Cartels

Enforcement, Appeals and Damages Actions

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USA

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Overview of the law and enforcement regime relating to cartels

The United States has the world's most mature cartel enforcement regime. Congress enacted the key U.S. federal anti-cartel statute, Section 1 of the Sherman Act (15 U.S.C. §1), in 1890. Several states had enacted their own antitrust laws even earlier. The enforcement regime has evolved into a complex system in which the laws can be enforced criminally by the federal government (and in rare cases by state governments), and civilly by the federal government, state governments, and private parties. Cases by private parties can be further subdivided into those brought by direct purchasers and those by indirect purchasers, and on a different axis between representative class actions and individual actions.

Cartel enforcement in the U.S. takes place within an adversarial system, with government enforcers and private plaintiffs on one side, and defendants on the other. An independent judiciary presides over trials and other disputes.

At the federal government level, the Antitrust Division of the Department of Justice enforces Section 1 of the Sherman Act. The Antitrust Division exclusively brings criminal actions under the Sherman Act, sometimes working in conjunction with other components of the DOJ where there are allegations of other violations, such as wire and mail fraud. Criminal antitrust enforcement is reserved for "hard core" violations of Section 1: price-fixing; bid rigging; and market allocation schemes among horizontal competitors. The DOJ can also pursue less egregious cases civilly.

Although the Federal Trade Commission (FTC), an independent agency, does not technically enforce the Sherman Act, it does enforce the FTC Act (15 U.S.C. § 41–58), which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices", allowing the FTC to challenge conduct civilly that would also violate the Sherman Act. Additionally, the FTC can use the FTC Act to challenge coordinated conduct that does not meet all of the elements of a Sherman Act violation, such as invitations to collude that do not lead to actual collusion.

Section 4 of the Clayton Act provides for a private right of action to enforce Section 1 of the Sherman Act. The Clayton Act entitles successful antitrust plaintiffs to treble damages, typically calculated based on the amount the plaintiff was overcharged as a result of the cartel activity, and also to compensation for their attorneys' fees and associated costs of litigation. The Clayton Act does not allow successful defendants to recover their costs of litigation. According to the U.S. Supreme Court, "by offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general'".[1] Defendants in private civil suits face joint and several liability, meaning that a single defendant could find itself responsible for the total

damages for the entire cartel, trebled, plus attorneys' fees and costs. The prospect of an enormous damage award leads most cases to settle before trial. Contingent fee arrangements – in which the plaintiff's attorney receives a percentage of whatever money is paid to the plaintiff to resolve the case, but receives no fees absent a monetary award to the plaintiff – are common in private antitrust cases.

The Supreme Court's holding in *Illinois Brick Co v Illinois*, 431 U.S. 720 (1977), prohibits indirect purchasers from asserting federal antitrust claims based on arguments that direct purchasers "passed on" the overcharge to the indirect purchaser. Many states, however, have enacted "Illinois Brick repealer statutes", allowing indirect purchasers to bring state antitrust and unfair competition claims (either in federal or state court). The Supreme Court in *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 U.S. 519 (1983), established a balancing test to determine standing of indirect purchasers to assert antitrust claims. The test considers the directness of the plaintiff's injury; the existence of more direct victims of the antitrust violation; the potential for duplicative recovery; and the likelihood that apportionment of damages would be overly complex or speculative. The Supreme Court has also heard the argument in *Apple Inc. v. Pepper*, a case that will give it an opportunity to revisit the Illinois Brick doctrine.

When a DOJ criminal investigation becomes public knowledge, follow-on private civil litigation is a near certainty. Often, a single set of facts will spawn a criminal case, a direct purchaser class action, an indirect purchaser class action, and several actions by individual plaintiffs who opt out of the class actions. The DOJ will often ask the court to stay discovery in the civil cases for a period of time to allow its criminal investigation to proceed unfettered.

States have the same rights as private parties to sue under Section 1 for damages when they are the victims of cartels. State attorneys general can also sue on behalf of the state's citizens in what are called *parens patriae* actions.

All states have some type of antitrust or unfair trade practice statute, most of which are based on and/or interpreted consistently with the federal antitrust laws. Many states provide for some form of criminal liability for such violations, although criminal enforcement is not common in most states and sanctions tend to be less severe than under federal law. State attorneys general are responsible for the public enforcement of these laws and nearly all states permit private civil damage actions, most for treble damages, although some states limit recovery to actual or double damages.

Criminal cases are commenced by prosecutors presenting evidence gathered during the investigation to a grand jury (a group of 16 to 23 citizens who determine whether sufficient evidence exists to indict the targeted company or individuals). An indictment is simply a finding of sufficient evidence to proceed to trial, not a finding of guilt. Prior to indictment, the DOJ will identify certain targets of the investigation whom it considers to be potential defendants based on the existence of substantial evidence linking the target to the crime. Targets are afforded the opportunity to meet with the DOJ to try to avoid indictment through a proffer of cooperation and testimony or by offering counterevidence of their own. Targets also have the right to testify on their own behalf before the grand jury, though in practice this is uncommon, in part because their lawyers are not allowed to accompany them during questioning by prosecutors.

Before a criminal defendant can be tried, the DOJ is required to disclose evidence or information favourable to the defendant, including exculpatory evidence, evidence that would permit impeachment of government witnesses, or mitigating evidence that would tend to reduce a criminal sentence.[2] In general, the DOJ provides to defendants the majority of

its investigative materials. Under certain circumstances, the government must also disclose any statements of its witnesses that relate to the subject matter on which the witness testified.[3]

Criminal cases under Section 1 that proceed to trial are heard in federal court, where the defendant may demand trial by jury. Prosecutors must prove criminal violations "beyond a reasonable doubt," the highest standard of proof in the U.S.

Civil plaintiffs commence cases by filing a complaint in federal or state court. Civil plaintiffs must meet the lower "preponderance of the evidence" standard.

The majority of cartel cases are resolved prior to trial. Criminal cases are often resolved by way of a plea agreement. Civil litigation is often resolved by way of a dispositive motion or settlement.

The statutes prohibiting cartels are brief and general. The Sherman Act deems "every contract, combination… or conspiracy… in restraint of trade" to be illegal. The nuance and boundaries of the law, and guidance as to how the law applies to various fact patterns, comes from judge-made caselaw in a system of *stare decisis*. A central element in all cartel cases is proof of an illegal agreement. Unilateral conduct does not violate Section 1 of the Sherman Act (though it may violate Section 2 (monopolisation), the FTC Act, or other laws). Satisfying the "agreement" element does not require a formal written document. Illegal agreements may be reached informally, through emails, instant messages, orally, or even with a wink or a nod. The DOJ's practice is to establish the existence of an agreement in criminal cases through direct evidence, reflecting the higher standard of proof that applies in the criminal context. To establish an agreement in civil cases where the evidence may be circumstantial, the U.S. Supreme Court has held that the evidence must tend "to exclude the possibility of independent action" and establish that the defendants "had a conscious commitment to a common scheme".[4] Proof that defendants engaged in parallel conduct is insufficient, standing alone, to show such a "conscious commitment". Plaintiffs must also allege certain "plus factors" to give rise to an inference of an agreement. Plus factors are proxies for direct evidence because they tend to ensure that courts punish concerted actions as opposed to unilateral, independent competitor conduct. There is no definitive set of plus factors.

Information exchanges among competitors are not prosecuted criminally, but may be challenged civilly if the anticompetitive effect of the exchange outweighs its procompetitive benefits. However, evidence that competitors exchanged competitively sensitive information, such as pricing, production levels, capacity, margins, and the status and details of customer negotiations or bids may constitute circumstantial evidence of an underlying cartel.

While Section 1 of the Sherman Act, read literally, would seem to prohibit all restraints of trade, the Supreme Court in 1911 held that it only prohibits "unreasonable" restraints of trade.[5] Subsequent decisions held that agreements among competitors to fix prices (or any component of pricing), restrict output, rig bids, or allocate customers or geographic territories lack any redeeming competitive value and are thus *per se* illegal. In other words, the law provides for an irrebuttable presumption that such agreements are unreasonable and have an anticompetitive effect on the market. For several decades now, the DOJ has reserved criminal prosecutions to *per se* cartel offences.

In order to come under the purview of Section 1, the challenged conduct must involve interstate commerce or trade with foreign nations. Most commercial activity occurring within the United States will have an interstate effect. The Foreign Trade Antitrust Improvements Act (FTAIA) (15 U.S.C. § 6a) (discussed below) covers foreign commerce.

Overview of investigative powers in the United States

Criminal enforcement:

The DOJ Antitrust Division, working in conjunction with the Federal Bureau of Investigation (FBI), other federal law enforcement agencies, and grand juries, has a significant array of traditional investigative powers at its disposal. These tools allow it to compel production of documents, question witnesses under oath and, with appropriate judicial approvals, raid private property to seize evidence.

Perhaps the DOJ's most influential investigatory tool in cartel investigations, however, is cooperation from cartel insiders. While sometimes overlooked as an investigatory tool, and while not as dramatic as an FBI dawn raid, cooperation is probably the DOJ's most fruitful method of gathering information and evidence. In order to reap the benefits of the Antitrust Division's corporate leniency programme (discussed in more detail below), corporations must provide the DOJ with full cooperation, including documents, attorney proffers, and witness interviews and testimony. Companies and individuals who are not eligible for leniency but agree to plead guilty also typically provide full cooperation to the government in return for the DOJ's agreement to request a lower sentence. In some cases, cooperating witnesses agree to gather evidence against co-conspirators during the covert phase of an investigation into an ongoing conspiracy, for example, by recording conversations with them (under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, communications can be legally intercepted if there is consent of one of the parties).

Even for witnesses not covered by the Antitrust Division's leniency programme or the cooperation obligation of a plea agreement, DOJ lawyers, often accompanied by FBI agents, will seek cooperation from witnesses by dropping in on them for unannounced interviews, often at their homes first thing in the morning. Witnesses approached in this manner are not compelled to cooperate, but often do.

In the case of witnesses located outside the U.S., the DOJ may initiate a border watch. When an individual on a border watch list voluntarily enters the U.S., immigration and border control authorities will notify the DOJ and may detain the individual or serve him or her with a grand jury subpoena for documents or testimony. There is no requirement of a warrant or showing of probable cause to place an individual on a border-watch list, which is not public and not disclosed to defence counsel. If the individual enters the U.S. and is not detained, the DOJ may conduct a drop-in interview with government lawyers and agents appearing unannounced at the person's hotel or workplace. Although cooperation with the interviewers is voluntary, individuals often cooperate. Individuals on a border watch also may have physical evidence, such as documents and electronic devices, searched at the U.S. border, where border control authorities enjoy extensive investigative powers.

To help incentivise foreign-based cartel insiders to submit to U.S. jurisdiction and cooperate, the Antitrust Division, in 1996, reached a Memorandum of Understanding (MOU) with U.S. immigration officials allowing such individuals to travel to the U.S. even if they have pleaded guilty. Because U.S. immigration officials consider antitrust offences to be crimes involving "moral turpitude", absent the MOU, foreign offenders, even if they agreed to plead guilty and cooperate with the government's investigation, would normally be permanently excluded from the United States (following any term of incarceration).

When the DOJ cannot rely on cooperation, it has a number of other investigatory tools. With a grand jury subpoena, the DOJ can compel testimony and documents from individuals and corporations throughout the U.S. The DOJ also asks subpoena recipients to produce

documents located outside the United States on a voluntary basis. Grand jury subpoenas for testimony compel individual witnesses are to be questioned under oath by DOJ lawyers before the grand jury. Witnesses' lawyers are not allowed in the grand jury room during testimony, although witnesses are permitted to take breaks to confer with their counsel. Witnesses can refuse to testify by asserting their right under the U.S. Constitution against self-incrimination. The DOJ can overcome this assertion by supplying the witness immunity for his or her testimony.

Additionally, upon a finding of probable cause by a federal judge or magistrate, the DOJ may obtain warrants permitting it, through the FBI, to search for and seize physical evidence located on private premises, including documents and electronic devices.

Civil enforcement:

Civil investigations by federal or state enforcement agencies do not involve a grand jury. Instead, the federal or state enforcement agency will generally issue civil investigative demands (CIDs) or civil subpoenas to obtain documents or sworn written or oral testimony from targets of the investigation, as well as from third parties. The evidence resulting from CIDs or civil subpoenas may form the basis of a civil lawsuit in federal court (brought by the DOJ or FTC) or an FTC administrative proceeding before an administrative law judge.

Private plaintiffs do not have the ability to use grand jury subpoenas or CIDs. Once a complaint is filed, however, private plaintiffs can use the civil discovery tools set forth in the Federal Rules of Civil Procedure or state discovery statutes – document requests, interrogatories, requests for admission and depositions – to further investigate a matter. Civil discovery can be targeted to the defendant(s) and to third parties. Prior to the filing of the complaint, private plaintiffs can look to public sources of information, or use private investigators to investigate cases.

Overview of cartel enforcement activity during the last 12 months

Assistant Attorney General Makan Delrahim took the helm of the Antitrust Division on September 28, 2017, just before fiscal year 2018 began. Soon after that, he remarked that the division's "criminal enforcement program has been and remains a core priority". The DOJ has had success in the past year, notching guilty pleas, convictions, or arrests in many of its ongoing matters, including: packaged seafood; LIBOR; foreign currency exchange; capacitors; real estate foreclosure sales; international ocean shipping; and liquid aluminium sulfate. Yet its criminal case filings and fines have been notably low for the last two years. For example, while in the period between 2008 and 2016 the division filed an average of 61 criminal cases per year (naming an average of 59 individuals and 21 corporations), in 2017 the division filed only 24 cases (naming 27 individuals and eight corporations), and in 2018 it filed only 15 cases (naming 18 individuals and 3 corporations). While total fines exceeded $1 billion in each of fiscal years[6] 2012, 2013, 2014 and 2015, the fines dropped off dramatically to $399 million in 2016, and dropped off again to $67 million for fiscal 2017. They rebounded a bit to $193 million in 2018, according to an unofficial tally.

Lower fine totals and case filings, however, should not necessarily be mistaken for less vigorous cartel enforcement. For one thing, fines and case filings are not imposed evenly across the multi-year arc of a cartel investigation. No cases will be brought and no fines recorded during the investigatory phase of a matter. Toward the end of a matter, resources are often devoted to individual prosecutions, which generate relatively low fines. Moreover, fine levels suffer when enforcement efforts focus more on individuals because sentences for individuals are tilted toward prison time with relatively low fines. Moreover, the corporate

fines the DOJ is able to impose depend greatly on the industry in the DOJ's cross hairs. Rightly or wrongly, the United States Sentencing Guidelines, which are used to calculate recommended fines, are driven by the volume of commerce affected by a cartel. The volume of commerce figures will be exponentially larger in some sectors (e.g. the financial sector) than in others. Lastly, the division was without a permanent Deputy Assistant Attorney General in charge of the criminal programme for approximately a year before the appointment of Richard A. Powers in May of 2018.

The Antitrust Division's 2019 budget request confirms that "[v]igorous enforcement of criminal antitrust laws will continue to be the number one priority of the Division's Criminal Program". The division's criminal enforcers are continuing to use all available investigatory tools, including unannounced drop-in interviews and dawn raids. In addition to the ongoing matters referenced above, the division continues to aggressively investigate the generic drug industry (state attorneys general are also active in this area) and has also reportedly launched new investigations into Chinese air cargo services and metal paints and coatings. The division has also repeatedly and publicly indicated its intent to pursue agreements among companies not to poach each other's employees. These statements follow the guidance to human resource professionals that the DOJ issued with the FTC in 2016. State attorneys general have also been active in this area, for example, requiring franchise operations to stop including no-poach clauses in their franchise agreements.

The DOJ's trial record was mixed. The DOJ was unsuccessful in a November 2017 trial, where an Ohio jury acquitted two Japanese firms, Tokai Kogyo Co. Ltd. and Green Tokai Co. Ltd., of price-fixing and bid rigging charges in the market for automotive body seals. The defence focused on evidence of intense price competition for the allegedly rigged components during the conspiracy period.

In October 2018, the DOJ persuaded a jury to convict two former Deutsche Bank traders in a Manhattan federal court of conspiracy and wire-fraud charges over their involvement in a scheme to manipulate the London Interbank Offered Rate (LIBOR). While the Antitrust Division assisted the Criminal Division at trial, there were no antitrust charges. Sentencing has been postponed to allow the parties to brief the issue of whether the government improperly relied on inadmissible compelled testimony. Defendants allege that the bank's internal investigation, conducted by outside counsel, was in fact being directed by the Commodities Futures Trading Commission and that employees provided information to investigators only because the alternative was termination of their employment.

Also in October of 2018, a Manhattan jury quickly acquitted three London-based bank traders in the foreign exchange rate rigging case. The Antitrust Division had accused them of conspiring not to trade against each other and manipulating daily benchmarks. The traders had communicated in a chat room which they referred to as the "cartel" and the "mafia". The government's main cooperating witness, however, testified that the traders did not intend to commit a crime, and did not think they were doing anything wrong or hurting anyone. The defence relied on a foreign exchange trading expert who testified that sharing market colour is a legitimate part of the business and that he examined trading data and did not see evidence of an effect on euro/dollar rates from the chats.

The DOJ was headed toward an October 2018 trial of Nippon Chemi-con, which it considered a ringleader of the electrolytic capacitors price-fixing conspiracy, but the case ultimately settled with the company pleading guilty. The plea deal came after the DOJ offered the company a discounted fine range of $40–$60 million. It offered the discount after it came to light that a government attorney had a potential conflict of interest. The

DOJ lawyer, who had worked on a mutual legal assistance treaty (MLAT) request to the Japanese government, had previously represented Nippon Chemi-con while in private practice. While the DOJ took the position that the conflict did not prejudice the defendant, it threatened to derail the DOJ's case. District Court Judge James Donato (who throughout the case has been frustrated by what he considers lenient plea deals for other companies) appeared especially frustrated by the inability to fine Nippon Chemi-con the maximum fine of $100 million. "Why is it in the interests of justice? How is it good for American consumers to effectively give a 40% discount based on this one issue?" he asked. Judge Donato ultimately capitulated and fined the company $60 million, the most he could under the plea deal.

At the appellate level, the Antitrust Division challenged its pre-trial loss in the heir locator matter. A federal court in the District of Utah ruled that the DOJ's prosecution of a defendant was subject to the defendant-friendly rule of reason standard, rather than the *per se* standard. For decades the DOJ has, as a matter of prosecutorial discretion, reserved criminal prosecution for *per se* violations where the court and jurors bypass inquiry into the reasonableness of the restraint and presume the anticompetitive effect of the agreement. Consistent with its historical practice, the DOJ charged the heir location case as a *per se* market allocation violation, alleging that the defendants and their competitors developed and implemented a set of written guidelines that governed how the participants would allocate potential customers that had been contacted by multiple competitors. The defendant, however, persuaded the district court that the restraint was different enough from standard customer allocation agreements that it should not be analysed under the *per se* standard. The court also ruled that the DOJ's claim was barred by the statute of limitations. The Tenth Circuit reversed the district court on the statute of limitations, but held that it did not have jurisdiction to decide whether the case should be decided under the rule of reason or *per se* standard. Courts of Appeals, as the Tenth Circuit noted, are only authorised to rule on decisions, judgments, or orders of a district court dismissing an indictment or information. Here, the district court did not dismiss the indictment, but only held that the DOJ had to proceed under the rule of reason. Following the Tenth Circuit opinion, the DOJ has asked the district court to reconsider its decision on the appropriate standard.

In *Animal Sciences Products, Inc. v. Hebei Welcome Pharmaceuticals Co.*, a price-fixing case against Chinese manufacturers of Vitamin C, the Supreme Court sided with the plaintiffs, unanimously reversing the Second Circuit which had overturned the judgment for the plaintiffs on international comity grounds. The Second Circuit found that the Chinese corporate defendants had been compelled by the Chinese government to fix prices for the vitamin sold to U.S. companies and that the defendants could not have complied both with Chinese law and U.S. antitrust law simultaneously. After considering an amicus brief submitted by the Chinse Ministry of Commerce, the Second Circuit held that Chinese law should prevail when the conduct involves Chinese companies acting on Chinese soil. The Supreme Court, however, held that while "a federal court should accord respectful consideration to a foreign government's submission", it "is not bound to accord conclusive effect to the foreign government's statements".

Leniency/amnesty regime

The Antitrust Division's corporate leniency programme affords full immunity from prosecution to a corporation when certain requirements are met. In 1993 the Antitrust Division redesigned the programme so that leniency was automatic for qualifying companies,

and all current officers, directors and employees who come forward with the company and cooperate are protected from criminal prosecution. With the redesign, the DOJ stressed transparency and objectivity. Following these changes, the success of the programme took off and leniency became the most important tool in the DOJ's enforcement toolbox.

The key requirements are that: (i) the DOJ has not yet learned of the conduct (Type A leniency) or does not yet have enough information to pursue a conviction (Type B leniency); and (ii) the corporation reports the misconduct fully and cooperates completely with the DOJ's investigation.[7] The DOJ keeps the identity of leniency applicants confidential. Depending on the nature of the cartel and the parties involved, however, the identity of the leniency applicant may become known, at least among the other defendants.

In addition to immunity from criminal sanctions under the DOJ leniency programme, applicants may also be eligible for benefits in follow-on private civil cases, including reduction from treble to single damages, and the elimination of joint and several liability by virtue of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) which congress passed in 2004. The requirements under ACPERA include cooperation with plaintiffs in civil actions.

Leniency is available only to the first-in applicant, and no formal leniency programme exists for cooperating parties who come in later. The DOJ values cooperation, however, and cooperation is a mitigating factor under the Sentencing Guidelines that the DOJ points to in recommending sentences to the court. Earlier cooperation is likely to be more valuable to the DOJ than later cooperation and is more likely to receive a larger fine discount.

The requirement that a corporation be the first to report to the DOJ to qualify under the leniency programme is designed to create an incentive for those who uncover problematic conduct to rush to the DOJ. If a company learns of some credible evidence of a criminal antitrust violation but does not have the complete picture of whether the conduct violated the antitrust laws, the DOJ allows the company to obtain a "marker" to secure its place in line with the DOJ while investigating further whether a violation in fact occurred. Typically, the process begins with a phone call by counsel to the DOJ to see if a marker is available. Usually some information regarding the nature of the illegal conduct and the evidence supporting it is shared at this time, but merely putting in the marker does not require full details of the scope of the cartel and the applicant's involvement. If the DOJ accepts the marker, the applicant must move quickly to conduct an internal investigation and prepare a formal proffer of evidence to the DOJ establishing that the company satisfies the leniency programme's requirements. Successful applicants will receive a conditional letter of amnesty, setting forth the requirements of cooperation by which the company must abide in order to maintain its immunity.

Under the leniency programme, the Antitrust Division has created an "amnesty plus" programme designed to create an incentive for later-cooperating parties to confess wrongful conduct outside the scope of the existing investigation. As part of amnesty plus, a company under investigation for one cartel offence that discovers another potential cartel offence may receive immunity for the second offence (assuming it qualifies for leniency) if it reports the conduct, and may also receive a considerable reduction in fine for the original offence. Conversely, under the DOJ's "penalty plus" policy, the government will seek fines and prison sentences at the upper end of the range recommended by the Sentencing Guidelines if a company was aware of additional antitrust violations but chose not to report them.

By most measures, the leniency programme has been dramatically successful. A series of international cartels have been brought to justice, billions of dollars of fines have been levied,

and hundreds of executives have been jailed. A huge percentage of cases in recent decades have relied on information that came, directly or indirectly, from the leniency programmes.

Key issues in relation to enforcement policy

Following success in the U.S., leniency programmes have been adopted by many other jurisdictions. More than 80 jurisdictions now have them in one form or another. Prior to this global expansion, if a company discovered cartel activity, the decision-making process was fairly straight-forward. If the company moved quickly it could secure complete immunity from crippling fines and prison sentences for executives by fully cooperating with a few authorities. Yet with more countries adding leniency policies, the calculus has shifted. The costs of securing leniency have skyrocketed. Leniency recipients must cooperate fully and transparently; that means: review and production of millions of pages of translated documents; detailed attorney proffers; witness interviews; and testimony. Moreover, each country's programme is administered differently. And because seeking leniency in only one or a few jurisdictions might leave you vulnerable to enforcement in others, seeking leniency anywhere means seeking it everywhere. But antitrust enforcers in one jurisdiction might issue cooperation demands that irreconcilably conflict with the demands imposed by another. Companies also have to take into account the risks (now more dire than ever) of follow-on private litigation, which is virtually inevitable when a cartel becomes public knowledge.

The new Deputy Assistant Attorney General Richard Powers is attuned to the increasing complexity and costs. He noted that the suggestions the DOJ is focusing on to reduce the burdens on leniency applicants include: 1) trying to coordinate timelines and deadlines to allow the applicant to meet them in multiple jurisdictions; 2) tailoring document demands to get the necessary evidence from the leniency applicant without unnecessary burden; and 3) where possible, coordinating the timing and locations of interviews to alleviate burdens on applicants and employees.

As the costs of applying for leniency increase, some worry that the benefits seem to be shrinking. In 2017, the DOJ published an amended version of its Frequently Asked Questions publication that explains the nuts and bolts of the leniency programme. Most observers interpreted the changes, including stricter requirements for immunity for current directors, officers, and employees in "Type B" situations (where the DOJ already has knowledge of the conduct), and a presumption against leniency for former directors, officers, and employees, as eroding predictability, transparency, and certainty, and signalling the Division's intent to cover fewer individuals.

A consensus seems to be forming among lawyers who practice in the international cartel arena that leniency has lost some of its lustre. These lawyers and their clients are at least pausing before pulling the leniency trigger, if not turning away from leniency altogether. As mentioned above, overall cartel fines and filings continue to be sharply off the record highs of just a few years ago. Part of that reduction may well be a result of a diminished appetite for leniency programmes.

Administrative settlement of cases

Criminal settlements

In criminal cases, the method for a target of an investigation to settle with the DOJ is for the target to admit guilt and agree to enter a guilty plea. The criminal justice system encourages resolution of criminal cases through plea agreements. Plea bargains can provide defendants with a number of benefits, including certainty, expedience, finality, and substantially reduced

criminal penalties. Before proceeding with plea discussions, the prosecution must be satisfied that it has a prosecutable case.

The Federal Rules of Criminal Procedure lay out different types of plea agreements, two of which comprise the vast majority of plea agreements in the cartel context. In an agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B) (known colloquially as a "B" deal), the government's attorney will agree to recommend a particular punishment; the defence is free to oppose this recommendation and argue for a lesser sentence. However, a defendant subject to a "B" deal has no right to withdraw the guilty plea if the court rejects all or part of the government's recommendation. The defendant must accept the sentence imposed by the court irrespective of the government's recommendation.

The majority of the DOJ's cases involving foreign corporations and individuals have been resolved on the basis of a "C" deal (in reference to Federal Rule of Criminal Procedure 11(c)(1)(C)). The "C" deal is a mutual recommendation by the prosecutor and defendant to the court on the appropriate sentence and the application or non-application of certain factors or provisions of the Federal Sentencing Guidelines. If the court accepts the "C" deal it is bound by the recommendation in the agreement. Some courts refuse to accept "C" deals because of the removal of the sentencing court's discretion.

Where a company agrees to a plea bargain, its directors, officers, and employees will similarly receive immunity from future prosecution, except for those who have been "carved out" of the non-prosecution provisions of the plea agreement. The DOJ's practice is to carve out a number of targets of the investigation who may be indicted for wrongful conduct associated with the violations set forth in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, though not always, higher-ranking executives who held pricing authority and actively promoted the cartel activity. The DOJ may also choose to carve out individuals who attended cartel meetings and entered into the agreements on behalf of the company, against whom the documentary evidence is often the strongest.

In 2013, the DOJ announced that it would no longer publicly disclose the names of individuals "carved out" from the non-prosecution provision of company plea agreements. In putting an end to this practice, the division recognised that "[a]bsent some significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers". The DOJ also announced that it would no longer carve out individuals from pleas merely for not cooperating in its investigation. Instead, the division will carve out only those individuals who are "potential targets" of the investigation (i.e., only those whom the division has reason to believe were engaged in the criminal conduct at issue and targets for potential prosecution).

During a plea negotiation for a corporate target, the DOJ typically interviews employees who may have had some involvement in the conduct (or receives attorney proffers from employees' counsel). The plea negotiations often focus on: who will be carved out of the non-prosecution provisions; the violations for which the defendant must admit guilt; the products or services covered by the conspiratorial agreement; the duration and geographic scope of the conspiracy; the cooperation credit that will be suggested; and the sentencing recommendation. The Antitrust Division website contains a model corporate plea agreement[8] and a speech by former Deputy Assistant Attorney General Scott Hammond which describes the plea agreement process.[9]

Civil settlements

The settlement of civil antitrust cases brought by the DOJ or FTC is by consent decree. Through consent decrees the agencies will seek to (1) stop the illegal practices alleged, (2)

prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred.

Civil consent decrees by the DOJ (but not FTC) must comply with the Antitrust Procedures and Penalties Act of 1974 (15 U.S.C. § 16), also known as the Tunney Act. The Tunney Act subjects the DOJ's consent judgments to public scrutiny and comment and requires the filing of a Competitive Impact Statement which sets forth the information necessary to enable the court and the public to evaluate the proposed judgment in light of the Government's case.

Third party complaints

Third parties (and injured parties who do not want to bring their own private litigation) can report violations to the FBI, the Antitrust Division, the FTC, or state attorneys general. All of these agencies welcome public complaints (although they are likely to be skeptical of claims that appear to be designed to hobble a competitor). The DOJ is most likely to be interested in a public complaint if the alleged harm is widespread. If the harm is focused on victims within a specific state, the DOJ may refer the matter to that state's attorney general. A complaining party should supply as much detail as possible about the alleged violation, the products, services, companies, individuals, organisations, and victims involved. Counsel who are familiar with cartel enforcement procedures and priorities can help package and present a complaint in a way that may increase the chances that the agencies will investigate.

Civil penalties and sanctions

The DOJ may seek equitable injunctive remedies for cartel activity via civil actions (15 U.S.C. §4), but has no power to seek civil fines. Such actions rarely proceed to trial and are commonly resolved by consent decrees typically requiring the defendant to cease the problematic conduct or imposing other internal changes in response to the government's concerns. The FTC is similarly limited to equitable remedies, including injunctive relief and disgorgement.

Right of appeal against liability and penalties

Criminal defendants have the right to appeal a guilty verdict following a trial. If a defendant is acquitted, the government's appeal rights are limited by the United States Constitution. The 5th Amendment's "double jeopardy" clause protects against multiple prosecutions for the same offence. Therefore, if the defendant is acquitted, the government cannot appeal. There are limited instances, however, when the government can appeal. The government may appeal court rulings which grant a defendant post-conviction relief (e.g., the reversal of a conviction). It may also appeal district court decisions on certain pre-trial motions (e.g., the suppression of evidence and sentencing issues). Criminal defendants who agree to plead guilty give up their right to appeal. In civil cases, both plaintiffs and defendants have the right to appeal adverse rulings. Convicted criminal defendants may also appeal their sentences.

Appeals from the trial decision are taken to the federal circuit Court of Appeals for the geographic region in which the trial court sits. Appellate courts generally defer to trial courts' findings of fact, overturning them only when they are clearly erroneous. Questions of law, by contrast, are reviewed *de novo*, in other words the appellate court considers the law as if for the first time. Notices of appeal must be filed within a relatively short window of time or the right to appeal is lost (much more time is allowed to file substantive appellate briefs

supporting the appeal). For civil litigants, the notice of appeal deadline is usually 30 days from entry of the judgment or order appealed from; for criminal defendants, the deadline is 14 days from the date of entry of judgment, or from the filing of the government's notice of appeal, whichever is later. From the circuit court, appeals are taken to the U.S. Supreme Court. However, review is discretionary and the Supreme Court only grants review for a tiny percentage of cases.

Criminal sanctions

The sanctions for cartel activity under the U.S. antitrust laws can be severe for both corporations and individual defendants, including high fines and, for individuals, prison time. Section 1 of the Sherman Act has always been both a criminal and civil statute, although when it was first passed in 1890, a violation was a misdemeanour with a maximum prison term of one year and a maximum fine of $5,000. The penalties have steadily increased since then. In 2004, the maximum criminal fine for corporations under the Sherman Act was increased to $100 million, where it sits today. But the Alternative Fines Act (18 U.S.C. § 3571) allows prosecutors to side-step such statutory limits and fine defendants up to "twice the gross gain or twice the gross loss" from the offence. This provision gives prosecutors powerful leverage, in certain cases involving large markets, to extract large fines in plea bargains. The DOJ has not been shy about exercising that leverage; it has collected cartel fines above the $100 million maximum many times.

To date, the largest fines levied against a corporate defendant for a Sherman Act violation are $500 million – the DOJ obtained this fine amount in two separate cases, one against F. Hoffman-La Roche, Ltd. and another against AU Optronics Corporation. With the exception of the fine against AU Optronics, the fines above the Sherman Act's $100 million maximum have always been in the plea bargain context based on an agreed upon set of facts. The AU Optronics fine followed a trial which required the DOJ to prove twice the loss to a jury "beyond a reasonable doubt".

In addition to significant fines, companies that engage in cartel activity face debarment and suspension from future government contracts. The Division is required to report individual defendants qualifying for debarment to the Defense Procurement Fraud Debarment Clearinghouse. The defendants are also listed in the debarment database known as the System for Award Management.

While the potential for prison terms has always been part of the Sherman Act, significant prison terms only started being imposed in the late 1980s. Violation of Section 1 became a felony in 1974, when the maximum prison term was increased to three years. In 2004, the maximum prison term was increased from three years to 10 years. In practice, prison sentences for individuals do not approach the statutory maximum of 10 years. They have averaged 22 months between 2010 and 2016.

The DOJ uses the Federal Sentencing Guidelines to recommend the penalties to impose on corporations and individuals convicted of or pleading guilty to a cartel violation. The Federal Sentencing Guidelines consider a variety of factors for the recommended penalties, including the volume of commerce affected, prior criminal history, role in the offence, cooperation with law enforcement, and compliance programme, among others. While federal courts are not required to impose sentences within the ranges provided in the Guidelines, *United States v. Booker*, 543 U.S. 220 (2005), they must still give "respectful consideration" to the Guidelines, *Pepper v. United States*, 562 U.S. 476, 501 (2011), in connection with a wider range of factors set forth in the federal sentencing statute (18 U.S.C. § 3553).

The DOJ's view is that maximum deterrence is achieved, in both international and domestic cases, by holding culpable individuals accountable, not just their corporate employers. The Division has followed through on this belief, charging several hundred individuals over the last decade. The Division has also insisted that individuals facing charges spend time in prison, and has continued to seek incarceration in most cases. The pressure on line prosecutors to look hard at charging individuals in each case increased with the issuance in September 2015 of a memorandum from Deputy Attorney General Sally Q. Yates laying out the DOJ's more aggressive policy on individual accountability for corporate wrongdoing.

In recommending the appropriate prison sentence for an individual defendant, the Guidelines assign a "base offense level" to a crime. For antitrust violations, the base offence level is 12, which results in a starting range of 10 to 16 months' imprisonment. The Guidelines further recommend increases to the base offence level when the specific antitrust offence is bid rigging, or when the affected volume of commerce exceeds certain thresholds starting at $1 million. The Guidelines then consider aggravating or mitigating factors in adjusting the time up or down, such as whether the individual abused a position of trust or participated in the obstruction of justice (Guidelines, §§3B1, 3C1). With respect to individual criminal fines, the Guidelines suggest beginning amounts corresponding to one to five per cent of the affected volume of commerce but no less than $20,000. The judge may then consider aggravating or mitigating factors in setting the fine, considering the extent of the defendant's participation in the cartel and the role he or she played, and whether and to what extent the defendant personally profited from the scheme, including through bonuses, promotions, or other career enhancements. Individuals who lack the ability to pay the fine are sentenced to community service, which the Guidelines recommend should be "equally as burdensome as a fine" (Guidelines, §2R1.1, application note 2).

For convicted corporations, the Guidelines recommend a "base fine" equal to 20 per cent of the affected volume of commerce. This base fine is then multiplied according to a "culpability score," which is calculated based on factors including the firm's previous criminal history, whether it has or will implement antitrust compliance programmes or policies, evidence of obstruction of justice, and self-reporting.

The Sentencing Guidelines also provide that courts can impose probation on corporations or require corporations to pay restitution under certain circumstances, and DOJ officials have increasingly considered, and in some cases requested and secured, court-supervised probation pursuant to the Guidelines as a means "to ensure an effective compliance program and to prevent recidivism".[10] The DOJ has echoed its commitment to corporate rehabilitation where "confidence is low that a defendant is committed to rehabilitating itself with appropriate compliance measures".[11]

Cross-border issues

Overseas reach of the Sherman Act

The statute that governs the overseas reach of the Sherman Act – the Foreign Trade Antitrust Improvements Act (FTAIA) (15 U.S.C. §6a) – is notoriously convoluted. The FTAIA generally removes foreign commerce from the reach of U.S. antitrust law, but then adds much of it back in through important exclusions and exceptions. The FTAIA allows the Sherman Act to apply with full force to "import commerce". In addition, the FTAIA allows the Sherman Act to apply to conduct involving foreign commerce if it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and that effect "gives rise to" the plaintiff's claims (the so-called "domestic effects" exception).

Courts are split on the degree of "directness" required to satisfy the domestic effects exception. The Ninth Circuit has held that an effect is "direct" only if it "follows as an immediate consequence of [defendants'] activity" (*U.S. v LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir 2004)). Thus "[a]n effect cannot be 'direct' where it depends… on uncertain intervening developments". *Id.* at 681. The Second and Seventh Circuits and DOJ have interpreted directness more broadly, applying a "proximate cause" standard. *See*: *Minn-Chem, Int v Agrium Inc*, 683 F.3d 845, 860 (7th Cir 2014) (*en banc*); *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816, 819, 824-825 (7th Cir 2015); and *Lotes Co v Hon Hai Precision Indus Co*, 753 F.3d 395, 410 (2d Cir 2014).

Courts have yet to define what counts as a "substantiality" effect. At least one court has remarked, however, that Congress intended to permit antitrust claims only where the alleged "anticompetitive conduct has… a quantifiable effect on the U.S. economy". *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). Finally, courts have held that plaintiffs must demonstrate that the requisite "direct effect" on U.S. commerce was "foreseeable" to an objectively reasonable person making practical reasonable judgments. *Animal Science Products, Inc v China Minmetals Corp*, 654 F.3d 462, 471 (3d Cir. 2011).

Red Notices and Extradition

When the DOJ applies the Sherman Act to overseas conduct it is bound to snare individuals residing abroad, some of whom will not voluntarily submit to U.S. jurisdiction. Where provided for by treaty, the DOJ may seek extradition of individuals from foreign jurisdictions. Most treaties contain a dual criminality requirement that permits extradition only for conduct that is criminalised in both countries. This has hampered U.S. authorities' efforts to extradite individuals for Section 1 violations because antitrust violations are not considered crimes in most of the rest of the world (although antitrust charges are often paired with fraud claims that are more likely to be criminal on both sides). The risk of extradition has increased as more jurisdictions around the world have criminalised cartel conduct. In 2014, the DOJ successfully extradited an Italian national from Germany on a charge of participating in a conspiracy to rig bids, fix prices, and allocate market shares for sales of marine hose sold in the U.S. and elsewhere.

The DOJ may place foreign individuals who have been indicted or are targets of a grand jury investigation on INTERPOL's red notice list. Once placed on the red notice list, the individual is at risk of being detained at the borders of the 190 participating countries. Obtaining a red notice requires the issuance of a valid national arrest warrant, but not proof that the individual is guilty of any crime. Red notice listings do not expire, so unless removed from the list an individual can be essentially indefinitely confined to their home countries. Some have criticised the use of red notices as a violation of civil and human rights because of the lack of due process protections.[12]

Charged individuals residing outside the U.S. are usually unable to get the charges dismissed *in absentia* due to something called the "fugitive disentitlement doctrine" which allows courts to deny rights to those who do not agree to appear and submit to the court's jurisdiction. That doctrine was applied in 2015 to a Swiss UBS trader charged in the LIBOR matter.

Developments in private enforcement of antitrust laws

The Illinois Brick Doctrine

For over 100 years the Clayton Act has authorised "any person" injured in his "business or

property" by a violation of the antitrust laws to sue for treble damages. Accordingly, the U.S. has the world's most established system of private antitrust enforcement. While the Clayton Act's private enforcement provision is expansive, the judicially created Illinois Brick doctrine significantly limits who is entitled to sue for damages. The doctrine generally holds that only direct purchasers from an antitrust defendant can proceed with a federal antitrust claim. In *Apple Inc. v. Pepper*, the Supreme Court will revisit the 40-year old Illinois Brick doctrine. While the case is a monopolisation case, a decision doing away with or altering the doctrine would significantly impact private cartel enforcement because the Illinois Brick doctrine plays a major role in many cartel matters.

The Illinois Brick doctrine is grounded, in part, on the desire to avoid conflicting and duplicative damages and on the judgment that attempting to allocate overcharges among purchasers along a distribution chain is complex and would substantially raise the costs of antitrust enforcement.

In *Apple Inc. v. Pepper* end-user iPhone owners allege that Apple monopolised the distribution market for iPhone applications. The issue is whether the iPhone owners have standing or whether such claims must be brought by the app developers who are the actual purchasers of app distribution services. Apple, and the amici that support it (including the United States), argue that a straightforward application of the Illinois Brick doctrine deprives the iPhone owners of standing. This is what the district court found when it dismissed the complaint (a decision that was later reversed by the Ninth Circuit). Plaintiffs, and the amici supporting them, argue that because they purchase apps from Apple they should be considered the direct purchasers and that the policy concerns underlying the Illinois Brick doctrine support their right to seek damages. The case was argued on November 26, 2018.

While the United States submitted an amicus brief in support of Apple, the current leadership of the Antitrust Division has indicated that it is contemplating a recommendation to the Court that it reverse its Illinois Brick decision.

Class Actions

Hundreds of private antitrust cases are filed each year. A large number of private civil cartel lawsuits are brought as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure. To qualify for class treatment under Rule 23, plaintiffs must plead and prove the following:

- that the class is so numerous that a joinder of every individual plaintiff is impracticable (numerosity);
- that there are questions of law or fact common to the class (commonality);
- that the claims or defences of the class representatives are typical of the class (typicality); and
- that the class representatives will adequately represent the interests of the class (adequacy of representation).

In addition, plaintiffs must prove that common questions of law and fact will predominate over any individual questions and that the class action device is a superior method for adjudicating the dispute.

Certain circuit courts of appeals have held that a class may not be certified unless the plaintiff also demonstrates that the class is ascertainable, *i.e.*, whether the class is defined such that one can objectively determine who is a member, and whether there is an administratively feasible method to make that determination and provide notice to the class members as required by the Due Process Clause of the U.S. Constitution. Other circuits have held that

this is not a relevant consideration at all at the class certification stage. Given the split in the circuits, it seems inevitable that the Supreme Court will eventually have to weigh in.

Opt-out litigation

Depending on the industry, purchasers of allegedly price-fixed products may be relatively large commercial enterprises. With increasing frequency, some of these purchasers have been electing to opt-out of the class procedure, retain their own separate counsel, and file individual lawsuits. As more jurisdictions around the world adopt private rights of action, procurement officials and in-house counsel at many companies are evaluating whether this strategy makes sense. Some of the benefits to filing a separate action include a potentially higher recovery, non-contingency attorney fee arrangements (and potentially lower fees), more control over the litigation, and more control over the settlement process, including the possibility for creative win-win business resolutions. Some of the drawbacks to filing separate individual opt-out actions include potential harm to supplier relationships, time and effort requirements to develop cases and damage models, increased discovery burdens, increased demands on in house legal departments and business people, and likely having to pay some attorneys' fees if the case is unsuccessful.

Reform proposals

In the spring of 2017, the Criminal Antitrust Anti-Retaliation Act was introduced in the Senate. The bill, if it becomes law, would give whistleblower protection for employees who provide information to the Department of Justice regarding conduct that violates the criminal antitrust laws by prohibiting employers from retaliating against such employees. In November of 2017 the bill passed the U.S. Senate. It is unclear whether the House of Representatives will take up the measure.

Some commentators have proposed a law that goes further than merely protecting whistleblowers from retaliation by their employers. Robert Connelly, former Chief of the Antitrust Division's Philadelphia field office and partner at GeyerGorey, has suggested providing whistleblowers with a financial reward for turning in a cartel. *See* "It's Time for an Antitrust Whistleblower Statute" in Connolly's blog *Cartel Capers*, http://cartelcapers.com/blog/time-antitrust-whistleblower-statute-part/. The financial reward would help the whistleblower defray the not insubstantial legal costs of securing immunity and cooperating with the government. The suggestion is provocative and controversial and there is no indication that legislators are considering it, but it is an idea that is now in the public sphere.

Endnotes

1. *Hawaii v Standard Oil Co.*, 405 U.S. 251, 262 (1972).
2. *See Brady v Maryland*, 373 U.S. 83 (1963); *Giglio v United States*, 405 U.S. 150 (1972).
3. Jencks Act, 18 U.S.C. §3500.
4. *Monsanto v Spray-Rite Service Corp.*, 465 U.S. 752 (1984).
5. *Standard Oil Co. of New Jersey v United States*, 221 U.S. 1 (1911).
6. The government's fiscal year ends on September 30.
7. Further details about DOJ's leniency programme may be found at www.justice.gov/atr/leniency-program.
8. https://www.justice.gov/atr/file/889021/download.
9. https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all.
10. "Prosecuting Antitrust Crimes," remarks of Assistant Attorney General Bill Baer at the Georgetown University Law Center Global Antitrust Enforcement Symposium, reprinted at https://www.justice.gov/atr/file/517741/download at 8.
11. "The Measure of Success: Criminal Antitrust Enforcement During the Obama Administration," remarks of Acting Assistant Attorney General Renata Hesse at the 26th Annual Golden State Antitrust, UCL and Privacy Law Institute, reprinted at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-remarks-26th.
12. *See* Nina Marino and Reed Grantham, "Wanted by Interpol," ABA Criminal Justice, vol. 30, No. 3, reprinted at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/2015_cjfall15_marino.authcheckdam.pdf.

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