
THE CARTELS AND LENIENCY REVIEW

EDITOR
CHRISTINE A VARNEY

LAW BUSINESS RESEARCH

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EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 26 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or internal investigation into suspect practices. Our emphasis is necessarily on established

law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the inaugural edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication in order to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York
January 2013

Chapter 1

INTRODUCTION

*Christine A Varney*¹

The dominant theme in cartel enforcement in recent years is a trend towards globalisation. Globalisation takes two principal forms: (1) a growing worldwide consensus that cartels cause serious consumer harm and should be dealt with accordingly; and (2) a marked increase in cooperation between jurisdictions in the identification, investigation and prosecution of transnational cartels. More eyes are watching than ever before, at a time when, because of the destabilising effect of leniency programmes, conspirators have less and less reason to trust one another.

Globalisation greatly complicates the strategy a corporation should adopt when possible wrongdoing is discovered or a government investigation commences. Counsel representing large corporate enterprises whose products are sold abroad are increasingly likely to face cartel investigations involving multiple jurisdictions, simultaneous processes and seemingly endless demands for documents and witnesses. For individuals, globalisation means that criminal liability is no longer limited to the United States. A substantial number of jurisdictions, including the United Kingdom, Canada, Japan, Brazil and South Korea, have criminalised cartel activity, although to date only a few have passed laws that allow prison sentences as a punishment. Perhaps more importantly, in the near term the United States will obtain extradition of foreign nationals with increasing ease.

For cartel participants whose activities affect US commerce, the ambitious US enforcement agenda remains a primary concern. The United States has a long history of aggressive cartel enforcement. The Department of Justice ('the DoJ') has pursued criminal punishment for core violations such as price fixing, market allocation and bid rigging since the passage of the Sherman Act in 1890, and has regularly pursued prison sentences for individuals since the 1970s. The DoJ has exclusive authority to prosecute criminal violations of the antitrust laws and regards criminal enforcement as a necessary

¹ Christine A Varney is a partner at Cravath, Swaine & Moore LLP.

complement to civil enforcement in deterring cartel behaviour. While some companies may be inclined to regard civil fines and private litigation damages as a cost of doing business, prison sentences for senior executives are a completely different deterrent. The DoJ has long used its bilateral relationships with other enforcement authorities, as well as its influence in organisations such as the OECD and the ICN, to advocate the view that cartel behaviour inflicts serious harm on consumers and should be a top enforcement priority around the world.

The overall trend in US cartel enforcement is clear: more investigations, more complaints, larger fines, and longer prison sentences for individuals. The DoJ's leniency programme deserves a great deal of credit for the broad success of the agency's enforcement agenda. The leniency programme grants substantial benefits, including immunity from criminal prosecution, to corporations and individuals who voluntarily admit their participation in unlawful activity and agree to cooperate fully in the DoJ's investigation, but these benefits are generally available only to the first cartel participant who steps forward. Leniency creates a prisoner's dilemma in which the interest of the individual cartel participant diverges sharply from that of the cartel as a whole, creating a 'race to the prosecutor' in which participants compete to be the first in the door.

In 2004, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which significantly increased the maximum penalties for antitrust offences. Since then, the volume of fines collected and the average length of the sentences imposed on individuals have grown. The DoJ is increasingly aggressive in seeking substantial jail sentences for individual senior executives who played a significant role in their firms' cartel activity. The DoJ usually insists that jail time must form a part of any plea agreement, including plea agreements with foreign nationals. The last decade has seen continuity in strong cartel enforcement across changes in administration and agency leadership. Cartel enforcement is likely to remain a top priority for the DoJ.

The European Commission's enforcement programme is active and highly successful. In 2001, the Commission brought a large enforcement action against eight members of the global *Vitamins* cartel, which resulted in fines of roughly US\$750 million. Revisions to the Commission's leniency programme in 2002 led to a sharp increase in self-reporting by violators. Fines have increased steadily over the same period. The Commission adopted additional reforms in 2004 that increased its enforcement powers. Perhaps most significantly, Commission staff have the power to conduct unannounced inspections, better known as 'dawn raids'. Dawn raids allow the Commission to preserve evidence and, because they are exceedingly disruptive to everyday business, strongly deter potential violations. The Commission emphasises international cooperation. Commission staff work closely with enforcement staff from numerous countries, including the United States, Canada, Australia, Korea and Japan, to coordinate ongoing investigations and information exchange.

While the United States and the European Union continue to be the worldwide leaders in cartel enforcement, perhaps the most momentous changes are taking place elsewhere. The enforcement regimes of China and India are in their infancy but are clearly entering a stage of growth. India recently imposed penalties of US\$1.1 billion on 11 members of the domestic cement industry, one of the largest aggregate fines ever achieved. China has moved somewhat more slowly. It is possible that these two large jurisdictions will move over the coming decades towards an aggressive cartel

enforcement agenda more closely modelled on those of the United States and Europe. This would greatly increase enforcement risk both for their own nationals and for the foreign corporations that sell technology, agricultural products and raw materials into these rapidly growing economies. Elsewhere, Brazil, South Korea and Japan are making strides towards more active enforcement. Other jurisdictions have increased penalties for violations and granted broader investigative powers to investigators, including the right to use wiretaps and execute dawn raids.

Investigative cooperation between jurisdictions is on the rise. Enforcement authorities understand that failing to cooperate creates a risk that evidence will be lost or destroyed. The *Auto Parts* investigation, which led to several guilty pleas and the imposition of 24-month prison sentences on two Japanese nationals, was a cooperative effort of the US, the UK, the European Commission, Japan and others. The Japan Free Trade Commission and European Commission staff conducted tightly coordinated dawn raids on the headquarters and branch offices of multiple market participants. This investigation, which involved multiple related product lines, will likely serve as a model for multilateral cooperation in confronting global cartels.

Although the United States has long advocated that other jurisdictions adopt criminal penalties for cartel conduct, only some jurisdictions have followed the United States' lead. For example, Mexico, Brazil, Russia and Australia are increasingly active in criminal enforcement. However, criminalisation may run counter to established business practices in jurisdictions that have strong traditions of central economic planning including some measure of export price control by the government. There is often a perception that price fixing, bid rigging and other cartel offences are more akin to rational, tough-minded business strategies than to criminal activity. As a general matter, however, criminalisation appears to be gaining momentum on the world stage, and jurisdictions that rarely imprison cartel offenders at home may nonetheless accede to pressure to extradite their own citizens to face prosecution abroad.

As best represented by the experience of the United States, leniency programmes are potent weapons in the cartel enforcement efforts of many jurisdictions. A majority of jurisdictions now offer a leniency option of some kind. While the broad principles of leniency remain constant, the mechanics can differ significantly from jurisdiction to jurisdiction. For example, while the US pledges to keep leniency applications confidential and to divulge information provided by an applicant only with the consent of the applicant, other jurisdictions do not offer these protections to leniency applicants. Jurisdictions also differ in the type and amount of cooperation they require in return for a grant of leniency.

The extraterritorial application of cartel laws is an important issue in a world where trade is increasingly globalised. Each jurisdiction must decide to what extent its competition laws may reach conduct that occurs beyond its borders. In the US, the Foreign Trade Antitrust Improvements Act (FTAIA) provides that as a general rule the Sherman Act does not apply to foreign conduct unless that conduct has a 'direct, substantial, and foreseeable' effect on US domestic or import commerce. Unfortunately, the statute's language does not lend itself to easy interpretation, a situation that has not been improved by many courts' often contradictory attempts to do so. The statute is clear in at least one respect: cartels that affect export goods are exempt from enforcement

(Canada's enforcement regime carves out the same exemption) – an approach that imposes supra-competitive costs on foreign purchasers.

This book is intended as a primer and reference for the private practitioner or in-house lawyer on the cartel enforcement regimes of the world's principal competition authorities. The book provides guidance on the investigatory and litigation procedures of those jurisdictions, including methods of evidence gathering, policies regarding information sharing with foreign enforcement authorities and private litigants, the scope of any leniency programme, and considerations relevant to sentencing. While the book focuses primarily on government investigations, each chapter briefly discusses the risk of follow-on private lawsuits, which in some jurisdictions may be substantial. Most importantly, this book will aid lawyers representing corporations to respond swiftly and with confidence when faced with the unwelcome news that their clients may have participated in cartel activity.

Chapter 27

UNITED STATES

Christine A Varney and John F Terzaken¹

I INTRODUCTION

The statutory basis for the prohibition on cartel activity in the United States is the Sherman Antitrust Act, 15 U.S.C. Section 1, which states in pertinent part, ‘Every 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, is prohibited.’² Federal law, along with most state statutes, provides for criminal and civil sanctions and applies both to corporations and individuals. Within the categories of conduct that violate Section 1, only certain of them, including agreements to fix prices, rig bids, or allocate markets, are regularly punished criminally. Those three specific types of agreements are prosecuted criminally because they are regarded as particularly harmful to competition.

As the language of Section 1 implies, a criminal offence under the Sherman Act requires an agreement between horizontal competitors. Most agreements between competitors that directly affect prices are unlawful and can be the basis for criminal prosecution. Agreements to control the outcome of a public or private bidding process or not to compete in a particular geographic or product market may also create criminal liability. Such agreements need not be explicit, as in the form of a written contract. An agreement can be demonstrated as long as there is a sufficient ‘meeting of the minds’

1 Christine A Varney is a partner at Cravath, Swaine & Moore LLP and John F Terzaken is a partner at Allen & Overy LLP. The authors acknowledge the substantial assistance of Jonathan J Clarke and Benjamin R Osborn in preparing this chapter. Mr Clarke is an attorney at Quinn Emanuel Urgqhart & Hedges LLP, and was formerly a litigation attorney at Cravath, Swaine & Moore LLP in New York. Mr Osborn is an associate in the litigation department at Cravath, Swaine & Moore LLP in New York.

2 15 U.S.C. §1.

to conduct an anti-competitive course of action. Such an agreement may be proven by direct or circumstantial evidence.

Under Section 1, a corporation may be fined up to US\$100 million or twice the gain from the illegal conduct or twice the loss to the victims. The Antitrust Division of the US Department of Justice ('the Antitrust Division'), which is the principal government enforcer of the prohibition, increasingly seeks the latter penalty in its larger cases. A corporation convicted of cartel conduct may also be debarred from participation in federal contracts, potentially a crippling sanction in some industries. Individuals may be fined up to US\$1 million and face prison sentences of up to 10 years. Average sentences recently have been in the range of 24 to 36 months; the highest sentence yet imposed is 48 months.³ The Antitrust Division insists upon a prison term for every defendant, including foreign nationals, who pleads guilty to a Section 1 violation.

Corporate and individual leniency programmes are the primary means by which the Antitrust Division uncovers potential cartel agreements.⁴ The Leniency Program creates a race among conspirators to disclose the cartel to authorities in order to receive immunity from prosecution, as well as a limitation on the damages that may be recovered by private plaintiffs in subsequent litigation. The Division grants only one leniency application per conspiracy. Subsequent cooperators are not immune from criminal prosecution but generally receive smaller fines and expose fewer of their executives to indictment than do non-cooperators.

The Antitrust Division's Amnesty Plus programme is also a significant source of investigative leads. If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, under Amnesty Plus it can receive substantial benefits in its plea agreement for that conspiracy by reporting its involvement in a separate conspiracy. The size of the Amnesty Plus discount depends on a number of factors and involves a considerable exercise of discretion by Antitrust Division staff. Amnesty Plus has led to several significant investigative leads in many recent, high-profile antitrust investigations, such as the *Air Cargo* and *Auto Parts* investigations.

The Antitrust Division has a wide variety of investigative tools at its disposal, including wiretap authority and broad subpoena powers. Antitrust Division staff often cooperate with other law enforcement agencies, including the Federal Bureau of Investigation ('the FBI') and US Attorney's offices, to make use of their specific expertise. Antitrust conspiracies often implicate other US criminal statutes, including those covering obstruction of justice and lying to federal agents, and the Antitrust Division often adds such charges to its indictments as a means of protecting the integrity of its investigative processes.

As the global economy has become more integrated, cartel behaviour increasingly has reached across borders, requiring an integrated response from the enforcement authorities of multiple jurisdictions. The United States relies on close working

3 *United States v. VandeBrake*, 771 F. Supp. 2d 961 (N.D. Iowa 2011).

4 See Department of Justice, Corporate Leniency Policy; Department of Justice, Individual Leniency Policy ('the Leniency Program'), available at www.justice.gov/atr/public/criminal/leniency.html.

relationships with those authorities to identify and investigate violations.⁵ The Antitrust Division also seeks to use treaties and other bilateral agreements to extradite foreign nationals whose criminal conduct has a substantial impact on US commerce, although thus far it has had limited success in doing so. Proceedings against foreign defendants still depend largely upon their voluntary submission to the jurisdiction of the US courts or their being arrested opportunistically during a visit to the United States.

II TYPES OF AGREEMENTS PROHIBITED

Of the conduct deemed unlawful by US federal antitrust statutes, only conduct that violates Section 1 of the Sherman Act may be prosecuted criminally. The Antitrust Division generally prosecutes ‘hard-core’ violations including agreements among competitors to fix prices, agreements to rig bids, and market allocation agreements. Such agreements are prosecuted criminally because they are very damaging to competition and inherently difficult to detect, making a strong deterrence programme necessary and appropriate. It is no defence to a criminal Section 1 charge that the agreement resulted in a price that was commercially reasonable, that competition was not actually affected, or that the agreement was necessary due to difficult market conditions.

No matter the type of agreement being considered, a criminal offence under Section 1 requires proof of four legal elements: (1) a concerted action (i.e., an ‘agreement’); (2) between two or more competitors; (3) to restrain trade; (4) that affects interstate commerce or commerce with foreign nations. The burden is on the Antitrust Division to prove these elements beyond reasonable doubt, which is the highest burden of proof in the US legal system.

i What is an agreement?

The first legal element – proof of an agreement – is the essence of a criminal offence under Section 1 and is the element upon which most criminal cartel cases turn. The difference between permissible and impermissible contact among competitors depends upon whether an agreement exists. An agreement can be explicit, such as a written contract or compact between competitors, or implicit, like an oral exchange of promises or even hints. An agreement can be demonstrated so long as there is a sufficient ‘meeting of the minds’ between competitors as to an anti-competitive course of action. As a result, an agreement between competitors can be proven either by direct evidence (such as the testimony of a participant) or circumstantial evidence (such as identical errors in bids by purported competitors). The mere exchange of market information, even

5 Scott D Hammond, ‘Charting New Waters In International Prosecutions’, speech at the Twentieth Annual National Institute on White Collar Crimes, 2 March 2006, available at www.justice.gov/atr/public/speeches/214861.htm (‘When the Division began detecting international cartels in the early to mid-1990s, Division prosecutors were routinely told that they would have to wait a year or so to receive a response to a foreign assistance request. They were also told not to be surprised if, once a response finally was received, the answer was simply that no assistance would be forthcoming. Those days are gone.’)

regarding current or prospective prices, does not violate Section 1. Note, however, that some conduct that does not violate Section 1, such as invitations to collude that do not result in an agreement, may be prosecuted civilly under Section 5 of the Federal Trade Commission Act.⁶ Invitations to collude may also be pursued civilly under Section 2 of the Sherman Act, which prohibits acts of attempted monopolisation.

ii Competitors

Competitors are firms that do business in the same product and geographic market, such that an agreement between or among them to fix prices is likely to harm competition. Only independent entities can reach an agreement within the meaning of Section 1; multiple controlled subsidiaries or divisions of a single corporate entity cannot conspire with one another to violate the antitrust laws.⁷ Joint ventures, standard-setting organisations, group purchasing organisations, and the like may involve multiple independent entities, but price and output agreements in these contexts are generally evaluated civilly under a burden of proof known as the ‘rule of reason’.

iii Restraining trade

Only agreements that restrain trade (i.e., affect competition) are reached by Section 1. These agreements generally involve price fixing, bid rigging, market allocation or other agreements that reduce competition such as agreements to reduce output.

iv Territorial reach

Broadly speaking, the Sherman Act is intended to reach only conduct affecting US commerce. Over the past 20 years, cartel cases have gone global, involving industries that operate both in the US and abroad. This has raised difficult questions regarding the territorial reach of the US antitrust laws that courts have struggled to resolve. With a 1982 statute, the Foreign Trade Antitrust Improvements Act (‘the FTAIA’),⁸ Congress attempted to clarify its intent in this area, but subsequent litigation addressing the FTAIA has raised as many questions of interpretation as it has answered. These issues are dealt with further below.

III IMMUNITIES AND AFFIRMATIVE DEFENCES

Congress has immunised certain highly regulated industries from the antitrust laws. Two judge-made doctrines, the filed rate doctrine and the *Noerr-Pennington* doctrine, have

6 For a recent example, see *In the Matter of Valassis Communications, Inc.*, FTC File No. 051 0008, Docket No. C-4160 (complaint filed 28 April 2006) (statements made in an analyst conference call describing with precision the company’s plan to end a ‘price war’ with its only competitor unlawful as an invitation to collude). An invitation to collude may also constitute mail or wire fraud, both of which carry criminal penalties.

7 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

8 15 U.S.C. §6a.

also immunised particular forms of conduct, also in the regulatory context. Finally, there are a number of statutory and common law doctrines that offer potential affirmative defences to an alleged Section 1 violation.

i Immunities

A number of industries, including insurance and freight railroads, are expressly immunised by statute from application of the antitrust laws. Separately, implied immunity exists where application of the antitrust laws would be ‘repugnant’ to a ‘pervasive’ federal regulatory scheme, as for instance with the sale of securities.⁹ The state action doctrine similarly exempts actions taken pursuant to a state regulatory scheme.¹⁰ Finally, certain activities and agreements related to labour and collective bargaining are exempt.¹¹

Federal statutes give some regulatory agencies the exclusive right to set rates for the utilities they regulate, including railroads and providers of electricity. These rates are often based on market data submitted by the utilities themselves. The filed rate doctrine both protects consumers, by mandating that only the agency-set rate may be charged, and seeks to avoid conflict between different branches of government by protecting such rates from collateral challenge by consumers under antitrust law.¹² Strictly speaking, because this bar applies only to private suits for damages, and not to government antitrust suits or to private suits for injunctive relief, the filed rate doctrine is not an immunity but simply a limitation on damages.¹³ The filed rate doctrine will not bar private suits where the agency-set price would have been different but for the submission of incorrect data by the regulated entity.¹⁴

Noerr-Pennington, named after two Supreme Court cases,¹⁵ is a judge-made doctrine that attempts to harmonise the goals of competition policy with the First Amendment rights of private citizens under the US Constitution. *Noerr-Pennington* limits enforcement of the antitrust statutes against certain acts that attempt to influence government processes, including various forms of lobbying, statements made in litigation and submissions to regulatory agencies. The implications of *Noerr-Pennington* for cartels would seem to be limited, since cartelists generally seek to hide their conduct from government rather than petition in support of it. To the extent that cartel members seek

9 *Credit Suisse Securities (USA) LLC v. Billing et al.*, 551 U.S. 264 (2007) (underwriters of SEC-regulated securities have implied immunity from the antitrust laws).

10 *Parker v. Brown*, 317 U.S. 341 (1943).

11 See Norris-LaGuardia Act, 29 U.S.C. §§52 & 105 (2006); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

12 See *Keogh v. Chicago and Northwestern Railway*, 260 U.S. 156 (1922).

13 See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (rejecting the claim that the filed rate doctrine should be construed as an immunity).

14 See, e.g., *Carlin v. DairyAmerica, Inc.*, No. 10-16448 (9th Cir. 7 August 2012) (the filed rate doctrine did not bar suit by milk purchasers where complaint alleged that USDA set prices based on false data reported by defendants).

15 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

to use government process to influence prices or output, however, that conduct may implicate *Noerr-Pennington*. Note, however, that the doctrine contains a ‘sham’ exception, whose contours are not entirely clear, that covers acts of fraud, bribery, etc., that wilfully distort that process.¹⁶ Fraud committed on the US Patent Office, for example, is not immunised by *Noerr-Pennington*.¹⁷ And even if such an act of petitioning the government were immunised, any underlying agreement to fix prices or output would not be.

ii Affirmative defences

As competition has become more global in nature, so too has the focus of US antitrust enforcement. This is particularly true with respect to cartels. Detecting, punishing and deterring international cartels is a top enforcement priority for the Antitrust Division. As discussed below, however, the extraterritorial reach of the US antitrust laws is limited by several statutory and common law doctrines. The federal courts have struggled over several decades to give firm shape to these doctrines, and considerable uncertainty remains.

FTAIA

The Foreign Trade Antitrust Improvements Act of 1982¹⁸ (‘the FTAIA’) limits the extraterritorial reach of the antitrust laws by excluding from antitrust review all foreign conduct except that involving (1) import commerce; or (2) conduct having a ‘direct, substantial, and reasonably foreseeable’ effect on US commerce. Recent cases decided under the FTAIA have left at least two unsettled questions of law. First, the FTAIA was once commonly assumed to impose limits on the subject-matter jurisdiction of the US courts to consider claims involving non-US commerce.¹⁹ More recently, some courts have treated the FTAIA as creating a substantive requirement for stating a claim under the Sherman Act. These courts reason that the FTAIA serves to clarify the text of the Act, which reaches trade ‘among the several states, or with foreign nations’.²⁰ A second unsettled issue concerns whether the government must show that the defendant intended to affect US commerce.

16 *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

17 See *In re Buspirone Antitrust Litig.*, MDL Docket No. 1410, 2002 WL 243184 (14 February 2002).

18 15 U.S.C. §6a.

19 See, e.g., *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004) (‘The FTAIA provides the standard for establishing when subject-matter jurisdiction exists over a foreign restraint of trade.’)

20 15 U.S.C. §§1 & 2; see, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 (N.D. Cal., 5 October 2011) (stating that ‘the FTAIA is not jurisdictional’); *Animal Science Prods.*, 654 F.3d 462, 469 (2011) (‘in enacting the FTAIA, Congress exercised its Commerce Clause authority to delineate the elements of a successful antitrust claim rather than its Article III authority to limit the jurisdiction of the federal courts.’)

The most recent case to confront both issues was *United States v. AU Optronics Corp.*²¹ In that case, the government charged a Taiwanese company and its executives with price fixing in the sale of liquid crystal displays (LCDs). The case was one of a very few in which the defendants in an international cartel prosecution did not seek plea bargains but instead litigated through trial, which meant the court confronted several issues of first impression.²² AU Optronics argued that the FTAIA's directive that foreign conduct involve either (1) import commerce, or (2) a 'direct, substantial, and reasonably foreseeable' effect on US commerce should be treated as a substantive element of the offence rather than a jurisdictional requirement. Because the government had not adequately alleged either of the two prongs of the FTAIA, the court should dismiss the indictment.²³ In response, the government argued that the FTAIA 'addresses subject-matter jurisdiction, not the merits or elements of the Sherman Act'. The government asserted in the alternative that because the indictment contained allegations of domestic conduct in addition to foreign conduct, the FTAIA did not apply.²⁴

The litigants in *AU Optronics* were able to cite circuit court opinions on both sides of the issue. The Third Circuit has held that the FTAIA represents a substantive, rather than a jurisdictional, limitation on the Sherman Act, while the DC and Ninth Circuits have treated the FTAIA's provisions as a limitation on subject-matter jurisdiction.²⁵ Recently the Seventh Circuit reversed its former position and joined the Third Circuit in treating the FTAIA as relating to the scope of coverage of the antitrust laws as opposed

21 09-cr-00110 (N.D. Cal. grand jury indictment filed 10 June 2010).

22 The Department of Justice ultimately won convictions against AU Optronics and two of its executives. On 20 September 2012, Judge Susan Illston imposed a fine of US\$500 million on the company and sentenced each of the executives to three years' imprisonment. See Amended Criminal Pretrial Minutes, *US v. AU Optronics*, 09-cr-00110 (N.D. Cal. filed 27 September 2012).

23 Notice of Motion and Motion of Defendants AU Optronics Corporation and AU Optronics Corporation America to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)), *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. 23 February 2011).

24 United States' Opposition to Defendant AU Optronics Corporation and AU Optronics Corporation America's Motion to Dismiss the Superseding Indictment, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. 25 March 2011).

25 *Compare Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011) (reasoning from the Supreme Court's opinion in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) that Congress must make a clear statement when a statutory limitation is intended to be jurisdictional, and finding no such clear statement in the FTAIA), with *Empagran S.A. v. F. Hoffmann-Laroche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (holding that because plaintiffs' claims failed to satisfy the FTAIA's requirements 'we are without subject-matter jurisdiction') and *LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2003) (affirming the district court's dismissal for lack of subject-matter jurisdiction when the alleged anti-competitive agreement did not have a direct, substantial, and reasonably foreseeable effect on US commerce).

to the courts' subject-matter jurisdiction.²⁶ The court in *AU Optronics* ultimately dodged the issue, holding that the indictment sufficiently alleged both 'import trade or import commerce' under the FTAIA and a domestic conspiracy to which the requirements of the FTAIA did not apply. The court's order did not address the question of whether the FTAIA is jurisdictional or substantive.²⁷

The issue has important consequences beyond the pleading context in which it arose in *AU Optronics*. If the FTAIA creates a substantive element of the offence, then the court will take the plaintiff or government's allegations as true for purposes of deciding a motion to dismiss, and the plaintiff or government will have to prove the FTAIA's requirements at trial to the finder of fact. On the other hand, if the FTAIA represents a requirement for subject-matter jurisdiction, then the FTAIA challenge would fall within the purview of issues for the court, rather than a jury, to decide.

The *AU Optronics* court also faced the question of whether and in what circumstances the government must show that the defendants in a foreign conspiracy case intended to produce a substantial effect on US commerce. The issue arose in two arguments. First, one of the defendants argued that intent to affect US commerce exists as a substantive *mens rea* requirement in any Sherman Act case alleging a foreign conspiracy.²⁸ The court rejected this argument, finding that intent to affect US commerce may be inferred from the fact of the conspiracy.²⁹

Second, another defendant argued that, if the Sherman Act applies to a foreign conspiracy through application of the *Hartford/Alcoa* standard,³⁰ then the government must allege intent to substantially affect US commerce in its complaint.³¹ The government responded by arguing that, in cases where the complaint alleges injury to US consumers,

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- 26 *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (2012), expressly overruling *United Phosphorus Ltd. v. Angus Chem Co.*, 322 F.3d 942 (7th Cir. 2003).
 - 27 Order Denying Defendants' Motion to Dismiss the Indictment, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 18 April 2011).
 - 28 Defendant Hsaun Bin Chen's Notice of Motion and Motion to Dismiss the Superseding Indictment, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 12 November 2010).
 - 29 Order Denying Defendants' Motion to Dismiss the Indictment and for a Bill of Particulars, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 29 January 2011).
 - 30 Under *Hartford/Alcoa* line of cases, the Sherman Act applies to import commerce if the foreign conspiracy causes substantial intended effects on US commerce. See *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 795-96 (1993) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d. Cir. 1945), and stating that it is 'well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'); *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 287 (4th Cir. 2002); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).
 - 31 Notice of Motion and Motion of Defendants AU Optronics Corporation and AU Optronics Corporation America to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)), *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 23 February 2011).

there is no requirement that the complaint allege intent to affect US commerce.³² The court ultimately ducked the issue, finding that the government's complaint contained allegations sufficient to satisfy even the defendant's proposed standard.³³

Whether the requirements of the FTAIA are substantive or jurisdictional, and whether and in what form intent to affect US commerce exists as a requirement for Sherman Act cases based on foreign conduct, will continue to be a live and hotly contested issues for years to come.

Foreign Sovereign Immunities Act

Under US law, foreign sovereigns and their 'instrumentalities' (which importantly may include companies owned or controlled by the state) are presumptively immune from the jurisdiction of US federal and state courts. The Foreign Sovereign Immunities Act³⁴ ('the FSIA') is the sole basis through which US courts can obtain jurisdiction over such entities. A defendant seeking to establish FSIA immunity bears the initial burden of demonstrating that it qualifies as a foreign sovereign, after which the burden shifts to the plaintiff to prove that an exception applies.

For antitrust purposes, the most important FSIA exception is the one for commercial activity.³⁵ Immunity does not extend to suits based on commercial activity having a sufficient tie to US commerce. Commercial activity is 'either a regular course of commercial conduct or a particular commercial transaction or act' whose character is determined 'by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose'.³⁶ The question is not one of motive but of whether the actions in question are akin to those undertaken by a private party engaged in trade or commerce.

The act of state doctrine

In some foreign jurisdictions, companies may still be subject to regulatory requirements that put them at risk of violating US law. The act of state doctrine dictates that the US courts must decline jurisdiction over a case when to decide that case might entail the court's refusing to give effect to the official act of a foreign sovereign. Despite its name, the act of state doctrine may be invoked by both state and non-state actors. The pivotal issue is that the US court must confront the validity of the official act of a foreign sovereign in order to adjudicate the case.³⁷ The act of state doctrine is based on concerns about

32 United States' Opposition to Defendant AU Optronics Corporation and AU Optronics Corporation America's Motion to Dismiss the Superseding Indictment, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 25 March 2011).

33 Order Denying Defendants' Motion to Dismiss the Indictment, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110-SI (N.D. Cal. filed 18 April 2011).

34 28 U.S.C. §§1330, 1332(a), 1391(f), and 1601-1611.

35 28 U.S.C. §1605(a)(2).

36 28 U.S.C. §1603(d).

37 US Dept. of Justice & Federal Trade Comm'n, Antitrust Enforcement Guidelines for International Operations 3.33 (1995).

judicial branch interference with foreign policy, which is the domain of the executive and legislative branches. Thus, while the FSIA is principally concerned with protecting the dignity of foreign sovereigns, the closely related act of state doctrine is founded upon US constitutional principles of separation of powers.³⁸

Foreign sovereign compulsion

Foreign sovereign compulsion is a narrow doctrine that is invoked only when the defendant can demonstrate that it was actually compelled by a foreign sovereign to violate US law, such that there was no way that it could possibly have complied with the law of both jurisdictions.³⁹ What constitutes compulsion is likely to be a fact-specific inquiry, but compulsion is probably demonstrated when the defendant can show that its failure to comply with the directive of the foreign sovereign would have resulted in penal or other severe sanctions. Two district courts recently came down differently regarding the foreign sovereign compulsion arguments of Chinese companies, both of which were subject to export regimes created by the Chinese Ministry of Commerce ('MOFCOM'). One found that defendants could not demonstrate compulsion when they appeared to have 'enthusiastically embraced' a MOFCOM price-setting regime;⁴⁰ the other, on roughly analogous facts, felt that the significant practical consequences of the defendant's failing to comply with the MOFCOM regime were such that the defendants were indeed compelled as a matter of law.⁴¹

Comity

International comity is a flexible, indeed somewhat fluid doctrine under which the federal courts sometimes abstain from exercising jurisdiction over a legal matter where to do so might impinge upon the laws or interests of another nation. Comity therefore overlaps with the act of state and foreign sovereign compulsion doctrines in its concern with the extraterritorial effects of US judicial action, but because it is more flexible, it might theoretically reach cases that those two doctrines do not. The Supreme Court appears, however, to have construed the doctrine rather narrowly in *Hartford Fire*.⁴² After *Hartford Fire*, comity is perhaps more potent in antitrust as an informal recognition of the need for cooperation in dealing with conduct that has transnational effects than as a formal limitation on the jurisdiction of the US courts over cases having an extraterritorial dimension.

38 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (doctrine driven by 'the basic relationship between branches of government in a system of separation of powers').

39 *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798–99 (1993).

40 *Animal Sci. Prods. v. China Nat'l Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, 423–24 (D.N.J. 2010), rev'd on other grounds, 654 F.3d 462 (3d Cir. 2011).

41 *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011). MOFCOM itself submitted an amicus brief asserting that the consequences to the defendants of not complying with MOFCOM's directives would have been serious. While such submissions are obviously self-serving, in this instance the court found MOFCOM's claims persuasive.

42 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

IV MEANS OF DETECTION

The Antitrust Division has a variety of means of detecting cartel conduct, including the voluntary cooperation of conspirators through the Leniency Program and Amnesty Plus; information gleaned from ‘whistle-blower’ employees; customer complaints; and tips from government procurement officers, who receive training from the Antitrust Division in spotting ‘red flags’ of collusive behaviour. Leads are also sometimes generated by other US law enforcement agencies, such as the FBI, US attorneys offices, and inspectors general for the various federal agencies, carrying out their own investigations of the industry or party in question.

Unlike some enforcement agencies, the Antitrust Division generally does not use statistical tests, or ‘screens’, to identify industries where competition problems exist. The Division’s heavy reliance on the Leniency Program to identify violations arguably creates a bias toward uncovering conspiracies in which distrust has already developed among the conspirators, meaning that the most successful and durable cartels go undetected.⁴³ Nonetheless, screens have a somewhat limited value since they are not capable of distinguishing between criminal cartel behaviour and merely cooperative behaviour in oligopoly industries, which is potentially a source of economic inefficiency but not in itself a violation of Section 1.

i Leniency

The Leniency Program is the cornerstone of the Antitrust Division’s cartel enforcement regime. It creates powerful incentives for self-reporting by wrongdoers that can have a significant destabilising effect on a conspiracy. The Leniency Program has had a significant effect on enforcement. According to a 2011 report from the Government Accountability Office, between 2004 and 2010 the Division filed a total of 173 criminal cartel cases, 129 of which involved a successful leniency applicant (75 per cent).⁴⁴ The success of the Leniency Program has been such that more than 50 jurisdictions have adopted similar programmes of their own.

The Division grants leniency to only one party in each conspiracy, and the race for the one leniency grant can sometimes be decided by hours when it becomes apparent to multiple conspirators that the agreement is on the verge of collapse. The difference in outcomes in such situations is often striking.⁴⁵ Subsequent cooperators nonetheless

43 For an argument that the Division should use screens to develop investigative leads, see Rosa Abrantes-Metz & Patrick Bajari, ‘Screens for Conspiracies and Their Multiple Applications’, 24 *Antitrust* 66 (Fall 2009).

44 ‘Stakeholder View on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection’, United States Government Accountability Office Report to Congressional Committees (July 2011), available at www.gao.gov/new.items/d11619.pdf.

45 Scott D Hammond, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, available at www.justice.gov/atr/public/criminal/239583.pdf. (‘Under the policy that only the first qualifying corporation receives conditional leniency, there have been dramatic differences in the disposition of criminal

may receive significant benefits, with the benefits decreasing the longer a party waits to cooperate. A leniency applicant must admit to a criminal violation of the antitrust laws in order to receive conditional leniency, it must move expeditiously to end its participation in the conspiracy, and it must commit to providing complete cooperation to the Antitrust Division.

The Corporate Leniency Policy⁴⁶ includes two types of leniency, Type A leniency and Type B leniency. Type A leniency is available only when the Division has not received information about the activity being reported from any other source. Type B leniency, whose benefits are not as great, is available even after the Division has commenced an investigation.

The requirements for Type A leniency are:

- a* at the time the corporation comes forward, the Division has not received information about the activity from any other source;
- b* upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity;
- c* the corporation reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation;
- d* the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
- e* where possible, the corporation makes restitution to injured parties; and
- f* the corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If a corporation qualifies for Type A leniency, all directors, officers, and employees of the corporation who admit their involvement in the violation and cooperate with the Antitrust Division's investigation will also receive leniency. Paragraph 4 of the model corporate conditional leniency letter⁴⁷ details the specific conditions for leniency protection for directors, officers, and employees.

The requirements for Type B leniency are:

- a* the corporation is the first to come forward and qualify for leniency with respect to the activity;
- b* at the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction;
- c* upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity;

liability of corporations whose respective leniency applications to the Division were very close in time.')

46 Department of Justice Corporate Leniency Policy, available at www.justice.gov/atr/public/guidelines/0091.htm.

47 The model corporate conditional leniency letter may be found at www.justice.gov/atr/public/criminal/239524.pdf.

- d* the corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation;
- e* the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
- f* when possible, the corporation makes restitution to injured parties; and
- g* the Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward.

If the corporation qualifies for Type B leniency, Antitrust Division policy states that directors, officers, and employees of the corporation will be considered for immunity from criminal prosecution. In practice, the Division ordinarily provides leniency to qualifying employees of a Type B applicant on the same basis as it does for employees of a Type A applicant.⁴⁸

The Individual Leniency Policy applies to a director, officer, or employee of a culpable corporation who comes forward on his or her own to report a violation. Once the corporation applies for leniency, individual directors, officers, and employees may be considered for leniency only under the Corporate Leniency Policy. The Individual Leniency Policy requires the director, officer, or employee to meet three conditions:

- a* at the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source;
- b* the individual reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation; and
- c* the individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.⁴⁹

ii Amnesty Plus

The Amnesty Plus programme has also been a powerful source of investigative leads for the Antitrust Division.⁵⁰ Amnesty Plus is available to a company that cannot claim leniency for a conspiracy already under investigation by the Division (the 'A' conspiracy) but which, in the course of its own internal investigation, uncovers evidence of a second conspiracy (the 'B' conspiracy) of which the Division is not aware. Under Amnesty Plus,

48 Scott D Hammond & Belinda A Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, Question 23, available at www.justice.gov/atr/public/criminal/239583.htm.

49 Department of Justice Leniency Policy for Individuals, available at www.justice.gov/atr/public/guidelines/lenind.htm.

50 Scott D Hammond, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, available at www.justice.gov/atr/public/criminal/239583.pdf. ('A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy.')

that company is not only eligible to receive leniency for the ‘B’ conspiracy, but may receive additional consideration from the Division in the ‘A’ conspiracy. While sentencing discretion ultimately rests with the court, the Division will recommend to the sentencing court that the company receive a substantial discount for its role in the ‘A’ conspiracy in light of its cooperation in the ‘B’ investigation. The size of this recommended discount depends on a variety of factors, including: (1) the strength of the evidence provided by the cooperating company in the ‘B’ investigation; (2) the potential significance of the violation reported in the ‘B’ investigation; and (3) the likelihood that the Division would have uncovered the ‘B’ conspiracy absent the self-reporting by the company.⁵¹

iii Government contracting

The US government puts billions of dollars of contracts out to bid annually, and it is increasingly dependent upon private firms to provide services in areas such as national defence and technology services. These markets are sometimes highly concentrated, raising the risk of bid rigging. The Antitrust Division has devoted substantial resources to training federal procurement officers to detect when these competitive bidding processes have been compromised.

The Antitrust Division has a long tradition of outreach and training for agents and investigators in the federal and state governments. The latest instance of this tradition came in 2009 when the Antitrust Division created the MAPS⁵² programme in response to the passage of the American Recovery and Reinvestment Act (the 2009 economic stimulus bill referred to as ‘the Recovery Act’). The Recovery Act directed various government agencies to spend large sums of money in a short period of time with the objective of stimulating the economy. The Division chose this time to launch a new training initiative for government officials charged with distributing these sums. The Division designed the MAPS programme to train government procurement officials to spot the ‘red flags’ of collusive behaviour. ‘MAPS’ training uses market analysis to identify potential high-risk bidding areas and trains officials to identify suspicious patterns in bidding and remarks by contractors that seem to reveal communications with other bidders. The MAPS programme also includes recommendations for best practices in procurement designed to insulate the process from bid rigging.⁵³ The MAPS programme continues to be a staple training for procurement officers serving state and federal agencies.

V LENIENCY PROGRAM MECHANICS

i Securing a marker

When counsel first obtains information that his or her client may have engaged in criminal cartel behaviour, that information may be incomplete or inconclusive as to

51 Id., at Question 9.

52 MAPS stands for ‘Market, Applications, Patterns, and Suspicious behaviour’.

53 US Dept. of Justice Antitrust Division, Congressional Submission FY 2012 Performance Budget at 42, available at www.justice.gov/jmd/2012justification/pdf/fy12-atr-justification.pdf.

whether the law has been violated or as to the extent of the conspiracy. Nonetheless, counsel should move quickly to secure a 'marker' from the Antitrust Division. The Division grants only one leniency application per conspiracy, and the Division has made it clear that there have been several instances in which the second company in was beaten by only a matter of hours. While the marker is in effect, no other company can 'leapfrog' the applicant that has the marker.

The evidentiary standard for obtaining a marker is relatively low. To obtain a marker, counsel must: (1) report that he or she has discovered evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product or service involved with sufficient specificity to allow the Division to determine whether leniency is still available; and (4) in most cases, identify the client.⁵⁴ The marker is good for a finite period intended to give the applicant an opportunity to conduct an internal investigation into the alleged conduct. A 30-day period for an initial marker is common. The marker may be extended at the Division's discretion if the applicant demonstrates that it is making a good-faith effort to complete its investigation in a timely manner.

In some instances, the company's internal investigation will uncover additional crimes not disclosed in the initial marker request. In keeping with its desire to encourage offenders to self-report through the Leniency Program, the Division's policy is to expand coverage for the applicant to include the newly discovered offences if leniency is still available for those offences.

Initial contact is generally made with either the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement or Director of Criminal Enforcement, who together review all requests for leniency. An applicant may also call any one of the Division's field offices or, if counsel is aware that the Division has begun an investigation, contact the investigating staff directly. Regardless, an applicant would be well advised to make a marker request orally, since written communications with the Division are potentially discoverable in subsequent civil litigation.

ii Confidentiality

The increasing willingness of jurisdictions to cooperate with one another in cartel investigations necessarily raises concerns for the leniency applicant as to the confidentiality both of its identity and of any information that it provides to the government. The Antitrust Division's policy has always been to treat this information as confidential absent agreement with the applicant, prior disclosure by the applicant, or by order of a court. Most other major enforcement jurisdictions have followed the Division's policy on

54 Scott D Hammond & Belinda A Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, Question 2, available at www.justice.gov/atr/public/criminal/239583.htm. The Antitrust Division will occasionally grant an anonymous marker when a counsel needs more time to verify additional information. An anonymous marker is of short duration, ordinarily a matter of days. After that, the counsel must identify his or her client or surrender the client's place in line.

this issue, such that, generally speaking, the leniency applicant has control over the flow of its information between governments.⁵⁵

Most leniency applicants consent to the sharing of their information among investigating jurisdictions so that those jurisdictions may coordinate their investigations. Coordination among jurisdictions has the potential to benefit the applicant to the extent that it reduces the need to respond separately to multiple information requests and also speeds resolution of a matter the corporation would generally prefer to put behind it. On the other hand, one could imagine a circumstance in which the better choice would be to withhold consent, for instance where the case for liability in the jurisdiction seeking information is marginal or where the enforcement resources of that jurisdiction are limited, such that it might simply drop its investigation in the absence of cooperation. The decision as to whether to waive confidentiality is therefore strategic and fact-driven, and counsel need not apply a 'one size fits all' approach.

iii Carve-outs

Antitrust Division policy with respect to charging individual employees has evolved significantly in the past decade. Formerly, corporate plea agreements typically protected most or all such employees from criminal prosecution. Recently, however, the Division has been strongly committed to hold individual executives accountable for cartel offences, a shift it believes is essential to effective deterrence. The result is that the Division increasingly 'carves out' culpable individuals for subsequent prosecution. The timing of a company's cooperation will affect the number of individuals carved out of the company's plea agreement. Generally speaking, the later the company is 'coming through the door', the longer the carve-out list will be.⁵⁶

The Antitrust Division's policy of identifying carved-out individuals by name in its leniency agreements has received some criticism.⁵⁷ Inclusion on a carve-out list does carry a measure of public stigma that strikes some as potentially unfair to individuals who may or may not be culpable and may never be charged with a crime. While this criticism is not wholly unfounded, a change in policy by the Antitrust Division seems unlikely. In defending the policy, the Division properly notes that since a leniency agreement creates a judicially enforceable contract between the Division and the applicant, clarity as to who is carved out is essential. In addition, non-public, *in camera* identification of the carve-outs is inconsistent with the Division's commitment to, and the public's right and

55 Scott D Hammond, 'Beating Cartels at Their Own Game: Sharing Information in the Fight Against Cartels', 20 November 2003, available at www.justice.gov/atr/public/speeches/201614.pdf.

56 This held true, for example, in the recent *DRAM*, *Rubber Chemicals*, and *Air Cargo* investigations. In the *DRAM* investigation, the third company through the door, Samsung, had seven carve-outs.

57 Leslie R Caldwell, 'DOJ's Inconsistent Publicizing of Suspects', *New York Law Journal*, 14 November 2007 (noting that the policy of the DOJ's Criminal Division and US Attorney's offices is not to identify uncharged individuals by name, including so-called unindicted co-conspirators).

interest in, transparency in the criminal justice process. Finally, a proper reading of the leniency agreement shows that the carve-outs are simply individuals who may be charged and that inclusion on the carve-out list is not, as has been claimed, ‘tantamount to an accusation of criminal conduct’.⁵⁸

To date, courts have universally upheld the Division’s carve-out policy against challenges from would-be carve-outs.⁵⁹

iv Cooperation with the Antitrust Division

Paragraph 2 of the Antitrust Division’s model corporate conditional leniency letter describes with specificity the cooperation obligations of the leniency applicant, including the provision of documents, making best efforts to secure the cooperation of current employees, and paying restitution to victims.⁶⁰ The leniency agreement does not require the company to turn over documents protected by attorney–client privilege, although of course the company may do so voluntarily.⁶¹ The company must make best efforts to secure the cooperation of current employees, but failure to secure that cooperation will not necessarily disqualify it from consideration for leniency.⁶² The Antitrust Division will consider the number and significance of the individuals who do not cooperate in deciding whether the company has actually confessed its wrongdoing and whether the Division is receiving the full benefit of the leniency agreement.⁶³ If the Division ultimately grants leniency to the corporation, however, employees who have declined to cooperate are not covered by the leniency grant and are subject to indictment.⁶⁴

If the Antitrust Division determines prior to granting a final, unconditional leniency letter that the applicant has not provided the cooperation set forth in the conditional leniency letter, it may revoke the applicant’s conditional acceptance and seek to indict the applicant and any culpable employees. The Division’s only attempt to revoke leniency ultimately failed. In 2002, after the *Wall Street Journal* published an article strongly suggesting that illegal activity had taken place in the bulk liquids shipment industry, Stolt-Nielsen reported its participation in an unlawful customer allocation conspiracy to the Division.⁶⁵ Stolt-Nielsen sought acceptance into the Leniency Program and received a marker, although the leniency application may have been triggered by the news article. Stolt-Nielsen cooperated with the investigation, and during meetings with Antitrust Division staff, counsel for Stolt-Nielsen represented that the company had taken prompt

58 Id.

59 See *Doe v. Hammond*, 502 F.Supp.2d 94 (D. D.C. 2007); *United States v. Korean Airlines Co.*, 505 F.Supp.2d 91 (D. D.C. 2007).

60 The model corporate conditional leniency letter may be found at www.justice.gov/atr/public/criminal/239524.pdf.

61 US Dept. of Justice Antitrust Division, Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters paragraph 16 (‘FAQs’).

62 FAQs at paragraph 17.

63 FAQs at paragraph 17.

64 FAQs at paragraph 17.

65 *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553 (E.D. Pa. 2005).

steps to end its participation in the cartel.⁶⁶ The Antitrust Division secured guilty pleas from two of Stolt-Nielsen's competitors and certain of their executives. The Division eventually concluded that Stolt-Nielsen had not fulfilled the leniency conditions and revoked Stolt-Nielsen's conditional leniency grant and arrested a company executive.⁶⁷

Stolt-Nielsen and the arrested executive sought an injunction barring the Antitrust Division from prosecuting them. The district court granted the injunction, finding (1) that the Division cannot unilaterally rescind a leniency agreement but must seek a judgment from a district court that the applicant has breached the agreement; and (2) that Stolt-Nielsen had not in fact breached the agreement. This injunction was vacated by the court of appeals, which held that the district court should not have decided the issue in the absence of an indictment.⁶⁸ The Antitrust Division then indicted Stolt-Nielsen and the executive. Stolt-Nielsen renewed its objection, and the district court dismissed the indictments, again finding that Stolt-Nielsen had not breached the conditional leniency agreement.⁶⁹

Some members of the corporate defence bar expressed alarm regarding the Antitrust Division's decision to revoke Stolt-Nielsen's conditional leniency. Following the decision in *Stolt-Nielsen*, the Division was quick to confirm its commitment to a fair and transparent Leniency Program.⁷⁰

v Limitation on treble damages under ACPERA

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ('ACPERA') provides a measure of protection on the civil side for successful leniency applicants. Under ACPERA, so long as a leniency recipient provides 'satisfactory cooperation' to the civil plaintiff, the leniency recipient may only be held liable for 'actual damages sustained [...] attributable to the commerce done by the applicant in the goods or services affected by the violation', as opposed to the treble damages remedy normally imposed under Section 4 of the Clayton Act.⁷¹ Joint and several liability is also unavailable to the plaintiff.⁷²

What constitutes 'satisfactory cooperation' as the term is used in ACPERA remains somewhat unclear. The text of the Act specifies that 'satisfactory cooperation' includes (1) providing the civil plaintiff with all facts known to the leniency applicant that are 'potentially relevant to the civil action'; (2) furnishing potentially relevant documents; and (3) making him or herself (in the case of individual applicants) available for depositions or testimony, or (in the case of corporate applicants) using

66 *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d at 565.

67 *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 181 (3d Cir. 2006).

68 *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 184 (3d Cir. 2006).

69 *United States v. Stolt-Nielsen, S.A.*, No. 06-cr-466, 2007 U.S. Dist. LEXIS 88011 (E.D. Pa. Nov. 29, 2007).

70 See 'Scott Hammond on Stolt-Nielsen' (1 May 2008), available at www.justice.gov/atr/public/speeches/234840.htm.

71 Pub. L. No. 108-237, §213.

72 *Id.*

best efforts to secure depositions or testimony from cooperating individuals.⁷³ In 2010, Congress amended ACPERA to provide that a court must also consider the timeliness of the leniency applicant's cooperation when deciding whether that cooperation was 'satisfactory'.⁷⁴

In practice, leniency applicants face an interesting strategic choice in deciding how much cooperation to afford civil litigants. Since Section 4 does not provide for prejudgment interest, any delay in civil adjudication benefits the defendant. The defendant may also be reluctant to provide data that plaintiffs need to prove their quantum of damages. On the other hand, civil proceedings provide the leniency applicant with the chance to assist in a case that may result in treble damages against their co-conspirators, which may confer a competitive advantage. The applicant's decision regarding the timing and extent of its cooperation is therefore strategic and fact-driven.⁷⁵

For the moment there is scant case law to help leniency applicants determine precisely how recalcitrant they can be before they risk some adverse consequence from failing to provide 'satisfactory cooperation', nor is it clear what the consequences might be. To date, only one decision has addressed the duty of a leniency applicant to cooperate with civil plaintiffs under ACPERA.⁷⁶ In that case, the Antitrust Division's investigation into price fixing in the LCD market lasted for several years, during much of which time civil discovery was stayed. The plaintiffs asked the district court hearing the civil case to compel the leniency applicant to reveal itself and cooperate with the plaintiffs' investigation. The Division opposed the motion, arguing that compelling the applicant's cooperation in civil discovery would prejudice the Division's ongoing criminal investigation.⁷⁷ The district court held that until the civil case was finally adjudicated against the applicant, the court could not address the adequacy of its cooperation and whether it was entitled to the benefit of ACPERA.⁷⁸

The decision does not provide much insight into the scope of the applicant's duty to cooperate. Until the law in this area is clarified, defendants likely will continue to do just enough not to imperil the benefit they receive under ACPERA.⁷⁹

73 Id.

74 Pub. L. No. 111-190, §3, 124 Stat. 1275, 1276 (2010).

75 For a plaintiff's perspective on the defendant's duty to cooperate under ACPERA, see Jay L Himes, 'It Ain't Funny How Time Slips Away: Amnesty Recipient Cooperation in Civil Antitrust Litigation', Global Competition Policy (August 2009) ('The very specificity of ACPERA's cooperation provisions demonstrates that Congress intended to afford the civil plaintiffs meaningful assistance pursuing their case, not a fleeting shadow to be forever chased.')

76 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009).

77 United States' Opposition to Direct Purchaser Plaintiffs' Motion to Compel the Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have to Claim Reduced Civil Liability, dated 1 May 2009.

78 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009).

79 As noted elsewhere, the Antitrust Division maintains the confidentiality of leniency applicants unless compelled to reveal the applicant's identity by court order. Note, however, that in some circumstances firms that are publicly traded in the United States may be required to reveal their

vi **Representational conflicts**

Representational conflicts are a frequent issue for corporate counsel who investigate potential cartel activity. Corporate internal investigations will generally involve interviews with senior company personnel, some of whom may face significant criminal exposure themselves and whose interests are not always aligned with those of the company. Upjohn warnings are essential in this context.⁸⁰

ACPERA softened the representational conflict issue for companies that receive corporate leniency.⁸¹ For companies that receive Type A leniency, leniency will automatically extend to ‘directors, officers, and employees of the corporation’ so long as the individuals admit their involvement ‘with candor and completeness’ and assist the Division throughout its investigation.⁸² For companies that receive Type B leniency, the Division ordinarily will extend leniency to the same set of individuals under the same circumstances.⁸³ When both the company and its officers, directors, and employees are protected under the same leniency ‘umbrella’, their interests are closely aligned, as both have an interest in assisting the Division and preserving leniency. Note, however, that the possibility of shared leniency does not automatically eliminate a potential conflicts issue. For instance, an individual may chose to assert his or her innocence rather than share in the corporation’s leniency, which likely would place his or her interests at odds with those of the corporation.

For cartel participants who do not receive Type A leniency, the corporation’s interests may still lie in cooperating with the government. In this scenario, however, the corporation cannot use the Division’s Leniency Program to shield its directors, officers and employees. In many circumstances an employee’s personal interests might be better served by declining to cooperate. This divergence can create a conflict of interest problem around which counsel must navigate very carefully.

participation in the Leniency Program, as well as some information regarding the underlying conduct, as part of their securities disclosure obligations.

- 80 *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Court held that a company could invoke attorney-client privilege to protect communications made between company lawyers and company employees, including non-management employees, but that the privilege belonged to the company only. The *Upjohn* warning is sometimes colloquially referred to as the ‘corporate *Miranda*,’ after the Supreme Court case that established the principal that the police must advise a criminal suspect of his or her right to counsel and right to refuse to answer questions during a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966).
- 81 Recall that ‘Type A’ leniency is available only to the first cartel participant that files for a marker, and then only under certain other conditions. See Section IV.i, *supra*.
- 82 Department of Justice Corporate Leniency Policy, available at www.justice.gov/atr/public/guidelines/0091.htm; see 15 U.S.C. §1.
- 83 Scott D Hammond & Belinda A Barnett, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, Question 23, available at www.justice.gov/atr/public/criminal/239583.htm.

US v. Norris,⁸⁴ in which the court convicted a British executive of conspiracy to obstruct justice in connection with an Antitrust Division investigation into price fixing in the industries for various carbon products, underlines the degree of caution corporate counsel should use when speaking to officers and employees. The government alleged that Ian Norris, then CEO of Morgan Crucible, obstructed the Division's investigation by, *inter alia*, conspiring with others to create falsified 'scripts' that would incorrectly characterise certain meetings with competitors as joint venture meetings.⁸⁵ Norris provided the scripts to Morgan Crucible's corporate counsel, who in turn produced the documents to the Antitrust Division.⁸⁶

The Antitrust Division subsequently indicted Norris on several counts including price fixing and corruptly persuading others with intent to cause others to alter, destroy, mutilate or conceal records.⁸⁷ Norris attempted to exclude testimony by the attorney for Morgan Crucible to whom he had given the allegedly fabricated scripts, arguing that his communications with the lawyer were protected by attorney–client privilege. The key issue was whether an attorney–client relationship existed between corporate counsel and Norris as an individual, or whether counsel represented only the company. As supporting evidence for the existence of an attorney–client relationship with Norris as an individual, Norris cited an e-mail in which the attorney said he had told the Antitrust Division that 'the firm represents the parent company, its affiliates and its current employees.'⁸⁸ The trial court found that no attorney–client relationship existed between counsel for the corporation and Mr Norris as an individual, and allowed the lawyer to testify.⁸⁹

Although the holding in *Norris* ultimately came out against the individual employee, the case serves as a cautionary tale for corporate counsel handling a cartel investigation.

vii Whistle-blower protection

In July 2012, two members of the US Senate, Charles Grassley and Patrick Leahy, introduced proposed legislation to protect employees who report antitrust violations to federal officials. The Criminal Antitrust Anti-Retaliation Act⁹⁰ would amend ACPERA to allow an employee who feels their employer has retaliated against them for reporting wrongful conduct to file a complaint with the Secretary of Labour. If the complaint is

84 *United States v. Norris*, 722 F.Supp.2d 632 (E.D. Pa. 2010).

85 Second Superseding Indictment, *U.S. v. Ian P. Norris*, No. 03-cr-632 (E.D. Pa. 28 September 2004).

86 722 F.Supp.2d at 635.

87 Second Superseding Indictment, see footnote 85.

88 Ian P Norris's Memorandum in Opposition to Antitrust Division's Motion In Limine to Permit Testimony of Sutton Keaney; Request for Evidentiary Hearing, at 5, 2:03-cr-00632-ER (E.D. Pa. filed 5 June 2010).

89 Norris' appeal was denied by the Third Circuit, which agreed with the trial court that the communications were not privileged. *United States v. Norris*, No. 10-4658, 2011 WL 1035723 (3d. Cir. 23 March 2011) (not published).

90 S. 3462.

substantiated, the employee would be entitled to reinstatement, back pay, and litigation costs, including attorney's fees. Unlike some whistle-blower statutes, the Grassley-Leahy proposal does not include financial incentives for employees to report wrongdoing. The Antitrust Division has not taken a position on the legislation, apparently believing that whistle-blowers are protected by existing federal law, and passage of the bill is uncertain.

VI PENALTIES

The primary determinant for sentencing in cartel cases is the US Sentencing Guidelines.⁹¹ Although most cartel cases brought by the Division result in plea agreements in which the Division negotiates an agreed-upon sentence with each defendant, the Guidelines are the starting point for these negotiations. Judges are involved in the sentencing process either when they consider approval of plea agreements or impose sentence after trial; in both cases their discretion is informed by the Sentencing Guidelines.⁹² Although the Guidelines take a number of factors into account, the volume of commerce affected by an antitrust conspiracy is the dominant factor in calculating the recommended sentence for a Section 1 violation.

i Volume of commerce

The volume of commerce affected is the most important variable in determining the recommended sentence for cartel participants under the Guidelines. The sentencing calculation differs between individuals and corporations, but in both cases the volume of commerce is the most important factor. For individuals, the sentencing recommendation is composed of both imprisonment and a fine. The recommended term for imprisonment is determined primarily by reference to an offence level.⁹³ Cartel offences have a base offence level of 12, with an increase of up to 16 levels depending on the volume of commerce affected.⁹⁴ To illustrate the importance of volume of commerce, if all other factors were held constant, the same criminal action would result in a recommended sentence of 10 to 16 months if the volume of commerce affected were less than US\$1 million, as compared to a recommended sentence of six-and-a-half to eight years if the volume of commerce affected were greater than US\$1.5 billion.

For both corporations and individuals, calculating the recommended fine begins by taking a specific proportion of the volume of commerce (20 per cent for corporations, and between 1 and 5 per cent for individuals). For individuals, the calculation stops

91 United States Sentencing Commission Guidelines Manual ('USSG'), §2R1.1 (Bid Rigging, Price Fixing or Market Allocation Agreements Among Competitors).

92 After *States v. Booker*, 543 U.S. 220 (2005) judges may deviate from the recommendations embodied in the Guidelines. However, judges must begin sentencing opinions by calculating the recommended sentence under the Guidelines, and failure to do so is a reversible error.

93 The Guidelines also take the criminal history of the defendant into account. See USSG §5A (sentencing table).

94 USSG §2R1.1.

there.⁹⁵ Corporate fines are subject to adjustment by a multiplier depending on the corporation's 'culpability score', but the multiplier cannot fall below three-quarters nor rise above four.

Given the dominant role that volume of commerce plays in cartel sentencing, it is perhaps surprising that there is no established method for calculating the 'volume of commerce affected' by a given conspiracy. The Sentencing Guidelines offer virtually no guidance, and because most criminal cartel defendants strike plea bargains with the Antitrust Division prior to the sentencing phase of the case, there is scant case law on the issue.⁹⁶

The *Air Cargo* cases illustrate the amplified effect that variations in the method for determining the volume of commerce can have on the size of a cartel defendant's sentence. The Division takes the position that the volume of commerce must include the entire price paid by customers, rather than just the component of the total price that was subject to price fixing. In the *Air Cargo* cases, this meant calculating the volume of commerce using the total price of air transportation for cargo, rather than the fuel surcharge that many airlines levied against customers and that had been inflated by price fixing.⁹⁷ The result was a volume of commerce calculation many times larger than it would otherwise have been.

One outstanding issue concerns whether the volume of commerce in international cartel cases should include sales made outside the United States. While public statements by the Antitrust Division indicate that only US sales are to be included in the volume of commerce calculation,⁹⁸ the Division has nevertheless considered foreign sales when determining fines. The most recent example comes from the ongoing *Auto Parts*

95 The percentage calculation for individual fines is subject to a lower bound of US\$20,000 – that is, the recommended fine for an individual can never fall below US\$20,000. *Id.*

96 According to the Guidelines, 'the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation'. *Id.*

97 See Plea Agreement at 3, *United States v. Korean Air Lines Co.*, Criminal No. 07-184 JDB (D. D.C. 1 August 2007), available at www.justice.gov/atr/cases/f225500/225524.htm (the price used to calculate volume of commerce 'consisted of a base rate and, at times during the relevant period, various surcharges and fees, such as a fuel surcharge and a security surcharge.')

98 See Brief for the United States and the Federal Trade Commission as Amici Curiae, *Statoil ASA v. Heeremac V.O.F.*, No. 00-1842 (3 January 2002), available at www.ftc.gov/ogc/briefs/statoil.pdf ('It is the policy of the United States to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted, fines obtained by the government were based solely on domestic commerce.');

Gary R Spratling, 'Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases', speech before the 13th Annual National Institute on White Collar Crime 18 (4 March 1999), available at www.justice.gov/atr/public/speeches/2275.pdf (the Division 'will normally use the volume of US commerce affected by the defendant's participation in a conspiracy when calculating that defendant's Sentencing Guidelines' fine range.').

investigation. In its plea agreement with corporate defendant Furukawa, the Antitrust Division fined the company for its participation in the *Auto Parts* conspiracy based on: (1) sales of auto parts that were manufactured abroad, but sold into the US for installation in cars made or sold in the US; (2) sales of auto parts that were actually manufactured in the United States and sold to automotive manufacturers in the United States; and, in part, (3) sales of fixed auto parts that were manufactured and sold abroad, but put into cars on assembly lines that were destined for the United States.⁹⁹ In *Auto Parts* and other recent cases, the Division has shown a propensity to expand the volume of commerce affected by a conspiracy by looking to both direct and indirect sales made into the United States.

Determining the volume of commerce in a cartel case is more art than science. In most cases, there is a process of negotiation between the Division and the parties. In general, the Division will seek the widest possible definition of volume of commerce, while the parties will seek the smallest. However, the Division's ambitions are tempered by at least two factors: the risk that a court might reject an overly aggressive definition, and the fact that the Division does not wish to make entering plea agreements an unattractive proposition for cartel participants. Cartel participants considering whether to enter a plea agreement must weigh the likely outcome of a negotiation over the volume of commerce definition.

ii 18 U.S.C. Section 3571

Under the Sherman Act as modified by ACPERA, the maximum possible fine for a corporate defendant is US\$100 million. However, the Antitrust Division has long taken the position that fines larger than US\$100 million are made possible by 18 U.S.C. Section 3571. That statute, which is a general criminal sentencing provision not specific to antitrust, provides that when any person derives pecuniary gain from the defendant's offence, the defendant 'may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process'. It is this provision that has allowed the Antitrust Division to negotiate numerous plea agreements with corporate defendants for fines substantially in excess of US\$100 million.

Prior to the recent verdict in *AU Optronics*, the Division had seen little success in pursuing alternative fines under Section 3571 outside the context of a plea agreement.¹⁰⁰ *AU Optronics* was the first case in which a court imposed a sentence greater than the

99 The third category of commerce was taken into consideration in determining the starting point for the cooperation discount. Scott Hammond, Deputy Assistant Attorney General for the Antitrust Division, stated: 'Not considering that commerce at all would have, I think, understated the seriousness of the offence and the impact this conduct had on the United States.' Ron Knox, 'The GCR Cartel Roundtable', *GCR*, 10 May 2012, www.globalcompetitionreview.com/features/article/31774/the-gcr-cartel-roundtable/.

100 See *U.S. v. Andreas*, 96-cr-762 (N.D. Ill. 2 June 1999) (refusing to apply the alternative fine statute when the Division did not comply with the court's order to provide certain pricing information to the defendants); *US v. O'Hara*, 90-cr-26, 1991 WL 286176, at *3 (D. Me. 13 September 1991) ('The alternative for calculating the bid-rigging fine – twice the gross

Sherman Act's US\$100 million statutory maximum in a contested sentencing after a jury trial. The case was a resounding success for the Division, ultimately resulting in a US\$500 million fine against AU Optronics.¹⁰¹

In the course of its overall victory in *AU Optronics*, the Division lost one important battle. The district court held that if the Division sought an alternative fine in excess of US\$100 million, under the rule established in *Apprendi v. New Jersey*,¹⁰² it would have to prove the amount of gross gain or loss to the jury beyond a reasonable doubt.¹⁰³ The Northern District reached this ruling despite the Division's argument that *dicta* in *Oregon v. Ice*¹⁰⁴ had carved out a space in which the *Apprendi* rule does not apply: namely, sentencing choices that traditionally fall within the purview of the judge rather than the jury.¹⁰⁵ The Northern District distinguished *Ice* on several grounds, including the fact that the criminal antitrust fine in this case was 'the primary form of punishment the government seeks and could amount to as much as \$1 billion'.¹⁰⁶ By contrast, the Supreme Court's *dicta* in *Ice* was prompted by a trial court's decision that a criminal defendant should serve consecutive rather than concurrent jail terms, which decision the Supreme Court characterised as an 'accoutrement' to the primary sentencing decisions.¹⁰⁷

As luck would have it for the Antitrust Division, however, its loss on this issue ultimately proved to be a long-term win, as a contrary result would have potentially jeopardised the greater than US\$100 million fine in *AU Optronics*. Shortly following *AU Optronics*, the Supreme Court decided *Southern Union Co. v. United States*. While that case involved the appeal of a sentence for a charge of storing hazardous waste without a permit under the Resource Conservation and Recovery Act, the question presented to the Court, as in *AU Optronics*, was whether *Apprendi* applies to the imposition of criminal fines such that a jury must find all issues of fact necessary to determine the amount of the fine.¹⁰⁸ The Court answered this question in the affirmative.¹⁰⁹ Accordingly, it is fair

pecuniary gain or twice the gross pecuniary loss – cannot be calculated without unduly prolonging or complicating the sentencing process and is, therefore, not considered.')

101 Judgment in a Criminal Case for Organizational Defendants, *US v. AU Optronics Corp.*, 09-cr-00110 (N.D. Cal. filed 2 October 2012).

102 530 U.S. 466 (2000) ('[A]ny fact that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.')

103 Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. §3571(d), *U. S. v. AU Optronics Corp.*, 09-00110 (N.D. Cal. 18 July 2011).

104 555 U.S. 160 (2009).

105 See footnote 98. The First Circuit had followed this logic a year earlier, affirming a district court's imposition of an US\$18 million dollar criminal fine even though the jury had made no finding with respect to how many days the defendant had stored hazardous waste illegally. *United States v. Southern Union Co.*, 630 F.3d 17 (1st Cir. 2010).

106 Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. §3571(d), *U.S. v. AU Optronics Corp.*, 09-00110 (N.D. Cal. 18 July 2011).

107 *Id.*

108 *Southern Union Co. v. U.S.*, 567 U.S. ___, No. 11-94 (2012).

109 *Id.*

to say the Antitrust Division dodged a bullet in *AU Optronics* and that in the future the Division will be prepared to plead and prove the amount of gross gain or loss to a jury beyond a reasonable doubt in any case where it plans to seek an alternative fine under Section 3571.

The *AU Optronics* sentencing was also notable because the court calculated the alternative sentence based on the aggregate gain or loss caused by the conspiracy. That is, the relevant figure for application of the alternative fine statute was the total loss or gain caused by all conspirators, as opposed to the gain or loss attributable to the individual defendant. Although other courts had previously calculated gain or loss for the purpose of applying Section 3571 on an aggregate or conspiracy-wide basis, the *AU Optronics* court was the first one to do so when sentencing a defendant in an antitrust cartel case.

iii Discounts

There are a number of potential sentencing discounts available to both corporate and individual cartel defendants. Among the most important are sentencing discounts for second-in corporate cooperators and downward adjustments for individuals under Section 5K of the Sentencing Guidelines.

A first-in corporation that applies for and obtains leniency receives full immunity from sentencing: successful applicants receive no criminal convictions, no criminal fines, and no jail sentences for employees. The position of a second-in cooperator – that is, a company that offers cooperation with the Antitrust Division after the Division has already granted leniency to another participant in the conspiracy – is substantially less advantageous, but a second-in cooperator still stands to receive a significant sentencing discount. How large a discount the second-in cooperator receives rests largely on the discretion of the Division. In exercising this discretion, the Division attempts to balance the value of the company's cooperation against the disproportionality in sentencing between defendants that results from discounts.¹¹⁰ Of course, any discount offered by the Division and embodied in a plea agreement must pass through review by the court and may be rejected (type C) or modified (type B).¹¹¹

There are a number of mechanisms through which second-in cooperators might enjoy sentencing discounts. First, the Division might move the court for a downward

110 See Scott D Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations', address to the 54th Annual American Bar Association Spring Meeting, Washington, DC (29 March 2006), available at www.justice.gov/atr/public/speeches/215514.pdf.

111 The Federal Rules of Criminal Procedure offer three potential forms for plea agreements. A so-called 'A' agreement under Rule 11(c)(1)(A), the government agrees to dismiss some of the counts in the indictment in return for a guilty plea to one or more of the other counts. The 'A' agreement may also include a sentencing recommendation. In a 'B' agreement under Rule 11(c)(1)(B) (the most common form of plea), the government agrees to recommend, or at least not to oppose the defendant's request for a particular sentence. A 'C' agreement under Rule 11(c)(1)(C) seeks to provide certainty to the defendant by taking sentencing discretion away from the district court. The court is not, however, obligated to accept a 'C' agreement and may insist that the plea be entered under Rule 11(c)(1)(A) or Rule 11(c)(1)(B).

departure from the sentencing guidelines under Section 8C4.1.¹¹² The Division often recommends discounts in the range of 30 to 35 per cent below the fine recommended in the Guidelines to second-in cooperators.¹¹³ Second, the Division will generally apply the Section 8C4.1 discount to a starting point that is the minimum of the range recommended in the Sentencing Guidelines – although the Division will chose a higher starting point if it determines either that the second-in cooperator played a leadership role in the cartel, or that the cooperator merits ‘Penalty Plus’ treatment.¹¹⁴ Third, the Division often agrees to fewer ‘carve-outs’ for high-ranking employees when the defendant is a second-in cooperator.¹¹⁵ Fourth, second-in cooperators may stand a better chance of enjoying credit under the Division’s Amnesty Plus or Affirmative Amnesty programmes.¹¹⁶ Finally, although it is not strictly speaking a sentencing discount, the Division’s practice is not to include in the volume of commerce affected for a second-in cooperator any commerce the Division discovered solely as a result of information provided by the second-in cooperator.¹¹⁷

Under Section 5K1.1 of the Sentencing Guidelines, the Antitrust Division may move the court for a downward departure from the sentencing guidelines for an individual who provides ‘substantial assistance’ to the investigation or prosecution. The Division has often done so in antitrust cartel cases.¹¹⁸ The Division may include a promise to request downward departure, subject to certain conditions, in a plea agreement.¹¹⁹ In considering motions for downward departure, the court may consider various factors including ‘the

112 USSG §8C4.1 allows the government to move for a downward departure when the corporate defendant has provided ‘substantial assistance’ in the investigation. The Guidelines further provide that the court shall determine an appropriate reduction based on various factors including (1) the ‘significance and usefulness’; (2) the ‘nature and extent’; and (3) the ‘timeliness’ of the company’s assistance.

113 See footnote 110, at 5.

114 *Id.* at 6–7. ‘Penalty Plus’ is the converse of ‘Amnesty Plus’. Amnesty Plus rewards a corporation with reduced sentencing for a conspiracy in one market if the corporation discovers a conspiracy in a second market during the course of its internal investigation and alerts the Division to the second conspiracy. Penalty Plus punishes a corporation with enhanced sentencing for a conspiracy in one market if the Division later learns of a conspiracy in a second market, and the corporation failed to discover the second conspiracy or failed to alert the Division.

115 *Id.* at 7; see Section V.iii, *supra*, for a discussion of carve-outs for individuals.

116 See Scott D Hammond, footnote 110, at 9–11.

117 *Id.* at 3–4.

118 See, e.g. Government’s Sentencing Memorandum and Government’s Motion for a Guidelines Downward Departure, *US v. Robert J. Hart*, 99-cr-595 (E.D. Pa. filed 19 October 1999); Government’s Sentencing Memorandum and Motion for a Guidelines Downward Departure, *US v. Bjorn Sjaastad*, 03-cr-652 (E.D. Pa. filed 16 October 2003).

119 See Model Annotated Individual Plea Agreement, paragraph 9 (13 July 2009), available at www.justice.gov/atr/public/guidelines/indl_plea_agree.htm; ‘The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All’, at remarks of Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division delivered

significance and usefulness of the defendant's assistance', the 'truthfulness, completeness, and reliability' of the defendant's testimony, any danger or injury to the defendant caused by his or her assistance, and the timeliness of the defendant's assistance.¹²⁰

While it does not qualify as an explicit 'discount', it is worth noting that individual foreign defendants in international cartel cases often receive jail terms that are significantly shorter than those of US defendants. The disparity in sentencing was much larger in the early 2000s than it is now, but it is still substantial. In 2010, the average prison sentence imposed against all individual cartel defendants – both foreign and US nationals – was 30 months; when the sample space is limited to foreign defendants, the average sentence was 10 months.¹²¹

Some commentators have observed that in contrast to other divisions of the Department of Justice, the Antitrust Division generally does not give fine reductions to corporations for maintaining compliance programmes.¹²² Some commentators further observe that there is tension between the Antitrust Division's reluctance to provide fine reductions for compliance programmes and the US Attorneys' Manual, which directs federal prosecutors to consider the 'existence and effectiveness of a corporation's pre-existing compliance program' as one of several factors when determining how to treat a corporate target.¹²³ Representatives of the Division take the position that the compliance programme of a company that has committed an antitrust violation and failed to obtain leniency must not, by definition, be 'effective' and thus has not met the requirements for receiving a discount under Section 8C2.5 of the Sentencing Guidelines.¹²⁴

iv Restitution and probation

Restitution to victims who were injured by the cartel is available as a punishment in cartel cases, but the Antitrust Division rarely pursues it. There are at least two reasons for this reluctance. First, criminal cartel convictions are often followed by private civil suits, which generally allow parties injured by the cartel to recover treble damages from the cartel participants, while restitution would serve only to make the injured parties

in Paris, France (17 October 2006), available at www.justice.gov/atr/public/speeches/219332.htm#N_74_.

120 USSG §5K1.1.

121 Division Update Spring 2011, Criminal Program, available at www.justice.gov/atr/public/division-update/2011/criminal-program.html.

122 See, e.g., Joseph Murphy & William Kolasky, 'The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior', 26 *Antitrust*, No. 2, Spring 2012, 61, at 63; see also Jonathan M Jacobson, *Antitrust Law Developments* 790–91 (Am. Bar Ass'n 6th ed. 2007) ('The Division has never recommended a reduction based on an effective antitrust compliance program.')

123 US Attorneys' Manual, 9-28.300 'Factors to Be Considered', available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrim.htm#9-28.300; see also Joseph Murphy & William Kolasky, footnote 122, *supra*.

124 Scott D Hammond, 'Agency Update with the Antitrust Division DAAGs', Comments at ABA Section of Antitrust Law Spring Meeting (30 March 2011); see also USSG §§8B2.1, 8C2.5.

whole.¹²⁵ Second, determining the amount of loss suffered by particular victims is difficult and complex, and may unduly complicate and delay the sentencing process.¹²⁶ This concern is sharpened by the availability of private civil suits as a mechanism to determine the amount of money owed to particular victims.

The Division may also recommend, and the court impose, a period of probation upon a corporate defendant in a cartel case.¹²⁷ Probation may include a variety of conditions, including that the corporation (1) not commit another federal, state, or local crime during the term of probation; (2) pay restitution if required; or (3) implement an antitrust compliance programme.¹²⁸ Notably, the Antitrust Division has recently begun seeking imposition of compliance monitors as a condition of probation, which can prove to be a costly and time-consuming constraint on corporate defendants.¹²⁹ Moreover, if a company violates the terms of its probation, the court may impose a variety of punishments, the harshest of which is revocation of probation and resentencing of the company.

v Extradition

The Division has focused increasing attention on prosecuting international cartels. In accordance with its position that punishing individuals is essential to effective cartel enforcement,¹³⁰ the Division often indicts foreign nationals who were leaders of or involved in a conspiracy. Until the recent extradition of Ian Norris, the Division had never successfully obtained formal extradition of an individual defendant from any foreign jurisdiction. There are no universal rules of extradition. Whether a defendant may face extradition depends on the particular terms of the bilateral extradition treaty

125 See USSG §8B1.1; see, e.g., United States' and Defendant Polo Shu-Sheng Hsu's Joint Sentencing Memorandum, at 3, *US v. Polo Hsu*, No. 11-cr-0061 (N.D. Cal. 15 March 2011) (government did not seek restitution because a follow-on private civil suit 'potentially provide[s] for a recovery of a multiple of actual damages').

126 See USSG §8B1.1; see, e.g., United States' Sentencing Memo. at 5–6, *U.S. v. UCAR Int'l Inc.*, No. 98-177 (E.D. Pa. 21 April 1998) ('Given the remedies afforded [antitrust victims] and the active involvement of private antitrust counsel [...] the need to fashion a restitution order is outweighed by the difficulty [in determining losses] and the undue complication and prolongation of the sentencing.')

127 See USSG §8D1.1 (listing the circumstances in which a court should impose probation).

128 *Id.* at §8D1.3.

129 US Sentencing Memorandum at 53, *United States v. AU Optonics Corp.*, No. CR-09-0110 SI (N.D. Cal. 11 September 2012), available at www.justice.gov/atr/cases/f286900/286934_1.pdf; see also Final Judgment, *United States v. Florida West International Airways, Inc.*, No. 10-20864-CR-SCOLA (S.D. Florida, November 2012).

130 See Belinda A Barnett, Senior Counsel, Antitrust Division, US Department of Justice, 'Criminalization of Cartel Conduct – The Changing Landscape,' Address in Adelaide, Australia (3 April 2009), available at www.justice.gov/atr/public/speeches/247824.htm#N_a_ ('[T]he Division has long advocated that the most effective deterrent for hard-core cartel activity, such as price-fixing, bid-rigging, and allocation agreements, is stiff prison sentences [for individuals].')

between the two countries involved. Most of the bilateral treaties to which the United States is a party provide that the other country will only extradite a defendant when the conduct underlying the offence charged is a crime under the laws of both countries (a concept referred to as 'dual criminality').¹³¹ Most foreign jurisdictions do not criminalise price fixing for individuals; hence the Division's historical difficulty in securing formal extradition from other countries.¹³²

Even in the case of *Ian Norris*, which was the first time a foreign jurisdiction extradited a defendant to the United States after he had been indicted for criminal price fixing, the United Kingdom extradited Norris only after a lengthy and contentious appeals process, and then only on grounds that Norris should face trial on his obstruction of justice charge rather than the price-fixing charge. Even so, the Division touted Norris' extradition as a sign that 'the safe harbors for offenders are rapidly shrinking' given the 'increased willingness [of foreign governments] to assist the United States in tracking down and prosecuting cartel offenders'.¹³³

As a practical matter, whether a foreign defendant travels to the United States to face price-fixing charges may have more to do with the defendant's interest in unobstructed international travel than with the possibility of formal extradition. Many defendants in international cartel cases are high-ranking executives in companies with an international scope. The existence of an outstanding arrest warrant that effectively bars their entry into the United States often provides an unacceptable crimp on their ability to conduct business.

Of course, the defendant has no motive to subject him or herself to the jurisdiction of a United States court if her trial or plea agreement would result in a felony conviction that bars his or her entry into the country. Recognising this dynamic, in 1996 the Division entered into a memorandum of understanding with what was then the Immigration and Naturalization Service (now the Department of Homeland Security). Under the terms of that memorandum, the Antitrust Division may petition the immigration authority to waive deportation or inadmissibility for aliens who have been convicted of an antitrust offence, and who have or will provide 'significant assistance'

131 See I A Sheerer, *Extradition in International Law*, 137 (1971).

132 See Daryl A Libow & Laura K D'Allaird, Recent Developments and Key Issues in US Cartel Enforcement, Presentation before the American Bar Association (28 October 2009), http://apps.americanbar.org/intlaw/fall09/materials/O'Farrell_Alfredo_Recent%20Developments.pdf. However, some foreign jurisdictions, especially Commonwealth countries, recently have adopted or considered adopting criminal punishments for price-fixing activity by individuals. See Belinda A Barnett, footnote 130 (listing foreign jurisdictions that have adopted or considered adopting criminal penalties for cartel offences); Scott Hammond, 'Charting New Waters in International Cartel Prosecutions', at 10 (2 March 2006) (noting that the United Kingdom's Enterprise Act imposes criminal sanctions on executives for price fixing).

133 Scott D Hammond, Deputy Assistant Attorney General, 'Address at the ABA Section of Antitrust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program' (16 November 2005), available at www.justice.gov/atr/public/speeches/213247.htm.

to the Division in prosecuting an antitrust case.¹³⁴ In practice, this means that foreign nationals convicted in cartel cases for whom the Division seeks an immigration waiver can continue to travel to and through the United States to conduct business.

vi Follow-on class actions

Private plaintiffs often bring private antitrust suits in the wake of a criminal prosecution by the Antitrust Division. Plaintiffs' attorneys frequently seek to bring these claims as class actions on behalf of a class of all direct or indirect purchasers who were harmed by the cartel.

When a price-fixing conspiracy covers a long period of time, as with the *LCD* cartel, or a very large product market, as with the *Vitamins* cartel, defendants' follow-on exposure can be considerable. Counsel for companies in cartel investigations must therefore be cognisant from the beginning of the downstream civil litigation effects of the decisions they make in the investigation, leniency and cooperation processes. While much of the information submitted pursuant to a criminal investigation may receive some form of protection from public disclosure, such information is potentially discoverable in civil litigation. Thus, counsel are well advised to closely consider the potential civil ramifications of each step taken in a criminal investigation, including considering the nature and extent of written submissions made to the government, as well as the handling of documents and witness statements.

Law Business Research publishes a comprehensive book dedicated to follow-on private actions entitled *The Private Competition Enforcement Review*. We recommend referring to that publication for further details on the intricacies of the private antitrust enforcement regime in the United States and those developing elsewhere around the world.

vii Debarment

In addition to their criminal and civil Section 1 risk, federal contractors face a significant collateral consequence of cartel violations: debarment from participation in future bids as contractors and subcontractors. The General Services Administration (GSA) maintains the Excluded Party List System (EPLS), a list of contractors debarred by any federal agency. Debarment policies differ from agency to agency, but a company barred by one agency is generally ineligible to participate in future bidding with any federal agency. Cartel violations in the contracting context may also trigger other criminal statutes, including 18 U.S.C. Section 1001, which criminalises false statements to federal officials. The Antitrust Division has charged defendants under these 'companion' statutes with increased frequency in recent years.

The Antitrust Division's Leniency Program does not provide any specific protection for leniency applicants with respect to debarment, but if an agency's rules are triggered only by a criminal conviction, then the applicant perforce will not face debarment. As to

134 Memorandum of Understanding between the Antitrust Division and the Immigration and Naturalization Service (15 March 1996), available at www.justice.gov/atr/public/criminal/9951.htm.

agencies that debar contractors based on evidence of wrongdoing that does not result in a conviction, the Division will not request specific relief from that agency on behalf of the applicant and cannot guarantee a particular outcome, but it will often agree to inform the agency of the applicant's cooperation.

Some jurisdictions, including the UK and Australia, also have debarment procedures for individuals implicated in cartel activity. And in the US, the Food & Drug Administration (FDA) has similar procedures for executives involved in fraudulent conduct before the agency, as does the Securities and Exchange Commission (SEC). At present, however, the US does not debar individuals convicted or implicated in antitrust violations from serving as an officer or director of a public company.

VII PROSECUTORIAL DISCRETION

The Antitrust Division has wide scope to exercise its discretion not to prosecute a particular defendant or to charge that defendant with less than all of the crimes for which he or she may be prosecuted. The Division has long restricted its exercise of this discretion to grants of leniency pursuant to the Leniency Program and to cooperating witnesses. The Division's reluctance in this regard reflects its strong belief in the deterrent value of corporate prosecutions to the prevention of cartel activity, as well as its interest in protecting the primary incentive that drives the success of the Leniency Program – namely, leniency for only the first conspirator to come forward and self-report. The Division's position has, however, begun to soften as it has become more involved in heavily consolidated and regulated industries, like the financial services industry, and as a result of the increasingly crowded global cartel enforcement environment.

i Non-prosecution agreements

The Antitrust Division's policy disfavours the use of non-prosecution agreements ('NPAs') or deferred prosecution agreements (DPAs) in criminal cartel investigations.¹³⁵ This is consistent with the Division's general view that the criminal sanction is essential to appropriate deterrence.¹³⁶ In 2011 and 2012, the Antitrust Division did employ NPAs with respect to a number of corporate defendants in the municipal bond investigation.¹³⁷

135 A 2009 Government Accountability Office study showed that the Antitrust Division had entered into only three such agreements between 1993 and September 2009. 'Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecuting Agreements, but Should Evaluate Effectiveness', December 2009, at 15 n. 29, available at www.gao.gov/new.items/d10110.pdf.

136 See Scott D Hammond, 'Charting new Waters In International Prosecutions', 2 March 2006, available at www.justice.gov/atr/public/speeches/214861.htm ('It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them.')

137 See, e.g., Letter from Christine A Varney, Assistant Attorney General, Department of Justice Antitrust Division to Kenneth A Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP (4 May 2011) (regarding UBS non-prosecution agreement in municipal bonds investigation),

Counsel should not, however, draw the conclusion that the Division did this out of solicitude for the defendants.

The cases against the municipal bonds corporate defendants predominately involved fraud violations, as opposed to antitrust violations, and thus required unique consideration by the Antitrust Division of the Principles of Federal Prosecution of Business Organizations.¹³⁸ Under the Principles, the Division was required to evaluate and balance, among other factors, the ‘collateral consequences’ of a prosecution on the municipal bond corporate defendants and their shareholders and employees.¹³⁹ In this instance, guilty pleas to criminal charges by the corporate defendants might have resulted in the defendants being barred from working as underwriters for municipal bonds, and given the number and significance of the firms implicated in the conspiracy, the debarment of these firms could have had a serious negative collateral impact on the viability and efficiency of the overall market for municipal bonds. The Antitrust Division’s use of the NPAs in the municipal bonds case is likely to be a rare event. Note that individual defendants were not offered NPAs, and over a dozen former financial institution employees entered guilty pleas.¹⁴⁰

For similar policy reasons, the Antitrust Division also disfavours the use of *nolo contendere* pleas, in which the defendant agrees to be punished but does not acknowledge the underlying wrongdoing. *Nolo contendere* pleas may be entered at the discretion of the court, however, and in a recent case, a *nolo contendere* plea was accepted over the objection of the Antitrust Division.¹⁴¹ The facts of that case were highly unusual, however, and counsel should not expect to be able to enter such a plea on behalf of either a corporate defendant or an individual absent such unusual circumstances.

ii Parallel foreign enforcement

The globalisation of cartel enforcement is slowly shifting the way the Antitrust Division and other cartel enforcers around the world approach prosecuting and

available at www.justice.gov/atr/public/press_releases/2011/270720a.pdf; Letter from Christine A Varney, Assistant Attorney General, Department of Justice Antitrust Division to Thomas Mueller, Wilmer Cutler Pickering Hale and Dorr (6 July 2011) (regarding JPMorgan non-prosecution agreement in municipal bonds investigation), available at www.justice.gov/atr/public/press_releases/2011/272815a.pdf.

138 Principles of Federal Prosecution of Business Organizations (Principles), U.S.A.M. 9-28.000, available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. It is worthy of note that the Principles expressly recognise the Antitrust Division’s alternative use of the Leniency Program in the context of antitrust violations. *Id.* at 9-38.400 (Comment).

139 *Id.*

140 For example, three General Electric executive were convicted in a jury trial after the company entered into an NPA with the Antitrust Division. See *United States v. Carollo*, No. 1:10-cr-00654-HB (S.D.N.Y. 11 May 2012). Although the three executives were accused of conspiring to manipulate the bidding process, they were charged with wire fraud, rather than Sherman Act violations.

141 *United States v. Florida West Int’l Airways*, 2012 WL 3000250 (S.D. Fla. 20 July 2012).

punishing defendants in international cartel investigations. The globalisation of cartel enforcement has led to increased international cooperation and coordination among authorities designed to enable and facilitate cross-border investigations. Through efforts of multilateral organisations – like the International Competition Network (‘ICN’), the Organisation for Economic Co-operation and Development (‘OECD’) and the International Bar Association (‘IBA’) – guidelines and best practices have been developed with an aim to harmonise antitrust enforcement actions.¹⁴² Moreover, numerous bilateral agreements have been concluded to govern the level of assistance and the exchange of information in the case of joint investigations.¹⁴³ And as evidenced by numerous, recent antitrust investigations, such as the *Air Cargo* and *Auto Parts* investigations, dawn raids are routinely taking place in close coordination between multiple enforcement agencies.

Coordination among cartel enforcers is now expanding into the post-investigative phases of prosecution and punishment. The demand for such coordination is on the rise because of the long list of interested enforcers in any given antitrust investigation. The growing demand for international coordination is further enhanced by the fact that certain legal concepts, such as double-jeopardy and successive prosecution, do not apply across borders.¹⁴⁴ The overriding concern is that in the absence of global coordination, defendants in international cartel cases may risk potential over-punishment as multiple enforcement authorities seek to redress the effects of the same cartel offence.

As it has been present throughout the evolution of cartel enforcement, the Antitrust Division has emerged as a thought leader in developing guiding principles it

142 Multilateral organisations like the ICN, OECD, and IBA have developed guidelines and best practices to harmonise enforcement actions. See e.g., ICN Work Product Catalogue, September 2012, www.internationalcompetitionnetwork.org/uploads/library/doc770.pdf; the OECD’s recommendations and best practice roundtables on cartels, www.oecd.org/daf/competition/cartelsandanti-competitiveagreements/; and the Antitrust projects of the IBA’s Antitrust Committee, www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Projects.aspx.

143 See, e.g., the cooperation agreements of the US Antitrust Division with its counterparties in Australia, Brazil, Canada, Chile, China, the EU, Germany, India, Israel, Japan, Mexico and Russia, www.justice.gov/atr/public/international/int-arrangements.html.

144 See, e.g., Antonio Cassese et al., *International Criminal Law: Cases and Commentary*, OUP, Oxford: 2011, p. 100; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, CUP, Cambridge: 2010, p. 80; Yitiha Simbeye, *Immunity and International Criminal Law*, Ashgate, Burlington: 2005, p. 85. Notably, for EU Member States, the application of the *ne bis in idem* principle in criminal cases (at least) extends to the European Union, under the now binding Charter of Fundamental Rights of the EU, Article 50. For the United States, the notion of double jeopardy is complicated by the existence of multiple sovereigns (i.e., the state and the federation). The Department of Justice has developed the ‘Petite Policy’ to establish guidelines on determining whether to bring a federal prosecution based on the same acts involved in a prior state proceeding. See United States Attorneys Manual, Title 9, Chapter 9-2.000 Authority of the United States Attorneys in Criminal Division Matters, 9-2.031 Dual and Successive Prosecution Policy (‘Petite Policy’), www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.

will employ when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action. Recently, the Division has articulated the following four-step analysis for determining whether to exercise discretion in response to a parallel foreign enforcement action: (1) Is there a single, overarching international conspiracy?; (2) Is the harm to US business and consumers similar to the harm caused abroad?; (3) Does the sanction imposed abroad take into account the harm caused to US businesses and consumers?; and (4) Will the sentence imposed abroad satisfy the deterrent interests of the US?¹⁴⁵ According to the Antitrust Division, the result of this analysis is not an all-or-nothing proposition. That is, depending upon how these factors stack up, the Division may consider reducing the scope of the activities under investigation, reducing the penalties applicable to the violation, or waiving prosecution of the matter all together.¹⁴⁶

While it predates the development of the analysis, the Antitrust Division's resolution of the cases against the 'UK3' in the *Marine Hose* investigation reflects how the Division's analysis may work in action. In the context of this global cartel of all major suppliers of marine hoses, both the US Antitrust Division and the UK's Office of Fair Trading ('OFT') wanted to criminally prosecute three UK executives for their involvement in the cartel. To avoid over-punishment of the individuals, the Antitrust Division coordinated its sentencing approach with its British counterpart. As a result, the Antitrust Division entered into plea agreements that allowed the three defendants to return to the UK for prosecution by the OFT and provided for reductions to the imposed US jail sentences by the length of any UK sentence.¹⁴⁷ The practical result of these agreements was that none of the UK3 had to return to serve prison time in the US.

VIII EMERGING TRENDS

Emerging trends reflect a growing tension between the Antitrust Division's interest in seeking greater penalties for cartel offenders on the one hand, and the need for more careful consideration and exercise of prosecutorial discretion on the other. Further complicating the picture, there is no end in sight to the continuing trend toward hotly contested litigation over the appropriate bounds of the extraterritorial reach of US antitrust laws. All of these trends reflect the globalisation of the practice of cartel enforcement and defence, a phenomenon born of worldwide developments in the increased criminalisation of cartel offences, proliferation of leniency programmes, greater cooperation and coordination among authorities, and more aggressive enforcement policies.

145 John Terzaken, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, 'Judicial Activism in Cartel Cases: Trend or Aberration', ABA Antitrust Spring Meeting 2012.

146 See Ron Knox, 'DoJ willing to defer to foreign enforcers – if the punishment is right', *GCR*, 17 April 2012, www.globalcompetitionreview.com/news/article/31674/doj-willing-defer-foreign-enforcers-punishment-right.

147 The plea agreements of Bryan Allison, David Brammar, and Peter Whittle can be found on the Antitrust Division's website: www.justice.gov/atr/cases/allison.htm.

The risk for companies and individuals that participate in cartels affecting US commerce has never been higher. Fines for corporations have risen precipitously over the past 10 years, both in terms of the total amount of fines imposed and the maximum fines imposed against particular corporations.¹⁴⁸ The Antitrust Division has imposed numerous fines exceeding the Sherman Act statutory maximum fine of US\$100 million, including two US\$300 million fines against participants in the *Air Cargo* conspiracy, a US\$400 million fine against a participant in the *Auto Parts* conspiracies, and a US\$500 million fine against a participant in the *LCD Panel* conspiracy. In 2012 alone, the Antitrust Division obtained more than US\$1.13 billion in criminal fines, the highest fine total in the 122-year history of the Sherman Act, from a mere 12 corporations.¹⁴⁹

Prison terms for individuals are also on the rise. The total prison days the Antitrust Division imposed on individuals skyrocketed from an average of 18,295 in 2010 and 2011 to 33,603 in 2012. Average sentence lengths also rose to nearly 25 months in 2012.¹⁵⁰

There is good reason to believe the trend toward higher fines and longer prison terms will continue. The Antitrust Division appears determined to push for longer prison sentences and higher fines, especially for defendants who do not admit guilt but rather insist on a jury trial. Though the court did not agree to the Division's request for 10-year terms of imprisonment for the individual defendants or a US\$1 billion fine for the corporate defendant in the recent *AU Optronics* case, the mere fact of the request for such extraordinary penalties sends a strong signal to the defence bar regarding the Division's intentions. The Division's tough stance, combined with the Eighth Circuit's affirmance of the district court's upward departure from the Sentencing Guidelines in *VandeBrake* and the *AU Optronics* court's finding on aggregated gain and loss under Section 3571, suggests that we are likely to see even longer prison terms and higher fines for cartel defendants going forward. The Antitrust Division, of course, believes strongly that such a trend would contribute to appropriate deterrence.

The trend toward increasing penalties may be tempered, at least in part, by separate trends indicating a willingness of the Division to entertain more consistently exercising prosecutorial discretion in international cartel cases and to recognise effective compliance programmes as part of its sentencing considerations. The Antitrust Division recently began articulating the makings of guiding principles it will employ when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement

148 For the three years between 2009 and 2011, the total amount of corporate fines levied in cases brought by the Antitrust Division was about US\$1.7 billion, up from US\$300 million for the three-year period between 2002 and 2004. Antitrust Division Workload Statistics, FY 2002–2011, available at www.justice.gov/atr/public/workload-statistics.pdf.

149 All figures taken from corporate plea agreements published on the Antitrust Division's website: www.justice.gov/atr. Note that the Antitrust Division tracks statistics on a fiscal year basis. The Division's fiscal year runs from 1 October to 30 September.

150 All figures taken from plea agreements and sentencing memoranda published on the Antitrust Division's website: www.justice.gov/atr. See also Antitrust Division Workload Statistics, FY 2002–2011, available at www.justice.gov/atr/public/workload-statistics.pdf.

action. The application of these principles could result in the Division reducing the scope of the activities it may investigate against a particular defendant, reducing the penalties applicable to a violation, or waiving prosecution of a defendant or matter all together. The Antitrust Division is also advocating that other authorities take steps to adopt similar principles to ensure consistency across international investigations.

The Antitrust Division has also recently provided the first hint that it may be willing to entertain arguments for more lenient treatment from corporations with robust antitrust compliance programmes. Beyond serving as another cautionary tale for corporations facing antitrust exposure in the US, the *AU Optronics* sentencing offers more immediate and practical guidance for counsel working to prevent corporations from ever facing such exposure in the first place. The *AU Optronics* sentencing marks the first time the Antitrust Division sought to impose a compliance programme on a corporation as a condition of probation for an antitrust violation. In so doing, the Antitrust Division provided unique insight into what it may consider to be an 'effective' antitrust compliance programme. More importantly, it may also have created an opening for a company that adopts a rigorous, *AU Optronics*-style compliance programme to successfully argue that programme is 'effective' under the Guidelines and thus worthy of a sentencing discount, even if a specific instance of wrongdoing occurred while the programme was in force.¹⁵¹

Finally, recent experiences solidify that the extraterritorial reach of the Sherman Act will continue to be a hotly litigated issue in both public and private enforcement cases for years to come. In the civil arena, courts do not appear to be interpreting the FTAIA to permit plaintiffs to sue in a US court where the pleaded impact on US commerce was merely an indirect result of a foreign conspiracy to fix prices in a global market. Judicial interpretations of the FTAIA arising out of private lawsuits could also constrain the Antitrust Division in criminal cases, since there may be no principled distinction in the extraterritorial reach of the Sherman Act for criminal and civil purposes. The Antitrust Division says that its position on the FTAIA is evolving, but it seems likely that the agency will continue to push a relatively expansive interpretation. Thus far, however, the courts appear to be headed in another direction.

IX CONCLUSION

In many ways, the United States remains the world's leading jurisdiction for cartel enforcement, and counsel for companies that may have engaged in wrongdoing must keep their client's potential US exposure at the front of their minds. But the Antitrust Division's sustained effort to export the US model has succeeded to such a degree that the rest of the world is now rapidly catching up in its commitment to enforcement and in the sophistication of its methods of investigation, detection, and punishment. The European Union in particular has built a robust enforcement mechanism, and Canada, the UK, Japan, Brazil and others are close behind. The US need not, indeed cannot, go it

151 To obtain a sentencing discount, a company must qualify for credit under the conditions of the Sentencing Guidelines.

alone. Its bilateral and multilateral relationships will play an increasingly important role going forward as the globalisation of cartel enforcement continues.

When leniency is available in the US, it will generally be a good idea for counsel to move expeditiously to seek a marker. The benefits of leniency are compelling. The decision to cooperate with the US investigation is, however, likely to raise collateral risks that must be considered at the outset, including criminal liability for individual employees¹⁵² and the potential for information disclosed to the Antitrust Division being discovered in follow-on litigation. Fortunately, the Antitrust Division aims to be transparent and predictable in its dealings with cooperators, whom it views as furthering US enforcement goals. Thus, counsel should be able to manage the leniency process with a measure of certainty regarding the terms of the agreement the corporation or individual is entering into and the Antitrust Division's expectations as to cooperation.

While the general trend in public enforcement is strongly toward convergence, the US remains something of an outlier in the scope and complexity of its private enforcement regime. Many jurisdictions continue to treat cartel enforcement as entirely a matter for public enforcement. Those jurisdictions that have moved towards a private right of action for damages largely are still trying to work out the scope of that right. Two significant features of the US model, treble damages and the class action mechanism, have not been widely adopted. These features may not map easily onto the institutional traditions of other jurisdictions. In the US itself, private plaintiffs confront several obstacles to recovery, including the FTAIA, the pleading demands of *Twombly*, and a measure of judicial hostility to class actions. Nonetheless, the risk of follow-on litigation remains very substantial, especially when plaintiffs have the benefit of a guilty plea by the corporation.

In the end, cartel enforcement in the US will no doubt remain a priority regardless of changes in administration or in the leadership of the Antitrust Division. The Division's efforts will continue to be marked by transparency in policy and predictability in results, themes that both fit with traditional US notions of due process and create the kind of environment in which the Division's Leniency Program is likely to function best. And in its dealings with its partners abroad, the Division will continue to try to lead by its example and advocate its policy views while remaining cognisant of the comity considerations that are essential to what is more and more a cooperative regime of global enforcement.

152 If the company successfully obtains leniency, leniency may extend to certain individuals. See Section IV.i, *supra*.

Appendix 1

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Christine A Varney is a partner at Cravath, Swaine & Moore and chairs the firm's antitrust practice. Widely recognised as one of the leading antitrust lawyers in the United States in both private practice and in government service, she is the only person to have served as both the US Assistant Attorney General for Antitrust (2009–2011) and as Commissioner of the Federal Trade Commission (1994–1997). She formulates global antitrust strategy for clients in connection with joint ventures, mergers, acquisitions, dispositions and other business transactions, including advising on business conduct or potential investments to ensure compliance with antitrust laws, securing antitrust regulatory approvals, and handling internal or governmental investigations into anti-competitive behaviour. Her clients span diverse industries, including transportation, telecommunications, technology, pharmaceuticals, manufacturing and financial services.

As Assistant Attorney General, Ms Varney oversaw all operations of the Department of Justice's Antitrust Division, including merger review, criminal and civil litigation and investigations and coordination with competition regulators outside the United States. From 1997 to 2009, Ms Varney was in private practice, representing major corporations before the DoJ and the FTC. Prior to becoming FTC Commissioner, she served as Assistant to the President and Secretary to the Cabinet in the Clinton Administration.

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