effect of such sentences. This concern has some merit and goes to the core purpose of sentencing: deterrence. But if used properly, the mitigating-role adjustment could increase, rather than decrease, the average sentence for individuals. As explained above, the mitigating-role adjustment would help reduce the number of individuals tried (and thus increase the number who plead guilty) and therefore avoid the decrease in the average sentence that results from failed convictions.

The mitigating-role adjustment should be reserved for those who have been targeted by the Division for prosecution. And, among those individuals, it should be reserved for only those who played significantly less roles in the conspiracy, as the Guidelines suggest. By limiting the use of

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<sup>28</sup> See Leah Nylen, *Antitrust Complexities Provide Hurdle to Trials*, MLEX, Dec. 28, 2011 (quoting Scott Hammond) (on file with authors).

the mitigating-role adjustment in this way, it would in no way guarantee its availability to potential defendants. Individuals would face the same risks as they do today during the investigation, thus they would face the same incentives to cooperate. The only difference would be that when the Division seeks a conviction, the Division would have an additional tool for reaching resolution without going to trial. ●