Cartel Regulation 2021

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LEXOLOGY
Getting The Deal Through

Dechert LLP

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.

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United States

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The primary statutory basis for federal cartel enforcement in the US is section 1 of the Sherman Act (15 USC section 1), which prohibits 'every contract, combination . . . or conspiracy . . . in restraint of trade'. The Federal Trade Commission Act prohibits 'unfair methods of competition' and 'unfair or deceptive acts or practices'. The Federal Trade Commission (FTC) does not technically enforce the Sherman Act, it instead relies on the FTC Act to challenge conduct that would also violate the Sherman Act. Also, the FTC may bring cases under the FTC Act challenging coordinated conduct that is beyond the scope of the Sherman Act, such as invitations to collude. On the state level, state antitrust and unfair competition laws substantially prohibit the same conduct as their federal counterparts and, depending on the state, may provide for criminal and civil enforcement.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

There are three principal enforcers of the federal antitrust laws. The US Department of Justice (DOJ), Antitrust Division has the power to investigate and to civilly and criminally prosecute cartel activity in the federal courts. The FTC enforces the FTC Act but only has civil enforcement powers in FTC administrative proceedings or federal court. Private plaintiffs may also sue in a federal court for treble monetary damages and injunctive relief under the Sherman Act. State antitrust laws are enforced criminally and civilly by state attorneys general in state courts and civilly by private plaintiffs. State attorneys general may also enforce federal antitrust statutes.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Not applicable.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Federal court decisions provide the framework for analysing cartel activity under the Sherman Act. Hard-core agreements among competitors to fix prices (or any component of pricing), restrict output, rig bids or allocate customers or geographic territories are considered to be per se illegal (ie, the law provides for an irrebuttable presumption that such conduct had an anticompetitive effect on the market). Per se cartel offences may be prosecuted criminally.

There are four elements of a criminal cartel offence:

- an agreement;
- between two or more competitors;
- that restrains trade; and
- that affects either domestic (interstate) commerce or import commerce.

In the absence of an agreement, unilateral conduct does not violate section 1 of the Sherman Act (although it may violate section 2 and other laws).

An 'agreement' under the Sherman Act need not be a formal written document. Agreements may be formed informally, through emails, instant messages, orally or even with a 'telling nod or wink'. 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. The law, especially as it pertains to civil enforcement, is more lenient. To establish an agreement in civil cases where the evidence is circumstantial, the US 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' (*Monsanto v Spray-Rite Service Corp*, 465 US 752, 768 (1984)). Proof that defendants engaged in parallel conduct is insufficient, standing alone, to evince a 'conscious commitment' (*In re Chocolate Confectionary Antitrust Litigation*, 801 F3d 383, 397-98 (3d Cir 2015)). 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 (*In re Flat Glass Antitrust Litigation*, 385 F3d 350, 360 (3d Cir 2004)). There is no definitive set of plus factors, although some decisions do contain lists of such factors (ibid at 360). The most important plus factor is traditional, non-economic (non-expert) evidence of a conspiracy (ibid at 361).

Information exchanges among competitors are not prosecuted criminally but may be challenged in civil court if the anticompetitive effect of the exchange outweighs its procompetitive benefits. That said, evidence that competitors exchanged competitively sensitive information may constitute circumstantial evidence of an underlying cartel. For this reason, competitors should exercise caution during business discussions not to discuss competitively sensitive topics such as pricing, production levels, capacity, margins and the status and details of customer negotiations or bids. The scope of information that is competitively significant varies by industry and companies should seek legal guidance about the scope of information that could give rise to antitrust liability if shared with a competitor.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and other competitor collaborations may be subject to scrutiny under the antitrust laws just like any agreement among otherwise independent firms. To avoid per se treatment, courts have held that the economic resources of the parties must be integrated so that, effectively, the joint venture amounts to a single entity. It is not enough simply to characterise an agreement among competitors as a joint venture; courts have held joint venture agreements to be per se unlawful where the agreement was nothing more than a price-fixing device. By contrast, a joint venture agreement is not per se unlawful under section 1 if it 'holds the promise of increasing a firm's efficiency and enabling it to compete more effectively' (*CopperweldCorp v Independence Tube Corp*, 467 US 752, 768 (1984)). Importantly, not every joint venture agreement raises competitive issues (eg, if the participants are not competitors), and a legitimate collaboration can violate the antitrust laws.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

Both individuals and corporations (as well as partnerships and other business entities) are subject to the antitrust laws. Criminal enforcement actions may be brought against corporations and individuals. Civil enforcement actions (both government and private) typically are brought against corporations but may also be brought against individuals. Likewise, non-profit entities are subject to the antitrust laws.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The extraterritorial reach of the US antitrust laws is governed by the Foreign Trade Antitrust Improvements Act (FTAIA) (15 USC section 6a). The FTAIA establishes a two-prong test for determining whether a defendant's foreign conduct falls within the scope of US antitrust laws. First, the threshold inquiry is whether the defendant's foreign conduct involves US 'import trade or import commerce'. If so, the conduct falls within the scope of US antitrust laws. The courts have strictly interpreted import commerce to capture only 'transactions in which a good or service is being sent directly into the United States, with no intermediate stops' (*Minn-Chem, Inc v Agrium, Inc*, 683 F3d 845, 854 (7th Cir 2012)). The Ninth Circuit has likewise interpreted import commerce to capture only 'transactions that are directly between the plaintiff purchasers and the defendant cartel members' (*US v Hsiung*, 778 F3d 738, 755 (9th Cir 2015)).

Alternatively, if the conduct does not involve 'import trade or import commerce', the defendant's foreign conduct falls outside the scope of US antitrust law unless it satisfies both prongs of the FTAIA's 'domestic effects' exception (ie, the foreign conduct has a 'direct, substantial, and reasonably foreseeable effect' on US domestic or import commerce, or on the export commerce of a US-based exporter, and that effect 'gives rise to' the plaintiff's claims (*F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 162 (2004); 15 USC section 6(a)).

The courts are split on the degree of 'directness' required to satisfy the domestic effects test. The Ninth Circuit has held that an effect is 'direct' only if it 'follows as an immediate consequence of [defendants'] activity' (*US v LSL Biotechnologies*, 379 F3d 672, 680 (9th Cir 2004)). Thus '[a]n effect cannot be "direct" where it depends . . . on uncertain intervening developments' (ibid at 681). The Second and Seventh Circuits and the Department of Justice have interpreted directness more broadly, applying a 'proximate cause' standard. See *Minn-Chem, Int v Agrium Inc*, 683 F3d 845, 859-61 (7th Cir 2012) (en banc); *Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816, 817-20 (7th Cir 2015); and *Lotes Co v Hon Hai Precision Indus Co*, 753 F3d 395, 410 (2d Cir 2014). While these standards are different, these differences may be of little practical distinction in most cases.

The courts have yet to define standards that would satisfy the 'substantiality prong' of the FTAIA. 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 US economy' (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F Supp 2d 953, 964 (NDCA 2011)). Finally, courts have held that plaintiffs must demonstrate that the requisite 'direct effect' on US commerce was 'foreseeable' to an objectively reasonable person making practical reasonable judgments (*Animal Science Products, Inc v China Minmetals Corp*, 654 F3d 462, 471 (3d Cir 2011)).

Civil plaintiffs must further establish, as an additional element of their Sherman Act the claim, that this 'direct, substantial and reasonably foreseeable' effect on US domestic commerce 'gave rise to' their claims (*Motorola Mobility v AU Optronics Corp*, 775 F3d 816, 818 (7th Cir 2015)). Moreover, because each sale to the plaintiff represents a 'separate accrual' of a claim, the 'give rise to' prong of the FTAIA must be satisfied for each transaction for which plaintiffs seek damages. In assessing whether a claim regarding a particular transaction satisfies the 'give rise to' prong of the FTAIA, courts have generally used a proximate cause standard.

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Under its current interpretation, the FTAIA limits the scope of Sherman Act claims to anticompetitive conduct that affects either import commerce or has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. Export cartels are thus beyond the scope of the Sherman Act.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are numerous statutory and judicially created exemptions and immunities from the antitrust laws. Congress has, to varying degrees, expressly exempted certain industry practices and activities from antitrust liability, usually in heavily regulated sectors such as the transport, healthcare, telecommunications, energy, insurance and financial industries. The McCarran-Ferguson Act (15 USC section 1011 et seq) is one example of such legislation, exempting state law-regulated insurance business that does not involve any agreement to 'boycott, coerce, or intimidate'. The courts have also created various industry-specific exemptions, including the well-known 'baseball exemption'.

Other exemptions and immunities apply more broadly but generally share the characteristic that they seek to avoid disruption of an existing regulatory scheme. The 'filed-rate doctrine' or '*Keogh* doctrine', for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161-65 (1922)). Similarly, the 'political question doctrine' removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

A series of court decisions beginning with *Parker v Brown*, 317 US 341 (1943) have exempted state governments from antitrust liability for conduct that, if engaged in by a private actor, would certainly be considered anticompetitive. This 'state action doctrine', or '*Parker* doctrine', may also extend to private actors in certain limited circumstances, when their conduct is taken in furtherance of an express regulatory scheme under state policy and is subject to state supervision.

Other exemptions and immunities seek to avoid disruption of an existing regulatory scheme. The 'filed-rate doctrine' or '*Keogh* doctrine', for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161-65 (1922)). Similarly, the 'political question doctrine' removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Internationally, the 'foreign sovereign compulsion doctrine' may provide a defendant with antitrust immunity if it can establish that it was compelled to violate US antitrust law because it was impossible to comply with both US antitrust law and the law of a foreign jurisdiction simultaneously.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The existence of a cartel typically comes to light when a participant applies for leniency and provides evidence of criminal activity. Many leniency applications are now triggered as a result of corporate compliance programmes. Other common sources of information for the enforcement agencies include existing investigations or litigation in related industries, whistle-blowers, tips from customers or competitors, or even publicly available evidence of suspicious market behaviour. Evidence of cartel behaviour has also been uncovered during merger control investigations conducted under the Hart-Scott-Rodino Act.

In a criminal investigation, the Department of Justice (DOJ) presents evidence to a grand jury, whose purpose is to determine whether there exists sufficient evidence 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. The bar the grand jury must meet to return an indictment is low and defence counsel is excluded from the grand jury process. The DOJ, therefore, generally will obtain any indictment it seeks from a grand jury. Defendants facing criminal antitrust charges have the right to a trial by jury, where the DOJ must prove guilt beyond a reasonable doubt.

The grand jury has broad investigatory powers that are separate from those of the DOJ. A grand jury may subpoena the production of documents and the testimony of witnesses. Witnesses may be served with a grand jury subpoena anywhere in the US (Fed R Crim P 17(e)). While witnesses have the right under the Fifth Amendment to the US Constitution to refuse to testify if their testimony would potentially incriminate them, the DOJ may compel testimony by granting the witnesses immunity, thereby removing the risk of self-incrimination.

Before the indictment, the DOJ will identify certain targets of the investigation, including corporations and individuals whom it considers to be potential defendants based on the existence of substantial evidence linking the target to the crime. Individual targets typically obtain individual outside counsel once they become aware of their status. Targets have the right to meet 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, although in practice this is uncommon, given the exclusion of defence lawyers from the grand jury.

Civil investigations do not involve a grand jury. Instead of subpoenas, the federal or state enforcement agency will generally issue civil investigative demands (CIDs) 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 may form the basis of a civil lawsuit in federal court (by the DOJ or Federal Trade Commission (FTC)) or an FTC administrative proceeding before an administrative law judge.

Cartel investigations, either civil or criminal, follow no set timeline and may linger for several years before proceeding to any enforcement action or termination.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The antitrust enforcement agencies have far-reaching, although not unlimited, investigative powers. The DOJ has at its disposal the broad investigative powers of the grand jury. Through a grand jury subpoena, testimony and documents may be obtained from witnesses throughout the United States. Also, upon a finding of probable cause by a federal judge, the DOJ may obtain warrants permitting it, through the Federal Bureau of Investigation, to search for and seize physical evidence located on private premises, including documents and electronic devices, or to place wiretaps allowing it to audit and record private phone calls between suspected cartel participants. Because much of the necessary evidence is in the possession of the cartel participants, the DOJ often grants immunity to key individual witnesses in exchange for cooperation and testimony.

In the case of witnesses located outside the United States, the agency may initiate a border watch. If an individual on a border-watch list were to voluntarily enter the United States, immigration and border control authorities may detain the individual and will automatically notify the DOJ. 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 formally disclosed to defence counsel. If the individual enters the United States and is not detained, the DOJ's practise is to conduct a drop-in interview, whereby lawyers and agents may appear unannounced, often at the person's hotel or workplace, and request to speak with the individual. Although cooperation with the interviewers is voluntary, individuals are often unaware of their rights making resisting the pressure exerted by the authorities in these situations difficult. There also exists the risk that physical evidence, such as documents and electronic devices, may become vulnerable to search or seizure at the US border, where border control authorities enjoy extensive investigative powers. Foreign companies under investigation by the DOJ, therefore, should carefully consider the circumstances under which executives may travel to the United States.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

US antitrust agencies routinely cooperate with their counterparts in the European Commission and elsewhere around the world. In its most visible form, this cooperation includes the coordinated raids of global cartel participants, but cooperation behind the scenes is increasingly

common. For example, under bilateral mutual legal assistance treaties (MLATs), US agencies share information with foreign counterparts. The United States has MLATs with approximately 80 jurisdictions that create a channel for the taking of testimony, the provision of documents or other physical evidence, and executing searches and seizures. Under these MLATs, investigators may exchange evidence, where possible under law, and theories of the case.

In addition to MLATs, the United States has entered into bilateral antitrust cooperation agreements (ACAs) and memoranda of understanding (MOUs), which are less formal than MLATs and do not generally bind the agencies to provide information or evidence but facilitate cooperation between the agencies. The United States has entered into ACAs with, among others, Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The Department of Justice (DOJ) and the Federal Trade Commission have bilateral MOUs with corresponding agencies in China, India and Russia, which serve a similar function to the ACAs.

The United States and the individual agencies participate in several organisations or international cooperative efforts whose aim is to increase and facilitate cooperation among antitrust authorities and to promote greater procedural and substantive convergence among the global antitrust regimes, including the International Competition Network, the Competition Committee of the Organisation for Economic Cooperation and Development and the United Nations Conference on Trade and Development.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Because the DOJ's subpoena powers extend only as far as the US border, relationships with foreign enforcers are critical to its ability to collect evidence located overseas. Particularly in recent years, the DOJ has increased its scrutiny of foreign cartels, and frequently relies on information shared among international agencies in preparing to prosecute foreign defendants. This is particularly true for (but is not limited to) the jurisdictions with which the United States has entered into MLATS, ACAs or MOUs.

Where provided for by treaty, the DOJ may seek extradition of individuals from foreign jurisdictions. Extradition had been largely theoretical in antitrust cases because most treaties contain a dual criminality requirement, but the risk of extradition has increased over time 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 United States and elsewhere.

The DOJ may also place an individual target of a grand jury investigation on Interpol's red notice list. Where extradition is not possible, and those individuals decline to voluntarily surrender to US jurisdiction, listing on a red notice will expose the individual to detention and extradition 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. There is no time limit on a red notice, so, in effect, listing on a red notice may indefinitely confine individuals to their home countries. Some commentators have criticised the DOJ's use of red notices as a violation of due-process rights because it amounts to the imposition of a sanction without a trial.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by courts of law. Criminal cases that proceed to trial are heard in federal court, where the defendant may demand trial by jury. Civil cases may also be heard in federal court, or, where the Federal Trade Commission is the enforcing agency, in administrative proceedings before an administrative law judge. Cases brought by state regulators under both federal law and state law may be heard in federal court, but purely state prosecutions are heard in state courts alone.

In practice, the vast majority of cartel prosecutions are resolved before trial by way of a plea agreement. In the civil context, nearly all litigations are resolved by way of a dispositive motion or by way of settlement.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

Criminal violations of the US antitrust laws must be proven beyond a reasonable doubt. Civil liability is established using the lower standard of preponderance of the evidence. The initial burden to prove guilt or liability always rests with the government or the plaintiff. Defendants have the burden to prove any affirmative defences only after this initial burden is satisfied.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In the criminal context, the Department of Justice's practice is to establish the existence of an agreement through direct evidence. Federal law, however, does permit civil plaintiffs to use circumstantial evidence to establish the existence of an agreement.

Appeal process

18 | What is the appeal process?

Defendants have the right to appeal a guilty verdict in a criminal trial. Both plaintiffs and defendants have the right to appeal adverse rulings in civil cases. The government may not appeal an acquittal of a criminal defendant because of the constitutional prohibition of double jeopardy.

In the federal court system, a trial takes place at the district-court level. 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 give great deference to trial courts' findings of fact, overturning them only when they are erroneous. Questions of law, by contrast, are reviewed de novo, meaning the appellate court considers the law as if for the first time. The right to appeal is generally lost unless timely asserted, and the windows in which appeals must be noticed are extremely short. For civil litigants, the deadline to appeal 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 (Fed R App P 4(a)(1)(A), 4(b)(1)(A)). From the circuit court, appeals are taken to the US Supreme Court. Supreme Court review is discretionary, and only a very small proportion of cases seeking review every year are ultimately heard.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Both corporations and individual defendants face severe sanctions for cartel activity under the US antitrust laws, including high financial penalties and, for individuals, imprisonment. For corporations, the Sherman Act imposes a maximum fine of US$100 million per offence. For individuals, the maximum is US$1 million, plus up to 10 years imprisonment. There is no minimum fine for either corporations or individuals, nor is there a minimum prison term.

The US$100 million cap has been surpassed in practice, however. The Alternative Sentencing Act (18 USC section 3571) may permit penalties to exceed the statutory maximum. A defendant may be fined up to twice its gross pecuniary gain from the criminal conduct, or twice the victim's gross pecuniary loss. At least one federal district court has held that if a fine above the US$100 million cap is sought, the government must prove the pecuniary gain or loss beyond a reasonable doubt (*US v AU Optronics Corp*, No. C 09-00110 SI, 2011 WL 2837418, at *4 (NDCA 18 July 2011)). In that case, the judge imposed a fine of US$500 million. Total annual criminal penalties exceeded US$1 billion for four years in a row, from 2012 to 2015, and topped US$3.6 billion in 2015 alone. These levels then dropped sharply in 2016 to US$399 million, largely because of the conclusion of several major investigations during the prior year.

Prison sentences for individuals do not in practice approach the statutory maximum of 10 years. Few individuals take the risk of a criminal trial, preferring to accept a reduced sentence in exchange for a guilty plea and a cooperation commitment. Prison sentences averaged 22 months between 2010 and 2016.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Department of Justice (DOJ) may seek equitable injunctive remedies for cartel activity via civil actions (15 USC section 4) but has no power to seek civil fines. The DOJ may, however, seek civil damages in cases in which the US government is a victim of the conduct under section 4A of the Clayton Act. The DOJ's actions rarely proceed to trial and are commonly resolved by consent decrees usually requiring the defendant to cease the problematic conduct or impose other internal changes in response to the government's concerns. The Federal Trade Commission is similarly limited to equitable remedies, including injunctive relief and disgorgement.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Federal Sentencing Guidelines (the Guidelines) apply to both individual and corporate violators of the antitrust laws. The Guidelines are not binding on federal judges (*US v Booker*, 543 US 220, 226-27 (2005)), although 'respectful consideration' to the Guidelines must still be given (*Pepper v US*, 562 US 476, 490 (2011)). The full text of the Guidelines is available online from the US Sentencing Commission's website.

In recommending the appropriate prison sentence for an individual defendant, the Guidelines assign a 'base offence 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 US$1 million. The judge may 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, sections 3B1 and 3C1). Concerning individual criminal fines, the Guidelines suggest beginning amounts corresponding to 1 to 5 per cent of the affected volume of commerce but no less than US$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 cannot pay the fine are sentenced to community service, which the Guidelines recommend should be 'equally as burdensome as a fine' (Guidelines, section 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 the firm tolerated the activity, whether it has or will implement antitrust compliance programmes or policies, evidence of obstruction of justice, and self-reporting. The minimum multiplier is 0.75, but the final fine is usually the result of extensive negotiation as part of the plea-bargaining process.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

In July 2019, the DOJ updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations to credit companies with effective compliance programmes. Specifically, the DOJ states that having an effective compliance programme can result in the DOJ recommending a fine reduction to the sentencing judge. The recommended fine may be within the range provided by the Guidelines or may be a downward departure from the Guidelines. The DOJ does not have a formula for determining what reduction if any, it will recommend.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The US antitrust laws do not subject individuals charged with or convicted of antitrust violations to orders prohibiting them from serving as corporate directors or officers. The Securities and Exchange Commission's regulations, however, do provide for disqualification of, among others, corporate directors or officers upon conviction of any felony or misdemeanour in connection with the purchase or sale of any security, which may be read to include antitrust violations tied to the purchase or sale of securities (Rule 262(a)(1), Rule 503(a)(1) of Regulation CF and Rule 506(d)(1) (i)). Equally significantly, in selecting directors and senior-level officers, corporations generally look for candidates with a strength of character, inquiring minds and a reputation for good judgement and wisdom. It is difficult to conceive of how a corporation could continue to rely on a director or officer who is subject to an order in a cartel case – that is, someone who had participated in cartel activities and either been convicted or is a cooperating witness – without exposing the corporation to liability or increased criticism from activist investors or corporate gadflies.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment of federal contractors from government procurement procedures is available as a discretionary sanction in response to cartel infringements. The Federal Acquisition Regulation System governs the process through which government agencies procure goods and services. The agency head or his or her designee may determine whether to debar a contractor convicted of a violation of federal or state antitrust laws relating to the submission of offers (48 CFR section 9.406-1, -2). Contractors that have been found liable in a civil enforcement proceeding may also be debarred. Whether to impose the sanction and for how long requires the debarring official to consider both aggravating and mitigating factors, but the length of debarment usually should not exceed three years (ibid at section 9.406-4). Suspension from government contracts is also available as a sanction before conviction or civil judgment. A contractor may be suspended for the duration of an investigation and any associated legal proceedings on suspicion of or indictment for antitrust violations unless proceedings have not been initiated after 18 months (ibid).

Unless they have previously been convicted, contractors must receive notice and an opportunity to be heard before being debarred. Suspension requires notice but may be imposed before being heard (ibid at sections 9.406-3, 9.407-3). The debarring official may impute the conduct of the contractor's officers, directors, shareholders, partners, employees, other associated individuals or joint venture partners to the contractor, and its conduct may likewise be imputed to them (ibid at sections 9.406-5, 9.407-5).

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The DOJ does not pursue the same defendant for the same conduct in both criminal and civil proceedings. Proof of a criminal violation requires knowledge and intent. Where such evidence is weak, the DOJ may choose not to prosecute criminally. That decision can be made before or during an investigation. Likewise, where a case presents novel issues of law or fact, the DOJ may opt instead to pursue civil remedies (Antitrust Division Manual at III–12).

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Direct purchasers are preferred plaintiffs under the antitrust laws and federal precedent. The Supreme Court's holding in *Illinois Brick Co v Illinois*, 431 US 720 (1977) bars indirect purchasers from asserting federal antitrust claims based on claims that direct purchasers 'passed on' the overcharge. Many states, however, have enacted 'Illinois Brick repealer statutes', to provide standing for indirect purchasers to bring claims under state antitrust and unfair competition laws. The Supreme Court further limited the standing of indirect purchasers to assert antitrust claims in *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519 (1983) (*AGC*). In *AGC*, the court established a balancing test to determine the standing; namely:

- 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.

Purchasers that acquired the affected product from competitors of the cartel members who are not themselves members of the cartel do not have the standing to seek damages from cartel members on the theory that it was the cartel members conduct that allowed the non-cartel competitors to take advantage of the increased prices (an 'umbrella damages' theory).

As a practical matter, state-law claims brought as class actions will be consolidated into the federal multi-district litigation under the Class Action Fairness Act of 2005.

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, calculated based on the amount of overcharge the plaintiff paid as a result of the cartel activity, and also to compensate for their attorneys' fees and associated costs of litigation. 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. While damage claims and even awards against defendants may be enormous, particularly in the context of class actions, no individual plaintiff may recover more than its actual damages, trebled. Civil trials are rare and settlements are common because of the in terrorem effect that results from the prospect of treble damages and joint and several liability. Recent class-action settlements routinely exceed US$100 million. The largest antitrust settlement in history, in the *Visa-Mastercard* antitrust litigation, was US$27 billion.

The Clayton Act does not provide a remedy for successful defendants to recover their costs of litigation.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Most private civil antitrust lawsuits are brought as class actions under rule 23 of the Federal Rules of Civil Procedure. In a class action, a representative plaintiff or group of plaintiffs sues on behalf of all similarly situated plaintiffs. Classes and subclasses of plaintiffs may be defined based on geographic location, product purchased or characteristics of the plaintiffs themselves. The class format allows for enormous efficiencies for plaintiffs, enabling them to establish liability for the entire class at once, to avoid inconsistent findings of fact or adjudications of law, and to define a clear process for establishing damages for each plaintiff. Where individual damages are small and not worth the cost of litigation, the efficiencies of the class format allow victims of cartel behaviour the possibility of recovery when it would otherwise have been infeasible.

Rule 23 sets forth the standards for courts to assess whether a claim may be adjudicated on a class-wide basis. To qualify for class treatment, plaintiffs must plead and prove the following rule 23 factors:

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

- adequacy of representation (that the class representatives will adequately represent the interests of the class).

Also, 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. In many antitrust class actions, the key issue for class certification is demonstrating whether plaintiffs can establish injury and damages on a class-wide basis. The class certification phase is a significant bar for plaintiffs to clear, requiring the court to rigorously assess expert opinions and factual evidence gleaned from discovery, often resulting in multi-day evidentiary hearings. See *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3d Cir 2008).

Participation in the class is not compulsory. Certain putative class members may elect to opt-out and pursue their own claims parallel to the class, usually cooperating with class counsel on certain discovery or drafting efforts that jointly benefit them, but with the power to diverge from the class in issues of strategy, discovery, other litigation processes and settlement. Such opt-out plaintiffs are usually corporations or individuals with large damages, who do not wish to defer to or be bound by decisions or settlements made by class counsel on behalf of the rest of the class.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Individuals and corporations may apply for leniency through the Department of Justice's (DOJ) leniency programme. If the application is granted, the applicant receives full immunity from criminal prosecution. Applicants that satisfy the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub L No. 108-237, 118 Stat. 661 (22 June 2004), may also become eligible for benefits in private civil cases, including a reduction from treble to single damages, and the elimination of joint and several liability. The requirements under ACPERA include cooperation with plaintiffs in civil actions. In October 2020, ACPERA's sunset provision was repealed and the act was reauthorised and signed into law.

To obtain leniency, an applicant must ordinarily be the first to report illegal activity to the government, before the commencement of an investigation (Type A leniency). This 'first in' requirement is true for both individuals and corporations. The applicant must not have been the ringleader of the cartel, must have promptly and effectively terminated its participation in the cartel, must fully disclose all relevant facts regarding the illegal activity and fully cooperate with the government investigation, and must make restitution to victims. Further, the DOJ must determine that granting leniency would not be unfair to others. Even if an investigation has already begun, obtaining leniency may still be possible for a first-in applicant as long as all other requirements are met and the DOJ does not already have evidence that warrants a conviction (Type B leniency).

For individual applicants who do not meet all the requirements, leniency may still be possible at the discretion of the DOJ, but it is usually more limited.

Further details about the DOJ's leniency programme may be found on the DOJ's website.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Formal leniency is available only to the first-in applicant, and no formal leniency programme exists for cooperating parties who are not the leniency applicant. Under Federal Sentencing Guidelines (the Guidelines), however, cooperation is a mitigating factor that judges may consider in sentencing. Similarly, the DOJ has the discretion to treat cooperating parties with greater leniency during an investigation or the plea-bargaining process.

The DOJ also has the discretion to enter into non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). In practice, NPAs and DPAs are rarely used in the cartel context because of the existence of the DOJ's leniency programme. In rare instances, however, applicants who were not 'first in' for leniency have received DPAs as a reward for their efforts in cooperating with the DOJ's investigation. NPAs remain a disfavoured approach for all but the 'first in' applicant; however, the DOJ recently updated their policies to allow prosecutors to grant DPAs (although not NPAs) to cooperating companies with effective compliance programmes (consistent with the DOJ's guidance on compliance programmes) in place. A compliance programme in and of itself does not guarantee a DPA, but an effective compliance programme will be taken into account when choosing whether to grant a DPA. NPAs and DPAs are more commonly granted to individuals who cooperate with the government's investigation, rather than corporations.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

To receive amnesty under the DOJ's leniency programme, the applicant must be the first to file. There is no formal leniency available for subsequent cooperating parties.

There is no significance to being 'second in', although, generally, the earlier a company begins cooperating with the government the greater the potential it has to receive a downward departure from the fine recommended under the Guidelines.

The DOJ's 'amnesty plus' programme is designed to create an incentive for later-cooperating parties to confess wrongful conduct outside the scope of the existing investigation. Under amnesty plus, if a later-cooperating party applies for leniency for one or more other cartels, that party, in addition to receiving full leniency for those separate cartel violations, would receive a considerable discount on any criminal fine assessed concerning the initial cartel violation. This contrasts with the DOJ's 'penalty plus' policy, under which the government will seek fines and prison sentences at the upper end of the range recommended by the Guidelines if a company was aware of additional antitrust violations but chose not to report them.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

To preserve its position as the first filer, a company that finds evidence of criminal cartel behaviour should contact the DOJ as quickly as possible to obtain a marker. The marker is then valid for a certain time (often 30 days, although this may be extended or shortened on a

case-by-case basis) to allow the company to perfect its application. This process usually involves a rapid and comprehensive internal investigation, involving document collection and review and witness interviews.

The decision of whether to seek amnesty is highly fact- and company-specific. If the evidence of criminal activity is unambiguous and the company is prepared to devote the considerable human and financial resources demanded of an amnesty applicant as part of its obligation to cooperate fully, seeking amnesty quickly may be advisable. If the evidence is ambiguous or weak, or the company judges that the risks and burdens of cooperation outweigh the potential benefits, amnesty may not be the company's strongest option. Given the government's high burden to prove criminal liability beyond a reasonable doubt, if strong defences (eg, jurisdictional or statute of limitations defences) exist, the better option may be to put the government to its proof.

If amnesty is unavailable, the company may face the decision whether to plead guilty or to take its risks at trial. As with the decision whether to seek amnesty, the decision whether to plead is highly defendant- and situation-specific, requiring consideration of the strength of the evidence, the strength of any available defences, and the risks associated with accepting a plea, which could expose the defendant to liability in follow-on civil cases.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Leniency recipients must cooperate fully and transparently with the DOJ's investigation in exchange for complete immunity. Also, if a leniency recipient satisfies the ACPERA requirements (including cooperation with the civil plaintiffs), it may be eligible for reduced civil damages (single, rather than treble), and may avoid joint and several liability.

There are no formal requirements defining the level of cooperation expected of subsequent cooperating parties. Ordinarily, the DOJ will request desired documents or access to witnesses, and then the party's response will be the product of negotiation. If a party pleads guilty in exchange for a reduced sentence, cooperation requirements are usually outlined in the plea agreement.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The DOJ must keep confidential the identity of the applicant, the fact it has been granted amnesty, and the substance of any negotiations with the applicant or subsequent cooperating parties. Depending on the nature of the cartel and the parties involved, however, the identity of the leniency applicant often does not remain a secret, at least among the other defendants. Plea agreements, by contrast, and the cooperation provisions contained within them, are made public.

In the related civil litigation, both the fact of amnesty and the ordinary-course materials produced by the recipient may become discoverable. Parties usually negotiate strict protective orders limiting the use of such materials to the litigation and designate documents with varying levels of confidentiality restrictions during discovery. If the case goes to trial, the confidentiality of these materials will be determined on a document-by-document basis, although given the public interest in the adjudicative process, it is often impossible to prevent disclosure of all documents. Trials are typically open to the public.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Most criminal cartel prosecutions are resolved via plea agreement rather than at trial. The parties typically negotiate the scope of the defendant's agreement, often using the Guidelines as a starting point for negotiations. The negotiated agreement must be presented to the court for approval. Judges have the discretion to approve or modify such proposed agreements but usually defer to the DOJ's recommendation.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a corporate defendant receives immunity under the DOJ's leniency programme, current employees, officers and directors will also receive immunity if they admit any wrongdoing and continue to assist the government's investigation. The DOJ also has the discretion to include specifically named former employees, officers and directors in the grant of immunity.

Where a company agrees to a plea bargain, its directors, officers and employees will similarly receive immunity from future prosecution, save for those who have been carved out of the plea. The DOJ's practice is to carve out several targets of the investigation who may be indicted for wrongful conduct associated with the violations outlined in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, although not always, higher-ranking executives who held pricing authority and actively promoted the cartel activity, whose prosecutions may serve as a warning to others. 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. The DOJ generally seeks to prosecute individuals who were in a position to stop the illegal conduct, both because of their knowledge of the cartel and their position of authority. In the past year, the DOJ has indicted two CEOs in connection with its cartel enforcement activities.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The process of applying for leniency, once the decision is made to do so, moves extremely quickly. Typically, the application begins with a phone call by counsel to the DOJ, to establish the applicant's marker as the first to file. Usually, some information regarding the nature of the illegal conduct and the evidence supporting it must be shared at this time, but merely putting in the marker does not require disclosure of full details of the scope of the cartel and the applicant's involvement. If the agency accepts the marker, the applicant must move rapidly through an internal investigation, including collection and review of documents and witness interviews, to prepare a formal proffer of evidence to the DOJ establishing that the company satisfies the requirements to obtain leniency. Successful applicants will receive a conditional letter of amnesty, setting forth the requirements of cooperation by which the company must abide to maintain its immunity. Compliance with these requirements is strict

and inflexible, necessitating complete transparency with the agency and the immediate and full disclosure of all evidence of illegal cartel activity. Failure to comply may result in the loss of immunity.

In all dealings with the enforcement agencies, complete candour and truthfulness are essential. Immunity will not be granted for illegal activity that is not disclosed. Equally important is to prevent obstruction of justice in the form of intentional or even careless destruction of documents or other evidence. Penalties for obstruction of justice are severe, sometimes exceeding those of the underlying crime itself, and may be pursued independent of or parallel to penalties for the initial antitrust violation.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The enforcement authority is required to disclose evidence or information favourable to a criminal defendant, including evidence that would tend to prove innocence, permit impeachment of government witnesses, or mitigating evidence that would tend to reduce a criminal sentence (*Brady v Maryland*, 373 US 83, 87-88 (1963)). Generally, the Department of Justice (DOJ) provides defendants with the majority of its investigative materials anyway. Under certain circumstances, the government must also disclose any statements of its witnesses that relate to the subject matter on which the witness testified (Jencks Act, 18 USC section 3500).

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

If there is no conflict or potential conflict of interest, counsel may simultaneously represent both a corporation and its employees that are under investigation. During a government investigation, however, conflicts may arise that necessitate obtaining separate counsel for the individuals. This can occur when the DOJ identifies an individual as a target of the investigation, and the individual's interests and the company's interests diverge, each potentially having an incentive to place responsibility for the illegal activity on the other. It may also occur during the company's internal investigation or preparations for litigation when previously unknown evidence of the individual's illegal activity emerges. The existence of conflicts is not unusual, and must continually be assessed on a case-by-case basis throughout the investigation. Occasionally, the DOJ will demand that an individual be provided separate counsel, either because a genuine conflict exists or as a strategic move to try to obtain greater cooperation from the individual. There may also be reasons apart from conflicts of interest in which it may be advisable to obtain separate counsel for an individual, especially if that person expresses that this is his or her desire. Ultimately, the decision whether separate counsel is necessary belongs to the lawyer and the clients, not the DOJ.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is generally inadvisable for the same counsel to represent multiple corporate defendants in a single civil case when those defendants are not part of a single corporate family. While it is common for counsel to represent both a parent and subsidiary company in single litigation, because generally, these entities share a unity of interest, such unity is far murkier or non-existent in the case of unaffiliated cartel participants. In practice, these joint representations rarely occur. In the criminal context, joint representations may not satisfy the defendant's Sixth Amendment right to effective assistance of counsel. Different lawyers or teams of lawyers within a firm may sometimes represent different defendants in the same matter with appropriate disclosure and waivers.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

Legal penalties and legal costs are treated differently for indemnification purposes. It is not permissible for a corporation prospectively to agree to indemnify an employee for future illegal activity. In some cases, however, indemnification for past criminal activity has been allowed. It is permissible for a company prospectively to agree to indemnify an employee for legal defence costs. Most company by-laws permit such indemnification.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Punitive payments to governments or their agencies or instrumentalities for violations of law, including fines and penalties, are generally not tax-deductible. These include payments settling potential liability for fines or penalties, or amounts forfeited as collateral posted in connection with proceedings where fines or penalties are possible. Compensatory damages paid to a government or government agency or instrumentality are usually not considered to be a fine or penalty.

Private damages awards or settlements may be considered business expenses under the tax laws – and therefore may be deductible, to an extent. It may also be possible to structure settlements in ways that maximise the ability of the payer to deduct or minimise the tax obligation incurred by the recipient. Understanding the tax implications of any penalty, settlement, compensatory damages award or other such payment will require the advice of a tax specialist.

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The DOJ does not recognise a principle of international double jeopardy, meaning that it does not consider the fact that another jurisdiction may have prosecuted a defendant for a crime as a bar to US enforcement. Generally speaking, however, the DOJ does in certain circumstances consider the enforcement actions taken by other jurisdictions in recommending fines or other sanctions. For example, the DOJ has recommended in some plea agreements that time served in the foreign jurisdiction be counted as time served toward a defendant's US sentence.

In civil cases, double recovery by a plaintiff is generally not permitted, and private damage awards will be reduced by amounts a plaintiff receives from other parties, including amounts paid in settlements. The principle of collateral estoppel may also bar a plaintiff from maintaining a claim in the United States against a defendant against whom it obtained a judgment on the same facts in a foreign jurisdiction.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Approaches for reducing fines vary from case to case and party to party. Until recently, the DOJ did not typically consider the presence of a pre-existing compliance programme to be a strong mitigating factor that would merit a significantly reduced fine. However, in July of 2019, the DOJ updated their 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations' to credit companies with effective compliance programmes. In addition to allowing for reduced sentencing, an effective compliance programme can lead to a significantly reduced fine. Compliance initiatives that a company takes after an investigation commences may contribute to lowered fines, but this is one factor among many, several of which are beyond the control of the defendant once the investigation has begun, such as the nature of the past criminal conduct itself or the volume of commerce affected. One of the meaningful ways a defendant may be able to reduce the fine is through early cooperation, although that decision may not always be advisable for all defendants. Adopting an effective compliance programme is the surest method to uncovering cartel activity in real-time, which can put the company in a position to apply first for leniency.

Generally, however, because fines are set through settlement negotiations, the best way to secure a lower fine is to negotiate from a position of strength. This requires the development of a robust defence from the outset, preserving the company's right to contest the government's case at trial, while at the same time looking for opportunities to cooperate proactively with the government in exchange for a reduced fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In *Federal Trade Commission v Abbvie* (3d Cir. 2020), the Third Circuit Court of Appeals held that the Federal Trade Commission (FTC) lacked the authority to secure disgorgement of profits as a remedy in antitrust cases. Specifically, the Court found that section 13(d) of the Federal Trade Commission Act, which allows courts to 'enjoin' antitrust violations, does not create the authority to secure disgorgement.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Not applicable.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

Efforts to respond to supply shocks or other consequences stemming from the covid-19 pandemic may give companies reason to collaborate with competitors in a way that benefits the public, but that simultaneously involves antitrust risk. To facilitate procompetitive collaborations that may be helpful to expand capacity, develop new products, or bring goods and services to individuals and communities, the Antitrust Division of the Department of Justice (DOJ) and the FTC jointly announced an expedited review process for proposed competitor collaborations related to covid-19. Examples of collaborative efforts that may not violate the antitrust laws, depending on the details of the proposal, include temporary combined production and distribution, shared equipment, medical supplies, raw materials, collaborative research and development and participation in joint purchasing arrangements. In their joint statement, the FTC and DOJ announced a new voluntary guidance review process for proposed collaborative efforts, and committed to respond within seven calendar days after receiving all necessary information for collaborations related to 'public health and safety'. Both the FTC and DOJ also committed to responding 'expeditiously' to all other covid-19 requests. Interested parties are required to explain how the collaboration is related to covid-19 and provide a detailed written proposal, which can be drafted with the assistance of antitrust counsel.

Despite this expedited review process, both the DOJ and FTC noted in their statement that they will pursue civil and criminal violations of the antitrust laws against individuals and businesses that are using the covid-19 pandemic as an opportunity to harm competition. For this reason, it is critical to obtain antitrust advice before attempting to collaborate with competitors.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

United States	
Is the regime criminal, civil or administrative?	The US regime has criminal, civil and administrative elements. Criminal actions are, by Department of Justice (DOJ) policy, reserved for per se violations of the antitrust laws, which generally include price-fixing agreements, bid rigging, and market allocation agreements.
What is the maximum sanction?	For corporations, the maximum criminal fine is the greater of US$100 million, twice the gross gain from the offence, or twice the gross loss to victims of the offence. For individuals, the maximum criminal fine is US$1 million and up to 10 years' imprisonment. In civil litigation, there are no maximum damage awards, and private parties are entitled to recover treble their actual damages plus attorneys' fees.
Are there immunity or leniency programmes?	The DOJ's formal leniency programme provides full immunity for criminal antitrust violations for the first to file, pending satisfaction of the programme criteria. Under the Antitrust Criminal Penalties Enhancement Reform Act of 2004, the leniency recipient may be eligible for reduced civil damages (single, not treble) and avoid joint and several liability in civil litigation.
Does the regime extend to conduct outside the jurisdiction?	The Sherman Act applies to extraterritorial conduct to the extent it involves either import commerce or foreign commerce that has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. In civil actions, the plaintiff bears the additional burden of establishing that their claim arose from that direct, substantial and reasonably foreseeable effect.

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