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Practical cross-border insights into cartels & leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Corporations and individuals may face both civil and criminal penalties under U.S. federal antitrust laws, which prohibit economic agreements that unreasonably restrain free trade. Section 1 of the Sherman Act prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". Section 4 of the Clayton Act enables private parties (including state and local governments) to bring civil actions for damages because of Sherman Act violations.

1.2 What are the specific substantive provisions for the cartel prohibition?

To convict a defendant for a criminal violation under Section 1 of the Sherman Act, the government must prove four elements beyond a reasonable doubt: (1) an agreement or concerted action; (2) between two or more potential competitors; (3) in an unreasonable restraint of trade; and (4) in or affecting interstate commerce or commerce with foreign nations.

Agreement or Concerted Action. An agreement, defined as an understanding or meeting of the minds between competitors, is the "essence" of a Sherman Act violation. The agreement does not need to be express or involve overt actions; tacit understandings are sufficient (although still subject to the reasonable doubt standard identified above). Evidence used to prove this element of the offence may include direct evidence, such as testimony from participants or other witnesses and communications with competitors, or circumstantial evidence, such as identical bidding behaviour.

Between Competitors. The parties must carry out business in the same product and geographic market to qualify as competitors. Products do not have to be identical to be considered part of the same market; a product market consists of all goods or services that buyers view as close substitutes. To qualify as a competitor, companies do not have to actively participate in the market, but they must be capable of participating.

Unreasonable Restraint of Trade. Under the rule of reason, which is the default doctrine for determining if a restraint is "unreasonable", conduct is unreasonable when its restraint on trade is greater than its procompetitive effects. Courts have found certain types of agreements to be illegal *per se* because of the harmful effect these arrangements have on competition. These agreements include, but are not limited to, price fixing, bid rigging and market division. In recent years, the government has shown a willingness to criminalise conduct that was previously pursued civilly. For example, the government has stated that it intends to pursue "no-poach" agreements criminally, although it is unclear if the government's public statements adequately put companies and their employees on notice of the change. If an agreement is *per se* illegal, the defendant is foreclosed from arguing either against the agreement's alleged adverse effects on competition or for the agreement's procompetitive justifications. With very few exceptions, *per se* violations are the subject of criminal investigations and prosecutions. Other agreements, such as joint ventures or participation in standard-setting organisations, that are not *per se* illegal, are subject to the rule of reason. Because of difficulty in proving beyond a reasonable doubt that conduct is unreasonable compared to its procompetitive effects, the Department of Justice ("DOJ") typically only prosecutes *per se* violations criminally.

Effect on Interstate and/or Foreign Commerce. Only agreements that take place in or affect interstate or foreign commerce are subject to federal antitrust laws. The interstate commerce test is met if products or services related to the agreement move across the borders of any state within the United States. The foreign commerce requirement is described in question 1.6.

As stated, the government must prove all four of the above elements in a criminal prosecution beyond a reasonable doubt. The government also must prove that either the agreement itself or an act in furtherance of the agreement occurred within the federal district where the criminal indictment is returned for trial. In a civil case, each element must be proven by a preponderance of the evidence.

1.3 Who enforces the cartel prohibition?

The Antitrust Division of the DOJ ("Division") is the sole enforcer of the antitrust laws with respect to criminal violations of the cartel prohibition. The Federal Trade Commission ("FTC") can challenge certain coordinating conduct pursuant to Section 1, but if it uncovers evidence of a criminal cartel violation in its investigations, it ordinarily will refer the matter to the Division. In addition, state attorneys general and private plaintiffs (as well as the Division) can bring a civil action for injuries resulting from a cartel violation. These other parties (including the FTC) can seek treble damages for injuries suffered, but only the Division can seek criminal fines for the cartel violation under federal antitrust laws. In addition to federal antitrust laws, some state antitrust laws give state attorneys general the ability to prosecute antitrust violations criminally as well.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

When the Division learns of a potential antitrust violation, its first step is usually to convene a grand jury, an independent investigatory body described in question 2.2. The Division can use the grand jury to gather relevant documentary and testimonial evidence. Throughout the investigative process, the Division may also rely on the Federal Bureau of Investigation ("FBI") to execute search warrants, conduct surveillance and interview witnesses.

Once the Division has gathered sufficient evidence of the potential antitrust violation, it may present this evidence to the grand jury. If the grand jury determines that a probable cause exists to support criminal charges, they will issue an indictment charging the defendant and initiating formal criminal proceedings. Following the indictment, and assuming jurisdiction, the defendant must appear before a federal court to enter a plea of guilty or not guilty on the charges. If the defendant decides to plead not guilty, the case will proceed to trial where the defendant has the right to be tried by a jury. If, after trial, the defendant is found guilty, the judge will issue a sentence according to the United States Federal Sentencing Guidelines ("Guidelines").

In many cases, defendants enter into negotiated pleas with the Division that waive their right to the grand jury. In those cases, the Division does not have to seek an indictment from the grand jury and instead files an information charging the defendant. Plea bargaining is explained in question 6.1.

1.5 Are there any sector-specific offences or exemptions?

Federal antitrust laws do not identify sector-specific offences, although exemptions do apply to certain types of activities. Most of the exemptions are created by statutes. For example, the Merchant Marine Act exempts ocean shipping carrier companies from antitrust prosecution, while the McCarran-Ferguson Act largely exempts insurance companies. In addition to the statutory exemptions, court-created doctrines may protect specific entities and activities. For example, states and certain state-supervised entities are exempt under the Parker Immunity doctrine, while joint lobbying or litigation efforts between competitors are protected under the Noerr-Pennington doctrine. Major League Baseball was granted an exemption to antitrust laws in a 1922 Supreme Court case. Congress limited the exemption slightly in 1998 with the Curt Flood Act, which repealed the exemption with respect to labour issues.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Foreign Trade Antitrust Improvements Act ("FTAIA") limits the reach of antitrust laws with regard to foreign commerce. Under the FTAIA, only foreign conduct that has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce with foreign nations may be prosecuted. However, U.S. courts have not settled the meaning of "direct, substantial, and reasonably foreseeable". Some courts require the domestic effects to be an immediate consequence of the defendant's activity, while others only require a reasonably proximate causal nexus between the alleged conduct and the domestic effects. There also remains some question as to whether the FTAIA applies with the same force to civil actions as to criminal actions.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

When investigating a cartel allegation criminally, the DOJ (through the grand jury's subpoena power, discussed further in question 2.2) can order the production of specific documents or information as well as carry out compulsory interviews with individuals. Additionally, the DOJ can carry out unannounced searches of business and residential premises during which time they can seize information and documents (retaining and/or copying the same) as well as secure and seal off the premises for the duration of their search.

When investigating a cartel allegation civilly, the DOJ or FTC can issue a civil investigative demand ("CID"), a statutorily authorised device that allows the agencies to compel the production of information and documents. The agencies can serve a CID on any natural or juridical person whom the agencies have "reason to believe" might have material or information "relevant to a civil antitrust investigation". Using a CID, the agencies can compel the production of specific documents or information as well as demand written or oral testimony (in the form of interrogatories or depositions). However, CIDs cannot be used to authorise searches of business or residential premises and the accompanying seizure, securing, and/or copying of materials on those premises.

As noted above, a number of entities aside from the DOJ and FTC can pursue civil actions for injuries resulting from cartel conduct. While these actions are not in themselves "investigations", the civil process allows for extensive discovery that includes, among other things, requesting that an opposing party produce documents, answer interrogatories and make witnesses available for deposition, essentially allowing these other entities similar access to the information which the DOJ or FTC would receive through a CID.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In a criminal investigation, the Division must convene a grand jury, an independent body vested with the power to issue subpoenas. Through this subpoena power, the Division has broad ability to investigate alleged conduct. The DOJ has significant discretion which it can (and routinely does) implement in carrying out an investigation. As a result, individuals (even those on the fringe of an investigation) may face substantial burdens in connection with sitting before a grand jury.

Documentary Evidence and Compulsory Interviews. Grand juries can issue subpoenas to compel the production of documentary (*subpoena duces tecum*) or testimonial (*subpoena ad testificandum*) evidence. If a witness refuses to cooperate with or testify before the grand jury, he or she can be held in contempt and subjected to fines or imprisonment.

Searches of Premises. The Division must obtain a search warrant from a judge before conducting a search of company or residential premises or seizing documentary evidence. To obtain a search warrant, the Division must submit an affidavit stating facts that show probable cause that a crime has been committed, that evidence of the crime exists, and that the relevant evidence is on the premises to be searched. However, the government may take possession of documentary evidence even without a search warrant if the party being searched voluntarily hands over the evidence. The Division can also conduct, without a

search warrant, surprise visits to individuals that are not represented by counsel. These individuals are not required to cooperate with the Division and do not have to permit the Division to search their property.

Informal Witness Interviews. The Division can interview an individual informally at any time if the individual is not represented by counsel. If the individual is represented by counsel, the Division must coordinate with counsel before conducting an interview. Usually, these interviews will occur either at the company's premises (such as in the course of executing a search warrant) or at the employee's home. The locus of the interview could impact who questions the witness. While both Division attorneys and agents from the FBI may conduct an interview at an employee's home, it is Division policy that attorneys may not be present on company premises while agents execute a search warrant.

Companies might consider developing procedures to protect employees from negative consequences of a government search. In a search and seizure, the company may want to contact legal counsel immediately. It is helpful for employees to remain calm and vigilant, taking note of any items collected during the search. Additionally, individuals have the right to remain silent during informal interviews and may refuse to answer any questions without an attorney present. These conversations have as much weight as formal interviews and any false statement made during an informal interview is subject to prosecution.

2.3 Are there general surveillance powers (e.g. bugging)?

While the Division mainly relies on the grand jury process to collect evidence, it can work in conjunction with the FBI to utilise electronic surveillance, such as wiretaps, if it receives court authorisation. The Division's electronic surveillance can include monitoring and/or accessing electronic data, including text messages, instant message communications and social media accounts. Companies should be cognisant of the content of these communications, as the Division may use them as evidence in antitrust investigations. Given the increasing prevalence of messaging platforms – as well as the occasionally blurred line between personal and professional accounts – companies should consider implementing policies governing employee use of electronic communications, especially regarding interactions with competitors.

2.4 Are there any other significant powers of investigation?

Cooperating parties seeking plea agreements or immunity not only provide documents and testimony in excess of what the Division can obtain through the grand jury, but also may consent to wiretaps and other electronic surveillance that may be used to incriminate co-conspirators. Cooperating parties can be particularly devastating tools for building an antitrust case against an alleged violator because they often obtain persuasive evidence of criminal conduct. However, a defendant can refute this evidence. For example, a defendant can impeach a government's witness if the witness's testimony does not comport with other evidence in the case, including the witness's own prior statements.

Given that the Division places an emphasis on obtaining cooperation from companies accused of criminal violations, it is possible that the prevalence of cooperating witnesses seeking to gather evidence that implicates fellow conspirators will increase. However, the parallel focus on prosecuting individuals stemming from the Yates Memo (which is discussed further in question 6.1) could chill cooperation as well, resulting in fewer cooperating witnesses overall.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

When the Division obtains a search warrant, FBI agents will execute searches of residential and company property, usually at the same time as or just prior to service of a grand jury subpoena. This timing minimises the opportunity for the defendant to destroy evidence while also incentivising targeted companies to seek leniency. The agents do not have to wait for counsel to arrive, but may wait if specifically requested. Also, the agents are limited in their search by the warrant itself, which must describe the exact location to be searched as well as identify with particularity the evidence to be seized.

2.6 Is in-house legal advice protected by the rules of privilege?

The attorney-client privilege protects communications between in-house counsel and company employees made for the purpose of seeking or providing legal advice. Companies should be aware that not all communications involving in-house legal counsel are privileged – only those with the purpose of seeking legal advice are covered. Communications strictly about business are not protected. Therefore, an email is not considered privileged simply because an attorney is copied; the communication must contain or seek legal advice. Companies should also be aware that an attorney's business advice ordinarily is not protected. For example, an employee requesting a lawyer's opinion about the legal issues posed by a merger likely would be covered by attorney-client privilege, while a conversation about the financial soundness of the merger would likely be considered unprotected business advice. Because of this, it may be helpful to keep discussions that seek legal advice separate from business discussions to strengthen any claim of privilege made during an investigation. Notwithstanding the foregoing, privilege rules in foreign jurisdictions can impact privilege claims in the United States. For example, internal company communications with an in-house lawyer in the European Union generally are not considered privileged under that jurisdiction's laws.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Challenging a Subpoena. As noted above, the Division has broad grand jury powers, and it can be difficult to quash a subpoena if its subject has any connection to the alleged conduct. Even so, the Division can avoid imposing burdens upon potential witnesses by planning its investigation accordingly. For instance, with respect to scheduling, the Division may accommodate alternative dates for a witness who is not available on the date the subpoena identifies, particularly if the witness is not essential to the investigation. Furthermore, because the Division can compel the attendance of grand jury members under threat of imprisonment, it can avoid imposing an unnecessary burden on a witness (e.g., by cancelling a grand jury session if failing to meet quorum) by planning in advance.

Privileged Documents. If either party believes that privileged documents (e.g., documents containing legal advice) have been seized during a search, the Division must put procedures in place to ensure that attorneys and agents working on the case do not access those documents.

Privilege Against Self-Incrimination. An individual called to testify before the grand jury has the right to invoke the Fifth

Amendment's privilege against self-incrimination and confer with counsel outside the jury room. However, grand jury proceedings themselves are conducted in secret and witnesses have no right to counsel inside the jury room. Generally, the government will not seek the testimony of an individual who states an intention to invoke the privilege before the grand jury because, to compel the testimony, the government would be required to provide that individual with immunity. The privilege against self-incrimination generally does not apply to documentary evidence, although courts have recognised a narrow, derivative "act of production" privilege that can protect an individual from being required to produce documents when the act of production itself would be incriminating.

Jurisdictional Limitations. Because of jurisdictional limitations in the federal rules governing the service of subpoenas, the Division generally cannot serve subpoenas on individuals or companies located outside of the United States. However, if an individual or company does receive a subpoena and fails to respond, it is possible that the Division will cooperate with the relevant foreign government to enforce the subpoena or otherwise secure the requested materials.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In criminal investigations, the government will bring obstruction of justice charges against individuals who attempt to impede enforcement efforts by destroying evidence or providing false information to the government. The Division has pursued a number of obstruction cases in recent years, suggesting increased enforcement on this issue. Individuals should also note that, while the Division has had limited success extraditing foreign nationals for antitrust violations, obstruction of justice is prosecutable in nearly every jurisdiction, and thus could serve as a basis for extradition.

In civil cases, obstruction may result in fines, jury instructions to make an adverse inference against the defendant, or other sanctions the court deems appropriate.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under the Sherman Act, corporations that commit antitrust violations are subject to fines of up to $100 million. Alternatively, the corporation may be subject to penalties based on the unlawful gains or losses occasioned by anticompetitive activity. Federal law provides for fines of up to twice the gross amount that the antitrust co-conspirators gained through the violation or twice the gross amount that the victims lost through the violation, whichever is greater. These alternative fines can – and in many instances have – exceed the $100 million ceiling the Sherman Act establishes, although the government is required to prove the amount of gain or loss in these cases beyond a reasonable doubt.

When imposing criminal penalties for antitrust violations, the courts assess antitrust-violation fines based on the formula and guidance set forth in the Federal Sentencing Guidelines. The court begins the analysis by calculating 20% of the total volume of commerce affected by the antitrust violation, which is then taken as the base fine. Note, the Guidelines do not define "volume of affected commerce", nor do they specify how to calculate the figure. Consequently, the court has significant flexibility in determining the appropriate base fine.

The court next assigns the corporate defendant a "culpability score" reflecting the circumstances involved in the particular case. The Guidelines outline various factors that may bear on the culpability determination, including the company's criminal history, the role that high-level personnel played in the conspiracy, the company's efforts to develop an effective compliance programme, and the extent of the company's cooperation with the government's investigation. The culpability score correlates to minimum and maximum multipliers, which are then applied to the base fine to calculate a fine range. This range is merely advisory, however, and the court may upwardly or downwardly depart from the suggested range in setting the final fine.

The DOJ, for its part, typically seeks a sanction that falls within the range the Guidelines suggest. In special circumstances, the DOJ may recommend a downward departure from the range suggested by the Guidelines in recognition of a defendant's cooperation or assistance. The DOJ also can, and usually does, seek discounted fines against defendants who cooperate immediately following the leniency applicant (e.g., a company that was second to report its antitrust violation). Like the Guidelines ranges themselves, however, the DOJ's role in the sentencing process is only advisory, and the courts retain broad discretion in making the final determination as to the size of the penalty.

In recent years, the Division also has emphasised probationary periods for companies convicted of antitrust violations. If the Division believes that a company has an ineffective compliance programme or is continuing to employ culpable individuals, then it could argue that court-supervised probation is necessary to prevent recidivism. This probation could include a court-appointed monitor. With respect to compliance programmes, discussed further in question 4.1, the government has both prioritised their promotion and rethought how compliance programmes should affect both charging and sentencing outcomes, noting that even the best compliance cannot foreclose every potential violation.

In addition to these criminal fines, corporate defendants may be ordered to pay restitution to the victims of the conspiracy. Defendants with federal contracts may be subject to prosecution under companion criminal statutes, such as those prohibiting mail fraud or wire fraud, and any company may be disbarred from future participation in government contract work.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The Sherman Act provides for criminal penalties of up to $1 million and 10 years' imprisonment for individuals who commit an antitrust violation. Individuals also are subject to the alternative fine regime by which the DOJ may seek to impose monetary penalties of up to twice the losses or wrongful gains resulting from the conspiracy. Like corporate defendant penalties, fines against individuals are based in part on the volume of commerce affected by the unlawful activity, with typical individual fines falling between 1% and 5% of this figure. Individual sanctions are not multiplied by a culpability score, but the Guidelines provide that these fines should in all cases exceed $20,000.

The volume of affected commerce also guides the court's determination regarding sentences of imprisonment. Antitrust violations increasingly are punished on an individual level using jail time: between 2010 and 2019, an average of 47 individuals per year were charged with antitrust violations. Of those

convicted, average prison sentences for the same period were 18 months. The DOJ may recommend that the court impose terms of imprisonment below the suggested Guidelines ranges for defendants who provide substantial assistance to the government's investigative efforts. The DOJ may also make such recommendations pursuant to plea agreements.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Criminal fines in corporate antitrust cases can be reduced to the extent necessary "to avoid substantially jeopardizing the continued viability of the organization". The Guidelines clarify that a defendant will be eligible for a reduction only if the court finds that the company would be unable to pay the minimum recommended fine, even if allowed the benefit of an instalment schedule. Additionally, the court may reduce the size of a criminal fine to ensure that the defendant company can pay restitution to the victims of the conspiracy.

The Guidelines require the courts to impose fines on individuals in antitrust cases unless the defendant can establish "that he is unable to pay and is not likely to become able to pay any fine". When determining the amount of the defendant's fine, the court may consider evidence of "the defendant's ability to pay the fine ... in light of his earning capacity and financial resources". The Guidelines provide that the courts may impose a lesser fine or waive the fine if the court finds that (1) the defendant is unable to pay and is not likely to ever become able to pay, or (2) imposing the fine would "unduly burden the defendant's dependents".

If a defendant wishes to pursue an "inability to pay" argument, a government-selected forensic expert will thoroughly review the defendant's books and records and may also request to interview company personnel. The process can be onerous and, even if the forensic expert finds in the defendant's favour, the court still can reject the forensic expert's findings at sentencing.

3.4 What are the applicable limitation periods?

Criminal antitrust actions are subject to a five-year statute of limitations. In cases involving prolonged conspiratorial activity, the statutory period begins to run after the termination of the conspiracy; that is, the point at which the purpose of the antitrust conspiracy has been achieved or abandoned. As stated in question 8.3, civil antitrust actions are subject to a four-year statute of limitations.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Companies may pay for the legal costs which current and former employees incur during antitrust investigations. Generally, companies are prohibited from paying the financial penalties imposed on their employees, however, pursuant to state laws forbidding indemnification in cases involving wilful violations of the criminal law.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In theory, an employer could hold a rogue employee liable for the costs associated with an antitrust violation; however, this scenario is unlikely under U.S. law. Vicarious liability allows plaintiffs to sue employers who benefit from their employees' misconduct, even if the misconduct in question was not at the employer's request. For this reason, a company seeking to hold its employee liable for antitrust sanctions or legal fees would be unlikely to succeed unless it could prove that the company was not involved in the violation, that it derived no benefit from the violation, and that the employee was not acting within the scope of his employment.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

In the United States, a parent company only becomes liable for the conduct of its subsidiary if the government (or civil plaintiffs) can pierce the corporate veil under an alter ego or agency theory. Specifically, the government must indict the parent along with its subsidiary and prove at trial that the subsidiary is an "alter ego" of the parent company or that an "agency" relationship exists.

As a general matter, in order to impose liability on a parent company based on the alter ego theory, the DOJ must show the following: (1) that there is such unity of interest and ownership that separate personalities of entities no longer exist; and (2) that failure to disregard their separate identities would result in fraud or injustice.

Under the agency theory, the DOJ must prove that the subsidiary was acting as an agent of the parent company. To prevail, the DOJ must show the following: (1) the parent company intended for the subsidiary (the alleged agent) to act on its behalf; (2) the subsidiary agreed to act as the parent company's agent; and (3) the parent company exercised total control over the subsidiary.

U.S. courts rarely pierce the corporate veil because there is a strong presumption that a parent company and its subsidiary are separate legal entities. Courts have zealously guarded the principle that a parent corporation is not liable for the acts of its subsidiaries and generally will not pierce the corporate veil except in the case of sham legal structures.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Division operates a Leniency Programme for both individuals and companies. The Leniency Programme underlies many of the Division's cartel investigations, with DOJ officials stating, "self-reporting under our leniency programme remains at high levels … increasingly, non-U.S. companies are reporting anticompetitive behaviour".

The Corporate Leniency Policy establishes two types of leniency, Type A and Type B, which incentivise companies to report antitrust violations through reduced sanctions. Critically, the Division will grant only one corporate leniency application per cartel conspiracy; thus, the programme may result in situations in which co-conspirators race to turn themselves into the government.

Type A and Type B leniency require that applicants confess fully to their participation in the conspiracy, take steps to terminate such participation, and agree to cooperate fully with the DOJ's investigative and enforcement efforts going forward. Successful applicants are awarded prosecutorial benefits, which vary depending on the form of leniency.

Type A leniency may be available under the following six conditions. The company must have: (1) voluntarily come forward before the DOJ became aware of any illegal conduct; (2) taken steps to terminate its participation in the illegal activity immediately upon its discovery of the conspiracy; (3) confessed fully and committed to providing complete, ongoing assistance to the DOJ's investigative efforts; (4) come forward as an entity, rather than through isolated confessions of executives; (5) made restitution to victims of the conspiracy where possible; and (6) not originated, led, or coerced others to participate in the illegal activity. A grant of Type A leniency confers automatic amnesty upon the company and its cooperating employees.

Type B leniency allows companies to apply for amnesty after the DOJ has become aware of illegal activity. The DOJ will grant this type of application only if it lacks the evidence to obtain a successful conviction against the applicant and it determines that leniency would not be unfair given the timing of the confession, the applicant's role in the conspiracy, and the nature of the illegal conduct. Additionally, companies must satisfy requirements (2) through to (5) of the above paragraph to qualify for the programme. If the DOJ grants the application, the company's employees will be considered for immunity from prosecution.

It is important to note, however, that in July 2019 the DOJ instituted a new policy for companies with strong corporate antitrust compliance programmes that do not qualify for leniency as the first to report. Under the new policy, corporate antitrust compliance programmes will now factor into prosecutors' charging and sentencing decisions and may allow companies to receive greater prosecutorial leniency from the Division. Prosecutors will consider the following factors in evaluating the effectiveness of compliance programmes: the design and comprehensiveness of the compliance programme; the company's culture with respect to compliance; the operational authority of those responsible for compliance; risk assessment, auditing and reporting protocols; the training of and communications with employees; and the discovery and remediation of violations, including the disciplining of employees.

While the effects of this new policy have yet to be seen in practice, it is possible the policy could result in the expanded use of deferred prosecution agreements ("DPAs") (discussed further in question 6.1). A company that is not eligible for Type A or Type B leniency, but is considering this option, should weigh the costs and benefits carefully, as DPAs could impose heavy burdens on the regulated party through strict control of business operations. Among other requirements, DPAs can mandate that a company terminate key employees, restructure business segments, and acquiesce to government oversight and monitoring.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, a company that confesses to an antitrust violation before its co-conspirators come forward can reserve its place as first in line for leniency by securing a marker for its application. To do so, the company must contact the DOJ with information about the antitrust violation and its potential role therein; the marker then will allow the company a finite period of time – for example, 30 days, to be extended on a rolling basis – to conduct a preliminary internal investigation into the nature of its role in the conspiracy. Because the leniency programme is only available on a "first in" basis, the marker system can play a critical role in determining which amnesty applications will be granted.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Companies may apply orally for leniency, and the DOJ does not specify that applications take any particular form. However, the DOJ may require applicants to turn over any documents relevant to their illegal activity.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Division protects the confidentiality of all information provided through leniency applications and will disclose the contents of an application only with the applicant's consent. These protections apply even against foreign antitrust agencies seeking information on applicants to the DOJ. The information in leniency applications may, however, be subject to discovery in criminal litigation. Additionally, civil plaintiffs routinely request (with success) documents used as part of a leniency application. To note, the government typically will seek to stay some or all discovery in a parallel civil case while its investigation is ongoing.

Leniency applicants also can make the strategic decision to disclose incriminating documents to private litigants pursuant to incentives established by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). ACPERA provides that successful leniency applicants may limit their civil liability by cooperating with plaintiffs in private suits related to the government's enforcement actions. To satisfy the statutory requirements, a company seeking relief generally must begin to cooperate early in the government's investigation and must also produce to the private plaintiffs a substantially larger body of documents than would be required under typical discovery rules. Companies that provide satisfactory cooperation are subject only to actual damages suffered by the plaintiff. In the absence of ACPERA's civil liability limitation, the defendant, in civil actions, would be subject to statutorily authorised treble damages and joint-and-several liability with other co-conspirators.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

A company that seeks leniency is obligated to cooperate with the government's enforcement efforts until the DOJ's investigation has concluded. These obligations are set forth in a conditional leniency agreement which the DOJ can revoke at any time during the investigation. Upon the conclusion of the investigation, the DOJ will provide the company with a final letter indicating that the leniency application has been granted.

Whether a company has satisfied its leniency obligations will depend in part on the number of individuals the company makes available and the information they provide. The DOJ has attempted to revoke a conditional leniency agreement only once based on a company's alleged failure to promptly terminate its involvement in the illegal activity, but this attempt failed before the courts. As a result, the DOJ amended the terms of its standard conditional leniency agreements to provide that if the DOJ does revoke a company's conditional leniency agreement, the company cannot appeal the decision prior to the conclusion of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, the DOJ has policies that provide for both additional rewards for certain cooperating companies, "leniency plus", and harsher sanctions for companies that fail to comply fully with the DOJ in its investigations, "penalty plus". Under the former programme, a company that cooperates with the DOJ in one investigation may be eligible for special benefits if it also reports information about an additional antitrust violation occurring in a separate industry. A company that obtains amnesty plus status will not be fined in connection with the second conspiracy, nor will the DOJ prosecute any cooperating employees, officers, or directors for the offence. The Division also may seek reduced sanctions for the first offence.

Conversely, a company that cooperates with an investigation may be subject to the "penalty plus" policy if the DOJ discovers that the company has failed to disclose information about separate antitrust activity. The DOJ treats such nondisclosure as an aggravating factor and, therefore, may seek greater sanctions against the company at sentencing.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The DOJ has programmes that allow individuals to contact the government in their individual capacities to report antitrust violations to the Division. Under current DOJ policy, an employee whistle-blower may be eligible for leniency or immunity if he reports antitrust activity of which the government was unaware and provides full cooperation with the DOJ. The employee cannot have originated or led the conspiracy in question, and he will not be granted immunity if he coerced others into participating in the illegal activity. Additionally, federal law prohibits companies from retaliating against employees who report corporate wrongdoing to the authorities.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Division frequently engages in plea bargaining rather than pursuing a matter to a contested trial. In a typical plea-bargaining agreement, the defendant pleads guilty to the antitrust violation and agrees to cooperate fully in the investigation. In return, the Division generally recommends a punishment less severe than the minimum of the range given by the Guidelines. The district court does not have to follow either the Division's recommendation or the Guidelines, but usually selects a sentence below the minimum of the Guidelines range for each offence.

Following a memo which the DOJ issued in September 2015 (often referred to as the "Yates Memo" in reference to its author, former Deputy Attorney General Sally Yates), the Division has placed a greater emphasis on accountability for individual defendants. Among other things, the original memo instructed Division attorneys to include a provision in plea agreements that requires a company to provide information about "all culpable individuals". Recognising that prosecutorial resources are limited, however, the previous administration narrowed that portion of the memo to apply to all individuals "substantially involved in or responsible for the criminal conduct" in an effort to make investigations more efficient. Whether the current administration continues this practice or further changes the policy has yet to be seen.

Regardless, each iteration of the memo so far has been consistent with the Division's position that, because it is seldom able to stop a crime before it starts, it must rely on deterrence, which entails seeking large criminal fines for corporations and significant jail time for executives.

Additionally, the past few years have seen an increase in the Division's use of DPAs, particularly with respect to companies involved in federal programmes, such as healthcare providers and generic drug manufacturers. While the Division traditionally has opted not to use DPAs to resolve criminal investigations, it has entered into several since 2019. Specifically, the Division justified this increased use by identifying its interest in resolving the charges without debarring the companies from participating in federal programmes, which the Division believes would be detrimental to the market overall.

Combined with the Division's new Procurement Collusion Strike Force, which focuses on routing out bid rigging in government contracts, it is likely that the Division's use of DPAs with companies that participate in federal programmes will continue, if not increase, in the future.

7 Appeal Process

7.1 What is the appeal process?

To initiate a criminal prosecution, the government must convince a grand jury to issue an indictment against the defendant. After receiving the indictment, the government must proceed to trial promptly and prove each element of the antitrust violation beyond a reasonable doubt to a jury of the defendant's peers. During this trial, the defendant has the right to confront its accusers and cross-examine them. While an individual defendant cannot be compelled to testify at trial, he or she can waive this right and take the stand in his or her own defence.

If the defendant is acquitted at trial, the government is precluded from trying the defendant again or appealing the acquittal. On the other hand, if the defendant is found guilty, he or she does have the right to appeal. While the government may not appeal a criminal verdict, it may appeal any sentence, generally within 30 days (although courts can amend or supplement this timeframe, and the others referenced below, through their local rules).

The appeal process in antitrust cases is the same as in any federal proceeding. The defendant must file a notice of appeal with the district clerk within 14 days of either the entry of judgment or the filing of the government's notice of appeal.

However, a defendant subject to a plea agreement typically will have waived the right to appeal for any reason other than ineffective assistance of counsel or prosecutorial misconduct.

To initiate a civil case, a plaintiff must file a complaint and prove in court by a preponderance of the evidence all the elements of the alleged violation. While the parties have a right to a jury trial in a civil case, the parties can also elect to have a bench trial.

In a civil proceeding filed in federal court, either party may appeal a district court's judgment within 30 days, except that when the United States is a party it has 60 days to appeal.

A losing party at the appellate level may ask the Supreme Court to review the case by filing a petition for a writ of *certiorari*.

The Supreme Court rarely grants writs of *certiorari* and only does so when at least four justices agree to hear the case.

If the civil case is filed in state court, the appeals process will follow that state's appellate procedure.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The district court exercises discretion in deciding whether to stay a judgment. An appeal does not stay a judgment automatically. If the district court does stay the judgment, it may take measures to ensure that the company can pay the fine after an unsuccessful appeal, such as requiring the company to post a bond. As a practical matter, a district court is unlikely to stay a fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The appeal process does not allow for the cross-examination of witnesses, which occurs during the trial period described in question 7.1. Instead, appellate courts review the district court record, which generally consists of the parties' papers and exhibits, any transcripts of proceedings, and the district clerk's official docket entries. Appellate courts review the district court's factual findings for clear error and legal conclusions *de novo*.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Section 4 of the Clayton Act allows a private party to bring a civil suit for any injury that results from an antitrust violation. The party generally receives three times the amount of the damages sustained as well as costs and attorney fees, except against the following defendants: (1) a leniency applicant or co-operator in a preceding DOJ investigation; (2) a joint venture engaged in research, development and production, or a standards development organisation that has given prior notification to the DOJ and the FTC; and (3) an export trading company that has received a certificate of review from the Department of Commerce. Section 16 of the Clayton Act also allows a private party to sue for injunctive relief against any threatened loss or damage that an antitrust violation would cause. In contrast to Section 4, a party bringing suit under Section 16 does not have to show actual injury to receive an injunction but only that a threat of injury exists.

Defendants in civil cases not only are jointly and severally liable but also have no right of contribution. Therefore, private parties can pursue a single defendant for the totality of damages from a cartel violation, and the defendant will have no recourse against the other members of the cartel.

In addition to private parties, the United States may bring a civil suit for antitrust injuries and receive an injunction or three times its damages along with costs if it prevails. A state attorney general also may bring an action for Sherman Act violations as *parens patriae* on behalf of natural persons within the state and receive an injunction or triple damages and costs, including attorneys' fees.

Given that a judgment in a criminal antitrust proceeding constitutes *prima facie* evidence of a violation in the subsequent civil proceeding, plaintiffs in "follow-on" civil actions may be litigating from a more advantageous position than plaintiffs bringing suit in a "stand-alone" action.

8.2 Do your procedural rules allow for class-action or representative claims?

As in other areas of law, private parties may bring class actions in antitrust if they satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. A putative class must meet the numerosity, commonality, typicality, and adequacy of representation requirements under Rule 23(a). Moreover, a court must find that the conditions set forth in Rule 23(b) are satisfied as well. These conditions include that a class action is a fair and efficient way of resolving the antitrust dispute and the questions of law or fact common to the class members predominate over any questions unique to individual members. Because of the predominance requirement, antitrust class actions generally are based on price-fixing violations and courts rarely certify classes of plaintiffs asserting claims of price discrimination.

8.3 What are the applicable limitation periods?

A civil action must be commenced within four years of the time when the action accrued. An action accrues whenever a plaintiff is injured by a violation of the antitrust laws. Thus, when anticompetitive conduct consists of multiple acts over time, each act has its own four-year statute of limitations. For a conspiracy, each independent act that injures the plaintiff restarts the statute of limitations.

This limitation is subject to tolling under certain equitable doctrines, such as fraudulent concealment, duress and estoppel. In addition, the civil statutory period may be tolled pursuant to government enforcement actions or class action proceedings.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

A "passing on" defence generally is not available to an antitrust defendant in a civil case. Succeeding in such a defence requires showing that the plaintiff (1) raised its price fully to compensate for the overcharge, (2) experienced no reduction in sales or profit margin, and (3) would not have raised his price absent the overcharge and/or maintained the higher price after the overcharge was discontinued. Such a showing usually requires a pre-existing cost-plus contract under which an indirect purchaser would suffer the entirety of the harm.

Indirect purchasers also are unable to use a "passing on" theory under the Illinois Brick doctrine. However, many states have rejected the Illinois Brick doctrine and allow suits by indirect purchasers under state law.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Under the Clayton Act, private plaintiffs, the United States, and state attorneys general acting as *parens patriae* can all recover reasonable costs. The relevant provisions for private plaintiffs and state attorneys general specify that costs include reasonable attorneys' fees. They also allow for pre- and post-judgment interest, although no private plaintiff has pleaded facts sufficient to obtain pre-judgment interest. Prevailing defendants, on the other hand, must bear their own attorneys' fees and are unable to obtain reimbursement from losing plaintiffs except under very special circumstances.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The DOJ is very active in pursuing cartel cases, with the Division reporting approximately 100 open grand jury investigations as of April 2020. Although the most high-profile investigations in recent years have focused on the electronics and automotive industries, the DOJ lately has been focusing on companies in the food supply chain (e.g., poultry, seafood, and beef suppliers) as well as companies in the healthcare industry (generic pharmaceuticals, home healthcare services, and cancer treatment centres). Because indictments and investigations regularly become public, civil actions typically follow.

Most cases are settled, and some are settled for substantial amounts. Among the few that go to trial, jury verdicts in favour of plaintiffs are common, although they are overturned sometimes on legal grounds.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

As stated in response to question 1.3, the DOJ is the sole enforcer of the antitrust laws with respect to criminal violations of the cartel prohibition. However, some state antitrust laws give state attorneys general the ability to prosecute antitrust violations criminally as well. While such state-level prosecutions have been rare historically, there are trends at the state level that indicate states could take on a more significant role in criminal antitrust enforcement in the future, either directly or indirectly. For example, state attorneys general offices have been expanding their antitrust enforcement bureaus generally and joining (if not leading) numerous high-profile civil antitrust investigations and litigations involving numerous major U.S. corporations. While many state antitrust laws are modelled after or are co-terminous with federal antitrust law, there is no legal barrier to states enforcing those statutes more aggressively or even seeking to expand their enforcement powers. As state attorneys general offices expand, they might find themselves not only with the resources but also the political support to pursue criminal antitrust investigations that once were thought to be the purview of the DOJ alone.

In September 2021, for example, New York enforcers arrested and indicted 10 individuals and corporations suspected of running a two-decades-long bid-rigging scheme for moving services. Specifically, the defendants are alleged to have submitted false and inflated bids to New York state and city offices responsible for securing relocation services for public benefits recipients, domestic violence survivors, and other crime victims, collecting more than $15 million from the jobs in the course of the conspiracy. Additionally, in a Texas-led civil antitrust lawsuit involving 15 attorneys general, an inadvertent disclosure in the defendant's answer to an amended complaint has prompted several Democrat lawmakers to request the DOJ to open a criminal antitrust investigation into that defendant (the DOJ has not yet commented). Assuming the DOJ declines to investigate, it is possible that certain state attorneys general will step in, as they have done in the civil antitrust context, to supplement and otherwise bolster federal enforcement.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

While it is of particular importance for a company or individual to understand its disclosure obligations to the DOJ in the course of a criminal investigation, it is equally important to understand the DOJ's disclosure obligations to the company or individual. In short, the grand jury process does not provide an opportunity for discovery on behalf of the investigated company or individual outside of voluntary disclosures by the DOJ (sometimes referred to as reverse proffers). In fact, the grand jury process is subject to broad and stringent safeguards under Rule 6(e) of the Federal Rules of Criminal Procedure meant to secure grand jury secrecy. Indeed, even though grand jury witnesses are permitted to disclose their testimony outside of the grand jury, those witnesses are not entitled (nor are their counsel or employers) to copies of their grand jury transcript.

As noted in response to question 4.4, however, once a grand jury issues an indictment and the status of the action changes from an investigation to a prosecution, the DOJ is obligated to disclose certain materials upon the request of the defendant. These materials are specifically outlined in various federal rules of criminal procedure and evidence, local court rules, and legal precedents. Chief among these sources are Rule 16 of the Federal Rules of Criminal Procedure (which identifies information subject to disclosure from both the government and the defendant), *Brady* materials (so called for *Brady v. Maryland* and typically consisting of exculpatory materials) and *Jencks* materials (so called for the Jencks Act and typically consisting of documents relied upon by government witnesses who will testify at trial). These sources will cover materials from any leniency applicant as well as testimony provided by grand jury witnesses.

The disclosure of these materials will be the defendant's first opportunity not only to review the evidence underlying the government's case but also to challenge that evidence. As a result, it is imperative for companies and individuals to recognise the information imbalance that can develop in the investigation phase of a criminal matter and the importance of prompt and diligent discovery at the start of the pre-trial phase.

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