

A close-up photograph of a stack of US dollar bills, including a prominent \$100 bill, resting on the right pan of a metal scale. The scale is positioned on a wooden surface, and the lighting creates strong highlights and shadows, emphasizing the texture of the paper and the metallic sheen of the scale.

Criminal Antitrust Fines and Penalties: Reductions Based on Ability to Pay

Criminal antitrust fines and penalties obtained by the Department of Justice have risen substantially in recent years, from USD\$338 million in 2005 to over USD\$3.6 billion in 2015.¹ One reason for this increase is the focus on investigating and prosecuting international cartels. The largest such investigation involves the automotive part manufacturing industry which through November 2016 alone resulted in over USD\$2.9 billion in fines from 47 companies that pleaded guilty or agreed to plead guilty.² As large criminal antitrust fines have become common, more companies are finding themselves facing potential penalties that exceed their available resources.

The U.S. Sentencing Guidelines allow for reduction of a fine under certain circumstances, one of which involves the company's Ability To Pay (ATP) the fine imposed. The Antitrust Division has recognised the legitimacy of ATP considerations in negotiated pleas.

FTI Consulting has experience in supporting clients on ATP cases and this article describes the methodology that has been used by FTI Consulting alongside Counsel to raise and support an argument for reducing a proposed fine through evaluation of the company's ATP during the course of a company's plea negotiations with the Division and where the argument has resulted in a fine reduction.

Background

Reduction of Fine Based on Inability to Pay

Section 8C3.3(a)

The court may reduce the fine below what is imposed

"to the extent that imposition of such a fine would impair [a company's] ability to make restitution to victims."

Section 8C3.3(b)

The court may impose a fine below what is otherwise required if

"the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required ... provided that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."

A Corporation was able to persuade the DOJ to agree to a sentence that included a reduction of more than USD\$500 million in the fine amount based on A's inability to pay. Neither the DOJ nor the court accepted A's representations about its limited resources at face value. Rather the DOJ retained an economic expert who offered an opinion that a guideline sentence (which would have started at USD\$672 million) would force A out of business and result in the loss of thousands of jobs. On that basis the DOJ argued that a substantial variance from the Guidelines was warranted. The court accepted that recommendation because it was satisfied that the DOJ "*adequately and fairly made its assessment with respect to the fine that could be made by the corporation without sacrificing its existence.*" A was sentenced to a fine of USD\$135 million, with USD\$10 million to be paid within 30 days of the sentence, and USD\$25 million installments each of the five years thereafter.

While the above may appear difficult for a company to satisfy in a contested sentencing, in the context of negotiated plea agreements, the Division has generally taken a more lenient approach. Consistent with its mission of promoting competition, the Division may agree to limit a proposed fine to an amount that will not be so great as to endanger the company's ability to continue as a viable competitor. To date, in the auto parts investigation alone, the Division has agreed to a reduction of the Guidelines fine for at least five companies based on inability to pay.

Description of the Process

When the DOJ proposes a fine amount under the Guidelines, counsel should carefully consider whether the company may have an ability-to-pay issue. It is the defendant's burden to produce relevant materials demonstrating its inability to pay the suggested fine under the Guidelines.³ To satisfy that burden, an ability-to-pay analysis should include careful review of the company's financial statements and recent financial performance, as well as forecasts of expected performance for both the company and the industry in general.

The Division and ultimately the court may find an analysis prepared by an independent financial analyst (in this case FTI Consulting) to be more persuasive and reliable, in particular if the outside expert has experience with ability-to-pay analyses in criminal sentencing matters for antitrust and related offenses, knowledge of the industry in question, and, for cases involving foreign corporations, knowledge and experience with financial accounting and performance metrics in that foreign jurisdiction.

When the question of a corporate defendant's ability to pay the Guidelines fine is raised, the Division consults with its Corporate Finance Unit to determine the maximum amount the corporation can afford to pay in installments without substantially jeopardising its continued viability. The DOJ will consider all current and projected financial information offered by the defendant.⁴ In addition, the DOJ will likely request that the company produce relevant financial documents so that they can make an independent determination of the company's financial condition and ability to pay. Such documents typically include the

company's audited and unaudited financial statements (balance sheet, income statement, statement of cash flows), annual Securities Reports, tax returns, strategic business plan and operating plan, related projections, budgets, borrowing and repayment schedules, and organisation charts.⁵

The DOJ will also retain its own analyst to independently evaluate the company's ability to pay and support in determining the appropriate fine amount. The DOJ will typically retain an expert with experience in complex accounting matters. It is helpful for the company's financial analyst to have a working knowledge of, and an established relationship with, the DOJ's expert in order to anticipate potential arguments and analyses the DOJ may employ.

Because it is the company's burden to show inability to pay, counsel will need to prepare a presentation for the DOJ demonstrating that inability. Counsel should work closely with the company's independent financial analyst and the company's internal financial team to prepare that presentation. The financial analyst should take the lead in making the presentation to the DOJ and the DOJ's expert and, in doing so, will need to explain the company's financial condition and expected ability to pay, including potential changes in its financial condition over the next five years. The company's financial analyst must also be prepared to explain how the assumptions underlying the projections were determined. At the same time that the company's financial analyst is preparing its presentation, the DOJ's expert will be reviewing the company's financial documents and preparing the DOJ's own calculation of the amount the company is able to pay. During the company's presentation, there will be an opportunity for the two analysts to discuss their models and assumptions used to project future financial performance. Frequently, the DOJ's expert will have follow-up questions, and there may be additional meetings, in person or by telephone, to discuss open issues. The DOJ will consider additional arguments by company counsel and its analyst to determine a final amount that the company is able to pay. In total, a company can expect the process to last six months or more.

Projected Free Cash Flow

While the Guidelines offer no prescribed methodology for analysing a company's ability to pay a fine, that analysis is typically performed by analysing the company's projected free cash flow and assessing the strength of its balance sheet. As the Mitsuba case illustrates, the Guidelines allow for a reasonable installment schedule to pay the fine. Therefore, free cash flow should be projected over the period during which a fine will be paid. The free cash flow available for payment of a fine is best measured by the free cash flows available to the equity holders of the company. Free cash flow to equity holders (FCFe) is calculated in the following manner:

	Net Income
Add	Non-cash items (e.g., depreciation)
Subtract	Capital expenditures
Add or Subtract	Net borrowings (difference between debt issued and repaid)
Add or Subtract	Incremental non-cash working capital needs

If debt issued exceeds repayments of principal, then the net borrowings would be an addition to the free cash flow. If the amount of non-cash working capital is lower than the prior year, the changes in non-cash working capital would be an addition to the free cash flow.

The first step in analysing free cash flow is to prepare projected financial statements over the installment period for the fine (typically up to five years). These projections should be prepared by the company's management and, if they are not pre-existing documents, should be prepared with the assistance of the company's financial analyst. Along with the projections, additional documentation should be obtained from the company that will help in assessing the reasonableness of the projections and help in preparing the ability-to-pay analysis.

Once FCFe has been determined, the analyst must consider whether any traditional dividend should be provided to the equity holders.⁶ The dividend can be based on historical amounts or projections from management. The amount after payment of a dividend would result in the free cash flow available to pay a fine. The DOJ will consider accepting continued payment of dividends (although perhaps at reduced levels) if the company can demonstrate that such continued payments are necessary to the company's continued ability to retain the support of key constituencies.

Once the initial analysis of free cash flow is completed, the calculation should be reviewed for reasonableness and for areas where the DOJ may have questions. Issues that should be considered in reviewing the free cash flow analysis include:

- How do the projected sales and operating margins compare with historical trends?
- How reasonable are the projected sales and operating margins given the anticipated economic and industry environment?
- How do projected capital expenditures compare with historical activity?
- If the projected capital expenditures are higher than what they were historically, why is this additional spend necessary (e.g., were there legally required investments)?
- Are the working capital needs appropriate given the level of projected sales?
- What effect will additional debt needed to pay a fine have on the free cash flow?

Strength of the Balance Sheet

Besides the additional cash flow generated during the installment period, the DOJ often considers additional sources available to pay a fine, such as non-essential assets, all sources of borrowing capacity, and additional equity raises. In order to quantify these sources, the strength of the company's balance sheet must be analysed in conjunction with projected operational performance. Assets that could potentially be available for payment of a fine include cash and cash equivalents, marketable securities, and non-operating assets. The amount of cash available to pay a fine is the

difference between the ending cash balance reflected on the projected balance sheet and the cash needed to support operations. Determining what cash and cash equivalents are needed to support operations can be accomplished by calculating certain liquidity ratios and comparing them to a peer group of similarly situated companies. Ratios typically used for this analysis include:

- Current and quick ratios;
- Cash as a percentage of total assets;
- Net working capital as a percentage of sales; and
- Cash in Days in Sales.⁷

In determining the peer group against which the company should be compared, the analyst must identify rivals that are the greatest competitive threats to the company's survival, and show that insufficient cash reserves to compete against these threats could jeopardise the company's continued viability. In developing the peer group, the analyst must further consider a comparable company's customer base, sales volume, liquidity, and input from management.

In addition to cash, the analyst should also look at the balance sheet to identify any marketable securities, other investments, or non-operating assets that could potentially be liquidated in order to pay a fine. The analyst should discuss these items with the company to understand whether and how readily the items can be liquidated and the value that would be generated from sale.⁸

In addition to reviewing the assets, the company's ability to raise additional debt or equity capital in order to pay a fine must be considered. While the announcement of criminal antitrust charges, a plea agreement, and a fine may negatively impact a company's ability to raise equity capital, the analyst can aid in determining what the company's borrowing capabilities are to finance payment of a fine. Because pre-plea negotiations with the DOJ are confidential, the analyst will experience some limitations in not having the ability to interview the company's lenders. Nevertheless, the analyst can still provide some insight as to what borrowing capabilities the company may have when facing a fine.

A review of information on the company's peer group may also inform the analyst about the company's borrowing capabilities. A company's debt-to-equity and debt-to-capital ratios as compared to the industry or peer group can provide an indication of whether a company has the ability to take on additional debt. The analyst must keep the peer group in mind when performing these analyses so as to not have the company over-leveraged on a relative basis. A company may also have unused lines of credit, but the terms of these contracts, including any financial/operating covenants, require a thorough analysis to determine how much of the line of credit would be available. Since the ability to raise additional debt may involve a variety of factors, such as what assets are available to collateralise the debt and what risk profile lenders may accept in lending additional funds, an analyst should work with the company to understand what additional capital can be raised and risk factors associated with these projections.

Other Legal Contingencies

As discussed above, free cash flow, assets, and any additional equity or debt that can be raised are all sources of funds to pay a fine to the DOJ. However, the analyst must also estimate how much of these available funds will be needed to satisfy the company's exposure to other legal contingencies. In an international cartel case, one such contingency is the potential for substantial fines from other jurisdictions. Some jurisdictions may coordinate closely with the DOJ.⁹ If those jurisdictions negotiate their penalties at the same time as the DOJ, the analyst will be able to incorporate those additional penalties into the ability-to-pay analysis. However, many jurisdictions may proceed on different timetables and, in those instances, the analyst, with the assistance of company counsel, will need to estimate future penalties and incorporate that estimate into the analysis.

In addition, after the company enters a plea agreement with the DOJ and the misconduct is publicised, victims may seek damages, restitution, and other remedies either through class action litigation, individual actions, or requests for voluntary

compensation. As described above, Section 8C3.3(a) of the Guidelines expressly recognises that a fine should not be set at an amount that would impair a company's ability to pay restitution to its victims. The company and counsel can aid the analyst in developing estimates of exposure from other legal contingencies. These contingencies could be material to the company's survival and, if quantifiable, should be reserved for on the projected balance sheet on an after-tax basis.

The Company's Ability to Pay

The company's ability to pay includes the aggregate amount available from (1) projected free cash flow over the installment period, (2) excess cash, and (3) additional capital that can be raised. From this sum, the amount necessary for other legal contingencies should be subtracted, resulting in the amount available to pay a fine. As part of the analysis, any key items or assumptions should be noted, including any contingencies which cannot be quantified but might have a material effect on the projections of a company's ability to pay.

Hypothetical Case Example

Airline Co. faced a substantial fine (up to USD\$250 million under the Guidelines) for price fixing with competitors on fuel surcharges for its cargo and passenger transport business segments. An analysis of Airline Co.'s ability to pay a fine was performed by projecting its free cash flows to equity holders and analysing the strength of its balance sheet.

At the time of the analysis, the economy was in a severe downturn where the credit markets were frozen and there was a dramatic decline in oil prices. In addition, the market for the company's services was in decline.

Historically, the company's Earnings before Interest and Taxes (EBIT) ranged between 2 percent and 5 percent of sales, and its net income ranged between -2 percent and 9 percent of sales. The trailing 12 months showed an EBIT margin of 2 percent and a net loss of 1 percent. Free cash flow was projected as follows:

USD millions	Year 1	Year 2	Year 3	Year 4	Year 5
Revenue	\$4,069	\$3,327	\$3,901	\$4,335	\$4,754
EBIT	(43)	(209)	(165)	(95)	(92)
NOPAT*	(186)	(311)	(302)	(242)	(246)
FCFe	(175)	(321)	(231)	(149)	(167)

* NOPAT = Net Operating Profit After Taxes

This negative cash flow preceded any consideration of other legal contingencies.

The projection was assessed for reasonableness by performing a sensitivity analysis based on industry forecasts of oil prices per barrel and various exchange rates between the company's local currency and the U.S. dollar. The sum of free cash flows in the sensitivity analysis ranged from positive USD\$260 million to over negative USD\$2 billion with an average of negative USD\$990 million. Because the projected sum of free cash flow to equity holders fell within this range, the sensitivity analysis supported the conclusion that the projections utilised were reasonable.

The projected balance sheet presented a similarly bleak scenario for Airline Co. Historically, Airline Co. had a working capital deficiency of USD\$1.2 billion and a debt-to-equity ratio that increased from 3:1 to 5:1 in the current year. Due to the tight credit markets at this time, Airline Co. was not able to refinance its outstanding debentures. The debenture market had been one of Airline Co.'s primary sources of financing. A soaring debt ratio would cause Airline Co. to breach various covenants in its debt agreements. Given the credit environment at the time, Airline Co. also failed to secure additional financing collateralised by its receivables.

Based on projected free cash flow losses and challenges obtaining additional financing, Airline Co. had limited to no ability to pay a fine. Through the ability-to-pay analysis, Airline Co. demonstrates the challenges of its financial situation and ultimately agrees with the DOJ to a reduced fine of USD\$50 million payable over five years.



Counsel may argue that it is essential to the DOJ's leniency policy for the DOJ to provide a cooperating company with a discount to the fine that would otherwise result under the Guidelines. Indeed, in the case of a company that is unable to pay the Guidelines fine, the DOJ can fulfill this policy imperative only by providing a discount from the maximum fine that the company can pay.



Cooperation Discount

As demonstrated above, the ability-to-pay analysis may lead to a proposed fine amount that is less than would otherwise be required, even taking into account whatever fine discount the DOJ may have agreed to in recognition of the company's cooperation. By definition, however, that fine amount is the maximum amount that the company can afford to pay, and, at least in theory,¹⁰ the same amount that the company would have been required to pay had it contested the case and been uncooperative. Because the DOJ has a longstanding policy of encouraging and rewarding cooperation, counsel representing companies that have provided cooperation to the DOJ should consider advocating that the cooperation discount be applied to the fine amount determined by the ability-to-pay analysis as opposed to the original fine determined under the Guidelines. In particular, counsel may argue that it is essential to the DOJ's leniency policy for the DOJ to provide a cooperating company with a discount to the fine that would otherwise result under the Guidelines. Indeed, in the case of a company that is unable to pay the Guidelines fine, the DOJ can fulfill this policy imperative only by providing a discount from the maximum fine that the company can pay. As such, the DOJ has recently agreed to offer such a discount to companies that cooperate under the Division's leniency program, in addition to a fine reduction based on the company's inability to pay.¹¹

The DOJ's recent policy shift is consistent with its long-touted principle that the prospect of a significant fine discount is a central benefit of its leniency program. Ten years ago, in a widely cited paper that retains a prominent position on the DOJ's website, then-Deputy Assistant Attorney General Scott D. Hammond described the Division's leniency policy for cooperating companies generally and explained the fine discount in particular.¹² Under that policy, "[S]econd-in companies that provide cooperation that substantially advances an investigation can expect to receive a plea agreement that recommends a substantial assistance departure pursuant to U.S.S.G. Section 8C4.1 and a fine below the minimum Guidelines range."¹³ For both the DOJ and the cooperating company, the "rewards are significant when the defendant decides to break ranks with the other cartel members

and becomes a cooperating witness for the government."¹⁴ And, indeed, the DOJ's second-in leniency policy has been exceedingly successful, as dozens of companies have cooperated, received fine discounts, and pled guilty, pursuant to the policy's terms.

However, where a company lacks the ability to pay even the discounted fine accounting for the benefit of cooperation, if the fine amount determined by the ability-to-pay analysis were not then discounted for cooperation, there would be no fine reduction benefit as a reward for its cooperation. Because the Guidelines themselves take inability to pay into account and authorize a fine reduction based on that inability to pay, a cooperating company would receive exactly the same fine after a conviction at trial, even if it had never cooperated and fought the DOJ from the inception.

Counsel should therefore argue that the failure to reward an "inability to pay" company with a fine discount would significantly undermine the leniency program. If companies believe that the substantial burdens of cooperation may not be rewarded, their incentive to cooperate will be substantially reduced. Accordingly, counsel should advocate that the DOJ apply its fine discount to the maximum amount that the company can pay to ensure the continued vitality of the leniency program and to ensure "inability to pay" companies enjoy an expected fine discount benefit for their cooperation. Application of a cooperation discount in this manner would allow the leniency program to continue to differentiate meaningfully between companies that cooperate and companies that resist and, thus, would properly incentivize cooperation.

Conclusion

The DOJ seeks to fine the violator without jeopardizing the continued viability of the company to operate as a going concern. Furthermore, the Guidelines contemplate reducing the size of the fine if the fine amount would be so great that it would impair the company's ability to make restitution to its victims, or if payment of the fine would risk the solvency of the company. Demonstrating that a fine imposed by the DOJ is beyond a company's ability to pay involves an analysis of the free cash flows over the period of payment, an analysis of what cash or other assets would be available to pay a fine, and an analysis of what capital can be raised to support a fine. The ability-to-pay analysis should also consider the cost of other potential fines and damages/restitution via lawsuits brought by harmed parties as a result of the conduct at issue in the criminal investigation.

In our experience the role of counsel and FTI Consulting is not only to assist the company in preparing a persuasive and objective analysis of its ability to pay, but also to assist the company in assessing the reasonableness of the proposed fine and answering questions from the DOJ about the analysis performed. Presenting an ability-to-pay analysis can be a powerful tool for seeking a reduced fine amount, preserving the company's ability to pay victims of the challenged conduct, and assuring that the company will continue as a viable competitor.

¹ See DOJ Criminal Enforcement Trends Chart (Dec. 2015), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

² See U.S. Dep't of Justice, Japanese Auto Parts Company Agrees to Plead Guilty to Antitrust Conspiracy Involving Steel Tubes (Nov. 8, 2016), <http://www.justice.gov/opa/pr/japanese-auto-parts-company-agrees-plead-guilty-antitrust-conspiracy-involving-steel-tubes>.

³ See *United States v. Nathan*, 188 F.3d 190, 212 (3d Cir. 1999).

⁴ See Decl. of Dale Zuehls ISO Reply to Defs' Sent. Memo. at 3, *United States v. AU Optronics*, No. 09-00110 (Dkt. 961-2) (filed Sept. 20, 2012).

⁵ See Example of Document Request List in Appendix, available at http://americanbar.org/groups/antitrust_law/publications/antitrust_magazine.html (Supplementary Materials).

⁶ Although funds available for return to equity holders may be available to instead pay a fine, the DOJ has recognized the legitimacy of some continued dividend payments in negotiated pleas. The principal rationale for doing so is that a total elimination of the dividend could excessively erode the company's shareholder base and endanger its shareholder support, thereby potentially threatening the company's viability and competitive standing.

⁷ The amount of cash necessary for operational needs can be calculated as a percentage of sales and translated to the Cash in Days in Sales metric (i.e., divide Cash by Sales and multiply by 365 days).

⁸ Some reasons for retaining these assets include that they could serve as collateral on existing or future debt or are needed to foster and strengthen critical business relationships as is common in Japanese business, custom, and practice.

⁹ Canada is the jurisdiction which has historically coordinated most closely with the DOJ on antitrust investigations. Press Release, U.S. Dep't of Justice, Nishikawa Agrees to Plead Guilty and Pay \$130 Million Criminal Fine for Fixing Prices of Automotive Parts (July 20, 2016), <http://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive>.

¹⁰ Although in theory the result of a negotiated inability-to-pay analysis should be the same as a litigated result, the DOJ may take a harsher approach in litigation than in negotiation. Because the company has the burden of demonstrating inability to pay, in practice, companies can expect a markedly less favorable result from a judge than they would receive from the DOJ in a negotiated plea agreement. For example, as noted above, the DOJ has, in negotiated resolutions, respected companies' assertions of their need to maintain certain levels of dividend payments and to refrain from liquidating marketable securities.

¹¹ *United States' Sentencing Memorandum, Motion for Departure, and Request for Expedited Sentencing, United States v. Rubycon Corp.*, No. 16- cv-00367-JD (Dkt. No. 5) at 14–15 (N.D. Cal. Spet. 7, 2016).

¹² Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All* 14, Address to OECD Competition Committee Working Party No. 3 (Oct. 17, 2006) ("Early cooperation from cartel members is absolutely critical to the detection and prosecution of cartel conduct, and the Division seeks to favorably reward and thus encourage such cooperation. Where the ultimate prize of full immunity is no longer available, second-in or early cooperators can still obtain substantial discounts below their Guidelines fine and incarceration ranges."), <https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all>.

¹³ Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* 5, Address to the 54th Annual Am. Bar Ass'n Section of Antitrust Law Spring Meeting (Mar. 29, 2006), <https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations>.

¹⁴ Hammond, *supra* note 16, at 20.

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