

# Probation Nation? What Upcoming Changes to the Sentencing Guidelines Mean for Antitrust Defendants

A photograph of a modern building's curved glass facade, showing multiple floors and windows, set against a light blue sky.

6 MIN READ

October 11, 2023, 10:39 AM

By: James W. Attridge

The Antitrust Division's ("Division") long-held view is that "individual criminal sanctions, including prison sentences, are the single most effective deterrent to antitrust crimes."<sup>[1]</sup> Although the Division's sentencing recommendations are based on an "individualized assessment," that assessment – at least historically – has "usually counsel[ed] in favor of incarceration."<sup>[2]</sup>

The U.S. Sentencing Guidelines ("Guidelines") are advisory, however, and judges don't always agree with the Division's recommended sentence. The average prison sentence in antitrust cases is on the decline, from 20 months in 2000-2009 to 15 months in 2020-2022.<sup>[3]</sup> Moreover, in several recent cases, the Division recommended a sentence of probation (and in another instance, pre-trial diversion), including in a post-indictment case against a corporate president whose company admitted liability and paid a \$100 million penalty.<sup>[4]</sup>

Against the backdrop of shorter prison sentences and a greater willingness to recommend probation for antitrust defendants, proposed changes to the Guidelines set to go into effect in November will give many antitrust offenders a lower sentencing range and thus an even greater likelihood of avoiding jail time.

Sentencing calculations lead to an offense level, which corresponds with a sentencing zone and specific sentencing range. Criminal history also affects the sentencing range that

corresponds with a particular offense level. First-time offenders with zero criminal history points (so-called “zero-point offenders”) have lower sentencing ranges, from 0-6 months for offense levels 1-8 in Zone A, to life for an offense level of 43 at the top of Zone D. <sup>[5]</sup>

The proposed amendments include a new two-point offense level reduction for certain first-time or zero-point offenders who—like the vast majority of antitrust defendants—lack a criminal history. <sup>[6]</sup> To receive the new two-point reduction, defendants must be a zero-point offender and meet other eligibility criteria. <sup>[7]</sup> Of the additional eligibility requirements, most won’t be an issue for the typical antitrust defendant. But, depending upon its interpretation, one potentially disqualifying factor is common in antitrust cases: defendants that receive an aggravating role adjustment, such as for leading, organizing, or supervising the offense, may be ineligible for the new, zero-point offender reduction. <sup>[8]</sup> As other commentators have noted, however, that criterion is likely to lead to litigation and should not apply to white-collar defendants because it ought to only disqualify those that receive an aggravating role adjustment *and* had involvement in a continuing criminal enterprise (i.e., criminal drug conspiracy). <sup>[9]</sup>

The benefits of the zero-point offender reduction are significant. In addition to a two-point offense level reduction and corresponding lower sentencing range, new Guidelines commentary explains that a no-jail sentence is “generally appropriate” for defendants that receive the zero-point offender reduction and fall within Zone A or B of the sentencing table. <sup>[10]</sup> The new Guidelines also suggest that a no-jail sentence may be appropriate even for defendants who fall within Zones C or D of the sentencing table, if they qualify for the zero-point offender reduction and the applicable Guidelines range “overstates” the gravity of their offense. <sup>[11]</sup>

If jail is the best deterrent, while at the same time custodial sentences are becoming less likely for average and lower-level antitrust defendants, what does that mean for the Division’s priorities going forward?

- **Admit the crime but do no time.** Those who admit the crime and tell the jury about the conspiracy from the inside can make compelling government witnesses. A lack of pleading witnesses was a feature in a number of Division’s recent trial losses. The desire for witnesses that admit to the crime, coupled with Guidelines changes that make jail time less likely and a greater willingness to entertain pleas to probation, may turn pleas to probation into a more common feature in antitrust cases.
- **Application of aggravating role enhancement may play a greater role in plea negotiations and at sentencing.** Come November, if defendants that receive an aggravating role adjustment are deemed ineligible for the zero-point offender reduction, negotiations and advocacy about whether the defendant played an aggravating role in the offense will become even more critical.
- **The Division may shift its focus to bigger cartels and higher-level participants.** The change may also guide the Division to focus its limited resources on bigger cartels and offenders more likely to receive jail sentences, particularly defendants who (i) do not qualify for the zero-point offender reduction or (ii) zero-point offenders who still fall within Zones C or D.

Because aggravating roles and greater volume of commerce drive higher sentencing ranges, the Division may also shift its prosecutorial focus to higher-dollar cartels, executives, and cartel leaders.

- **A particular impact on labor?** The most interesting impact may be on labor-market cases. Higher affected commerce means higher sentencing ranges, but labor cases tend to have a lower volume of commerce because the affected commerce is salaries rather than sales. And unlike many seller cartels, the more appealing labor cases (both to Division prosecutors and juries) may also be those with *lower* affected commerce because they impacted lower-wage employees. The combination of Guidelines changes, the nature of labor cartels, and their novelty as criminal cases may make individuals accused of labor-market violations particularly likely to avoid jail.
- There's no question the Division remains committed to criminal prosecution of labor-market violations.<sup>[12]</sup> But given that juries (and in one case, a judge) have so far been unwilling to convict individuals for labor-market collusion, and with probation being the likely result *if* a conviction is ever obtained, the Division may shift its immediate focus away from prosecuting individuals and toward pursuing companies and continuing its amicus efforts to affect the law.<sup>[13]</sup>

[1] U.S. Dep't of Just., Just. Manual § 7-3.420 (2022).

[2] *Id.* § 7-3.500. In support, the Justice Manual cites the advisory U.S. Sentencing Guidelines, which note that “in very few cases will the guidelines not require that some confinement be imposed,” U.S. Sent'g Guidelines § 2R1.1 cmt. background (U.S. Sent'g Comm'n 2021), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf> [hereinafter “USSG”], and that “[i]t is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders,” *id.* cmt. n.5.

[3] *Criminal Enforcement Trends Charts*, U.S. Dep't of Just., Antitrust Div. (June 29, 2023), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

[4] See *United States v. Harwin*, 2:20-cr-00115 (M.D. Fla. Aug. 23, 2023), Dkt. No. 313-1 (agreeing to a Rule 11(c)(1)(C) plea with no custodial sentence); *United States v. Pedrick*, 4:20-cr-00081 (S.D. Ga. Sept. 19, 2023), Dkt. No. 384 (another 11(c)(1)(C) plea for a term of probation); *United States v. Hee*, 2:21-cr-00098 (D. Nev. Jan. 23, 2023), Dkt. No. 115 (pre-trial diversion agreement).

[5] USSG, *supra* note 2, at ch. 5, pt. A, Sentencing Table.

[6] U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines, at amend. 8, pt. B, subpart 1, § 4C1.1 (effective Nov. 1, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf) [hereinafter “2023 USSG Amendments”].

[7] *Id.*

[8] See *id.*; see also USSG, *supra* note 2, § 3B1.1 (aggravating role adjustment); Mark Rosman & Jeff VanHooreweghe, *What Goes Up, Doesn't Come Down: The Absence of the Mitigating-Role Adjustment in Antitrust Sentencing*, Antitrust Source (Aug. 2012), <https://www.wsgr.com/PDFSearch/rosman-august-12.pdf> (finding that the Division has sought an aggravating role adjustment in roughly half of its recent individual prosecutions).

[9] See Alan Ellis, Mark Allenbaugh & Doug Passon, *How Zero-Point Offender Change Will Work Prospectively*, Law360 (Oct. 5, 2023), <https://www.law360.com/whitecollar/articles/1729489/how-zero-point-offender-change-will-work-prospectively>. (“The last criterion for the zero-point offender adjustment should only preclude supervisors and up within criminal drug conspiracies from receiving the zero-point offender adjustment, and not, for example, a supervisor of a wire fraud conspiracy.”).

[10] 2023 USSG Amendments, *supra* note 6, at amend. 8, pt. B, subpart 2, cmt. n.10 (“Zero-Point Offenders”).

[11] *Id.*

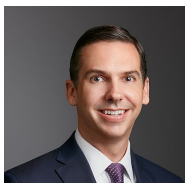
[12] Jonathan Kanter, Ass’t Att’y Gen., Antitrust Div., Remarks at the Fordham Competition Law Institute’s International Antitrust Law and Policy Conference (Sept. 22, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law> (“Let me confirm: we are just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets.”).

[13] *Id.* (citing *Deslandes v. McDonald’s USA, LLC*, --- F.4th ---, 2023 WL 5496957 (7th Cir. Aug. 25, 2023), as a “terrific opinion” and example of the Division’s “thriving” amicus program).



## Related People

---



James W. Attridge

## Related Services

---

Antitrust

To subscribe to our publications, [click here](#).

# News & Insights

- GCR Live: Law Leaders Europe 2025  
**SPEAKING ENGAGEMENT     ANTITRUST**
- AHLA Annual Meeting 2025  
**SPEAKING ENGAGEMENT     ANTITRUST**
- SABA North America Annual Conference 2025  
**SPEAKING ENGAGEMENT     ANTITRUST**
- Navigating Compliance: How the 2025 Hart-Scott-Rodino Updates Are Impacting Businesses  
**WEBINAR     ANTITRUST**
- NJSBA Annual Meeting and Convention 2025  
**SPEAKING ENGAGEMENT     INTELLECTUAL PROPERTY**
- Hartford HealthCare Black and Red Gala 2025  
**SPONSORSHIP     ANTITRUST**
- Informa CompLaw Antitrust West Coast Conference 2025  
**SPEAKING ENGAGEMENT     ANTITRUST**
- AHLA Health Care Transactions Program 2025  
**SPONSORSHIP     ANTITRUST**
- Five Healthcare Antitrust Topics to Watch at the Upcoming Health Care Transactions Conference in Nashville  
**AXINN VIEWPOINTS     ANTITRUST**
- IAM Live: Auto IP USA 2025  
**SPEAKING ENGAGEMENT     INTELLECTUAL PROPERTY**