

The Cartels and Leniency Review

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Simpson Thacher Litigation Partner John Terzaken is the Co-Editor of *The Cartels and Leniency Review*. The sixth edition, now available online, is a primer and reference on cartel enforcement regimes of the world's principal competition authorities. The book brings together leading competition lawyers from more than 30 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 full edition is available through the publisher's website and can be obtained [here](#).

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Simpson
Thacher



THE CARTELS AND LENIENCY REVIEW

SIXTH EDITION

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THE LAWREVIEWS

EDITORS' 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 enforcers. 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 that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than 30 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 because of 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 31 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an 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 sixth edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed 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 to ensure that what you read is the latest intelligence.

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INTRODUCTION

*John Buretta and John Terzaken*¹

Globalisation remains the overarching theme of modern antitrust cartel enforcement. It takes two principal forms: a growing worldwide consensus that cartels cause serious consumer harm and should be dealt with accordingly; and 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 each other.

The role of cartel enforcement has undergone a long evolution. From the enactment of the Canadian Competition Act in 1889 and the Sherman Act in 1890 to the mid 1940s, Canada and the United States were the only nations prohibiting cartels. In Europe, cartels were then still widely regarded as at least partly beneficial to the national economy. Several European nations even enacted legislation in response to the Great Depression, enabling the government to establish compulsory cartels or to force outsiders to join already existing ones. Particularly during the Second World War, excessive concentration of economic power was used to create 'national champions' that were easy to control and that could outperform their foreign rivals.

In the aftermath of the Second World War, the United States put pressure on Germany and Japan to break up existing cartels and to put in place cartel enforcement regimes. At the same time, the United Kingdom adopted a new antitrust regime as part of its social policies to stimulate employment. Antitrust law was subsequently included in the 1957 Treaty of Rome as one of the key policy areas of the European Community, laying the foundation for the European Commission's cartel enforcement practice.

In the past few decades, cartel enforcement has spread from to virtually every major jurisdiction in the world. There are now antitrust authorities in over 125 countries across all continents actively pursuing cartel activity, and that number continues to grow.

More countries are pursuing cartel activity and they are doing so more aggressively than ever before. Both mature and new antitrust regimes have come to regard aggressive prosecution of cartel offenders as a primary policy objective. This is reflected in the ever-increasing penalties imposed on offenders year-on-year, with enforcers such as the US Department of Justice and European Commission regularly imposing fines totalling more than \$1 billion each year.

This is also reflected in the expansion of the number of jurisdictions that have criminalised cartel offences. In addition to the United States, where cartel offences have long been prosecuted criminally, more than half the Member States in the European Union have now criminalised certain cartel offences, as well as Australia, Brazil, Japan, Korea, Mexico and Russia. Although the shift has not come without challenges, criminalisation of cartel enforcement is undoubtedly gaining momentum globally.

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Cartel detection has also become more effective. This is primarily the result of the growing use of leniency programmes. In the 1990s, only the United States and a handful of other countries had leniency programmes. Today, there are antitrust leniency programmes in more than 50 jurisdictions. This virtually global availability of leniency programmes radically destabilises cartels because of the tremendous incentives for co-conspirators to self-report to authorities once a cartel no longer serves its purpose.

Cartel enforcers are also benefiting from increased multi-jurisdiction cooperation and an expanded jurisdictional reach. Enforcement authorities understand that failing to cooperate creates a risk that evidence will be lost or destroyed. As a result, organisations such as the International Competition Network and the Organisation for Economic Co-operation and Development were formed to drive global cooperation and convergence among enforcement authorities in the prevention, detection, investigation and punishment of cartel conduct. Today, there is close cooperation and coordination among enforcement authorities globally, as evidenced by the fact that in nearly every recent global antitrust investigation dawn raids were coordinated across continents.

Extraterritorial cartel enforcement has now become standard practice for the major enforcement jurisdictions. Whereas the United States was sharply criticised at first for the application of the Sherman Act to foreign conduct, other antitrust enforcement regimes now appear to have firmly embraced the principle of extraterritorial cartel enforcement. Of the world's major antitrust regimes, Colombia and arguably Canada are the only countries for which the location of the conspiracy is a decisive factor in establishing jurisdiction. For other countries, it is sufficient for the conduct to affect national trade or commerce. Up-and-coming cartel regimes are routinely adopting similarly expansive policies on extraterritorial cartel enforcement.

This increasingly crowded and complex global enforcement environment complicates the strategic decision-making facing corporations and individuals when possible wrongdoing is discovered or a government investigation commences. Counsel representing large corporate enterprises whose products are sold abroad are likely to face cartel investigations involving multiple jurisdictions, simultaneous processes, and seemingly endless demands for documents and witnesses. Individuals are likely to face similar demands, as well as the sobering reality that they may now be subject to criminal prosecution in multiple jurisdictions or be more readily exposed to extradition for prosecution in jurisdictions inclined to incarcerate them for extended periods, such as the United States. This added complexity places a premium on the need for counsel to assist clients in developing a global strategy from the outset of an international cartel investigation.

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.

UNITED STATES

*John Buretta and John Terzaken*¹

I ENFORCEMENT POLICIES AND GUIDANCE

The statutory basis for the prohibition on cartel activity in the United States is the Sherman Antitrust Act, 15 USC Section 1, which states, in the pertinent part, that ‘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, as well as most state statutes, provides for criminal and civil sanctions and applies to both corporations and individuals. Within the categories of conduct that violate Section 1, only some of them, including agreements to fix prices, rig bids or allocate markets, are regularly punished criminally. These 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 geographical 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’ to conduct an anticompetitive 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.³ The Antitrust Division of the US Department of Justice (Antitrust Division or the 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.⁴ Average sentences recently have

1 John Buretta is a partner at Cravath, Swaine & Moore LLP and John Terzaken is a partner at Simpson Thacher & Bartlett LLP.

2 15 USC Section 1.

3 *Id.*; 18 USC Section 3571(d).

4 15 USC Section 1.

been 22 months;⁵ the highest sentence yet imposed is 60 months.⁶ The Antitrust Division insists upon a prison term for every individual defendant, including a foreign national, 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.⁷ 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 Antitrust Division grants only one leniency application per conspiracy. Subsequent cooperators are not immune from criminal prosecution, but will generally receive smaller fines and expose fewer of their executives to indictment than do non-cooperators.

The Antitrust Division's Leniency Plus Program (also known as the Amnesty Plus Program) 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 Leniency 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 Leniency Plus discount depends on a number of factors and involves a considerable exercise of discretion by Antitrust Division staff. Leniency Plus has led to several significant investigative leads in many 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 (FBI) and US Attorney's offices, to make use of their specific expertise. In addition, joint investigations between the Antitrust Division and the Criminal Division of the US Department of Justice (Criminal Division) have become common, especially in market manipulation cases, such as those involving foreign exchange rates and benchmark interest rates. Antitrust conspiracies often implicate other US criminal statutes, including those covering obstruction of justice, lying to federal agents and fraudulent use of mail or wire communications, and the Antitrust Division often adds such charges to its indictments as a means of protecting the integrity of its investigative processes. In some cases, including those involving allegations of market manipulation, defendants have been criminally charged with violations of the wire fraud statute, but not violations of the Sherman Act.⁸

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

5 US Department of Justice, 'Criminal Enforcement Trends Chart Through Fiscal Year 2016' (30 January 2017), available at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

6 Press release, US Department of Justice, 'Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico' (6 December 2013), available at www.justice.gov/atr/public/press_releases/2013/302027.pdf.

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

8 See Plea Agreement, *United States v. UBS Securities Japan Co Ltd*, No. 12-cr-268 (D. Conn. 19 December 2012).

authorities to identify and investigate violations.⁹ 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, such as 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 anticompetitive 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 regarding current or prospective prices, does not

9 Scott D Hammond, ‘The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades’, speech at the Twenty-Fourth Annual National Institute on White Collar Crimes, 25 February 2010, at 14, available at <https://www.justice.gov/atr/file/518241/download>. (‘There is a growing worldwide consensus that international cartel activity is harmful, pervasive, and is victimizing businesses and consumers everywhere. The shared commitment of competition enforcers to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels.’)

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 or deceptive behaviour, may be prosecuted civilly under Section 5 of the Federal Trade Commission Act.¹⁰

ii Competitors

Competitors are firms that do business in the same product and geographical 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.¹¹ 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. During the past 20 years, cartel cases have gone global, involving industries that operate both in the United States and abroad. This has raised difficult questions regarding the territorial reach of the US antitrust laws that the courts have struggled to resolve. With a 1982 statute, the Foreign Trade Antitrust Improvements Act (FTAIA),¹² 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 in Section III.ii.

10 For a recent example, see *In the Matter of Fortiline, LLC*, Docket No. C-4592 (complaint filed 23 September 2016) (alleging that statements made in two meetings and an email communication expressing Fortiline’s preference that a manufacturer increase its prices in two states was unlawful as an invitation to collude). An invitation to collude via email or a telephone call – even if no agreement is reached – may also constitute mail or wire fraud, both of which carry criminal penalties. In such situations, the FTC will refer the matter to the Criminal Division. For another example of a violation of Section 5, see *In the Matter of Drug Testing Compliance Group, LLC*, Docket No. C-4565 (complaint filed 21 January 2016) filed before the Federal Trade Commission. There, the FTC alleged that a maker of drug and alcohol testing products contacted a competitor to convince that competitor to enter into a market allocation agreement, in violation of Section 5. *Id.* The FTC claimed that the defendant violated Section 5 by inviting its competitor to collude.

11 *Copperweld Corp v. Independence Tube Corp.*, 467 US 752 (1984).

12 15 USC Section 6a.

III IMMUNITIES AND AFFIRMATIVE DEFENCES

Congress has granted immunity from the antitrust laws to certain highly regulated industries. Two judge-made doctrines, the filed rate doctrine and the *Noerr-Pennington* doctrine, have also granted an exemption to particular forms of conduct 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 granted immunity 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.¹³ The state action doctrine similarly exempts actions taken pursuant to a state regulatory scheme,¹⁴ whether such an action was taken by the state itself or by non-state actors with delegated authority to act or regulate anticompetitively.¹⁵ Finally, certain activities and agreements related to labour and collective bargaining are exempt.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹

Noerr-Pennington, named after two Supreme Court cases,²⁰ is a judge-made doctrine that attempts to harmonise the goals of competition policy with the First Amendment rights

13 *Credit Suisse Securities (USA) LLC v. Billing*, 551 US 264 (2007) (underwriters of Securities and Exchange Commission-regulated securities have implied immunity from the antitrust laws).

14 *Parker v. Brown*, 317 US 341 (1943).

15 See *Patrick v. Burget*, 486 US 94 (1988); *FTC v. Phoebe Putney Health System, Inc.*, 568 US 216 (2013) (finding that, in application of the standard set forth in *Town of Hallie v. City of Eau Claire*, 471 US 41 (1985), immunity will attach to anticompetitive conduct undertaken pursuant to a state’s regulatory scheme when the state has foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals, and that Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively).

16 See Norris-LaGuardia Act, 29 USC Sections 52 and 105 (2006); *Connell Constr Co Inc v. Plumbers & Steamfitters Local Union No. 100*, 421 US 616 (1975).

17 See *Keogh v. Chicago & NW Ry*, 260 US 156 (1922).

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

19 See, e.g., *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856 (9th Cir 2013) (the filed rate doctrine did not bar suit by milk purchasers where a complaint alleged that the US Department of Agriculture set prices based on false data reported by defendants).

20 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 US 127 (1961); *United Mine Workers of America v. Pennington*, 381 US 657 (1965).

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 the government rather than petition in support of it. To the extent that cartel members seek 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, of which the contours are not entirely clear, that covers acts of fraud, bribery, etc., that wilfully distort that process.²¹ Fraud committed on the US Patent Office, for example, is not exempted by *Noerr-Pennington*.²² And even if such an act of petitioning the government were exempted, 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.

Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)

The FTAIA²³ limits the extraterritorial reach of the antitrust laws by excluding from antitrust review all foreign conduct except that involving import commerce, or conduct having a ‘direct, substantial, and reasonably foreseeable’ effect on US commerce. 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,²⁴ but recent cases have revisited this view,²⁵ and courts now treat the FTAIA as creating a substantive requirement for stating a claim on the merits under the Sherman Act.²⁶ These courts reason that the FTAIA serves

21 *California Motor Transport Co. v. Trucking Unlimited*, 404 US 508 (1972).

22 See *In re Buspirone Antitrust Litig*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

23 15 USC Section 6a.

24 See, e.g., *United States v. LSL Biotechnologies*, 379 F3d 672, 683 (9th Cir 2004) (‘The FTAIA provides the standard for establishing when subject-matter jurisdiction exists over a foreign restraint of trade.’).

25 The Supreme Court decisions of *Arbaugh v. Y&H Corp*, 546 US 500 (2006) and *Reed Elsevier, Inc v. Muchnick*, 559 US 154 (2010) explained that courts should interpret a statute as imposing jurisdictional limitations where Congress has explicitly articulated it as such. Those circuits to address the FTAIA since *Arbaugh* have treated the statute as imposing a substantive merits limitation, not a jurisdictional bar. See, e.g., *Animal Sci Prods, Inc v. China Minmetals Corp*, 654 F3d 462 (3d Cir 2011) (reasoning from the Supreme Court’s opinion in *Arbaugh* 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); *Minn-Chem, Inc v. Agrium Inc*, 683 F3d 845 (7th Cir 2012) (treating the FTAIA as relating to the scope of coverage of antitrust laws as opposed to the courts’ subject-matter jurisdiction, expressly overruling *United Phosphorus Ltd v. Angus Chem Co*, 322 F3d 942 (7th Cir 2003)); *US v. Hui Hsiung*, 778 F3d 738 (9th Cir 2015).

26 Departing from its prior decision in *US v. LSL Biotechnologies*, 379 F3d 672 (9th Cir 2004), the Ninth Circuit held that ‘[t]he FTAIA does not limit the power of the federal courts; rather, it provides substantive

to clarify the text of the Act, which reaches trade ‘among the several states, or with foreign nations’.²⁷ This has important consequences in the criminal context. As a substantive element of the offence, the government must adequately allege that the foreign conduct involves either import commerce, or a ‘direct, substantial, and reasonably foreseeable’ effect on US commerce when bringing an indictment.²⁸ Outside the pleading context, the court must also take the plaintiff’s or government’s allegations as true for the 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.

A recent case to confront these issues was *United States v. AU Optronics Corp.*,²⁹ in which 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.³⁰ AU Optronics contended that, because the government had not adequately alleged either of the two prongs of the FTAIA, the court should dismiss the indictment.³¹ The court in *AU Optronics* ultimately did not address that 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 *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*

elements under the Sherman Act in cases involving non-import trade with foreign nations’. *Hui Hsiung*, 778 F3d at 753. In *Lotes Co, Ltd v. Hon Hai Precision Industry Co, Ltd*, 753 F3d 395 (2nd Cir 2014), the Second Circuit likewise endorsed the substantive nature of the FTAIA, overruling its prior decision in *Filetech SA v. France Telecom SA*, 157 F3d 922 (2nd Cir 1998).

27 15 USC Sections 1 and 2; see, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F Supp 2d 953, 959 (ND Cal. 2011) (stating that ‘the FTAIA is not jurisdictional’); *Animal Science Prods.*, 654 F3d at 469 (‘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’).

28 In the ‘Antitrust Guidelines for International Enforcement and Cooperation’, issued in January 2017 by the Antitrust Division and the Federal Trade Commission, the two agencies announced that whether the FTAIA goes to a claim’s merits or a court’s subject-matter jurisdiction will not affect their decision to bring an enforcement action: ‘This difference will not affect the Agencies’ decisions about whether to proceed with an investigation or an enforcement action because the Agencies will not proceed when the FTAIA precludes the claim on the merits or strips the court of jurisdiction.’ US Department of Justice & Federal Trade Commission, ‘Antitrust Guidelines For International Enforcement And Cooperation’ (13 January 2017) n.82, available at <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017>.

29 09-cr-00110 (ND Cal grand jury indictment filed 10 June 2010). The case is referred to as *United States v. Hui Hsiung* rather than *United States v. AU Optronics Corp* at the court of appeals level.

30 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). The convictions of all defendants were recently affirmed by the Ninth Circuit in *US v. Hui Hsiung*, 758 F3d 1074 (9th Cir 2014).

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. 23 February 2011).

requirement in any Sherman Act case alleging a foreign conspiracy.³² The court rejected this argument, finding that intent to affect US commerce may be inferred from the fact of the conspiracy.³³ Second, another defendant argued that, if the Sherman Act applies to a foreign conspiracy through application of the *Hartford/Alcoa* standard,³⁴ then the government must allege intent to substantially affect US commerce in its complaint.³⁵ The court ultimately ducked the issue, finding that the government's complaint contained allegations sufficient to satisfy even the defendant's proposed standard.³⁶ On appeal, the Ninth Circuit noted that the *Hartford/Alcoa* intentionality requirement was contained in the 'targeting' language of the jury instructions, reasoning that the conspirators could not have targeted the US market unintentionally.³⁷ Similarly, in the Third Circuit, the court of appeals held that the FTAIA's effects exception does not contain a 'subjective intent' requirement and that only an objectively reasonably foreseeable effect on US commerce is necessary.³⁸

Recent cases decided under the FTAIA have left several unsettled questions of law surrounding the application of the statutory exceptions therein. The largest debate surrounds a circuit split concerning direct effects exception, and two tests have emerged to determine whether conduct exhibits a sufficient direct effect for the purposes of the FTAIA.

In *United States v. LSL Biotechnologies*, the Ninth Circuit confronted a government challenge to a joint venture between a domestic and foreign corporation to develop genetically modified tomato seeds with a longer shelf life.³⁹ Under the terms of the joint venture agreement, each party was allocated certain exclusive territories in which it could sell the tomato seeds that were jointly developed, whereby the domestic corporation was provided the exclusive rights to the North American markets.⁴⁰ The Ninth Circuit held that the conduct at issue was sufficiently direct, and thus outside the ambit of the FTAIA's protection, only where the effect 'follows as an immediate consequence of the defendant's activity'.⁴¹ There, the government argued that the agreement's 'direct' effect prevented the foreign company

32 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).

33 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).

34 Under the *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 US 764, 795-96 (1993) (citing *United States v. Aluminum Co of America*, 148 F2d 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 F3d 281, 287 (4th Cir 2002); *United States v. Nippon Paper Indus Co*, 109 F3d 1, 4 (1st Cir 1997).

35 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).

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

37 *US v. Hui Hsiung*, 778 F3d 738, 748-49 (9th Cir 2015).

38 *Animal Sci Prods. v. China Minmetals Corp*, 654 F3d 462, 471 (2011).

39 *United States v. LSL Biotechnologies*, 379 F3d 672, 674 (9th Cir 2004).

40 *Id.*

41 *Id.* at 680 (borrowing from the dictionary definition of direct and from the definition of direct as interpreted by the Foreign Sovereign Immunities Act).

from innovating higher quality seeds in the United States.⁴² The court rejected this argument, given that the foreign corporation had not yet developed a seed capable of cultivation in the United States, holding that an effect cannot be direct when it relies on ‘uncertain intervening developments’.⁴³ Thus, the government’s allegations failed to qualify as immediate for the purposes of the direct effects exemption.

More recently, the Ninth Circuit also applied the ‘immediate consequence’ test in the criminal context in *Hsuing*, reasoning that the defendants’ conduct – secret price-fixing meetings to set the price of a component that formed a substantial part of the cost in the finished LCD product – had an immediate consequence on the US market, especially where the foreign defendants directly negotiated with US corporations.⁴⁴

A clear split has emerged with a decision from the Seventh Circuit in which that court repudiated the ‘immediacy’ of the Ninth Circuit’s approach in favour of a proximate cause standard, holding instead that an effect is direct under the FTAIA if there is a ‘reasonably proximate causal nexus’.⁴⁵ Most recently, in *Lotes Co v. Hon Hai Precision Industry*, the Second Circuit aligned itself with the Seventh Circuit’s approach. Although the court ultimately barred plaintiffs’ claims under the FTAIA, it recognised in *dicta* that foreign anticompetitive conduct ‘can have a statutorily required “direct, substantial, and reasonably foreseeable effect” on US domestic or import commerce even if the effect does not follow as an immediate consequence of the defendant’s conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect’.⁴⁶ There, plaintiffs and defendants manufactured USB components abroad, and both served as members of an industry standard-setting organisation; neither sold directly to the United States. The plaintiffs claimed a refusal to license supported claims of exclusionary conduct under the Sherman Act, and argued that ‘curbing competition in China will have downstream effects worldwide’ and that ‘price increases [...] will be “inevitably” passed on’ to US consumers. Recognising that ‘anticompetitive injuries can be transmitted through multi-layered supply chains’, the court announced the ‘proximate nexus’ test: ‘[w]hether the casual nexus between foreign conduct and a domestic effect is sufficiently “direct” under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain’.⁴⁷

The proper approach remains an open issue. Some scholars applaud the Ninth Circuit’s ‘immediate consequence’ test for its relative ease of application and respect for foreign sovereign’s enforcement; others have criticised it for being overly strict.⁴⁸ The Antitrust Division favours the proximate cause standard, explaining that this standard is ‘more

42 Id. at 681. The government also argued that the agreement enabled domestic corporations to increase profits, an argument the court found unsupported by the facts.

43 Id.

44 778 F3d 738, 758-61 (9th Cir 2015).

45 *Minn-Chem, Inc v. Agrium, Inc*, 683 F3d 845, 856 (7th Cir 2012).

46 753 F3d 395, 413 (2d Cir 2014).

47 Id. at 413.

48 Compare ‘Antitrust – Foreign Trade Antitrust Improvement Act – Second Circuit Adopts Minn-Chem Test for Domestic Effects’, 128 *Harvard Law Review* 759, 765 (2014) with Gerald F Bifulco, ‘From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvement Act’, 64 *Emory Law Journal* 869, 889 (2015).

consistent with the language of the [Sherman Act]’.⁴⁹ 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 issue 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 Act (FSIA)⁵⁰ 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.⁵¹ 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’, the character of which is determined ‘by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose’.⁵² 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.⁵³ The act of state doctrine is based on concerns about 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.⁵⁴

49 US Department of Justice & Federal Trade Commission, ‘Antitrust Guidelines For International Enforcement And Cooperation’ (13 January 2017) n.93, available at <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017>. Makan Delrahim, currently the Assistant Attorney General for the Antitrust Division, supported this interpretation in a law review article published in 2005. Makan Delrahim, Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct, 61 NYU Ann. Surv. Am. L. 415, 430 (2005).

50 28 USC Sections 1330, 1332(a), 1391(f) and 1601-1611.

51 28 USC Section 1605(a)(2).

52 28 USC Section 1603(d).

53 US Department of Justice and Federal Trade Commission, ‘Antitrust Enforcement Guidelines for International Operations’, 4.2.1 (13 January 2017), available at <https://www.justice.gov/atr/internationalguidelines/download>.

54 *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 423 (1964) (doctrine driven by ‘the basic relationship between branches of government in a system of separation of powers’).

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.⁵⁵ 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. In two cases based on roughly analogous facts,⁵⁶ the district courts found that Chinese companies arguing that they had been compelled to follow export regimes created by the Chinese Ministry of Commerce could not demonstrate compulsion when they appeared to have engaged in ‘consensual cartelization’.⁵⁷ However, in the most recent of these cases, *In re Vitamin C Antitrust Litig*, the Second Circuit overturned this conclusion, but on comity grounds.⁵⁸ The Second Circuit gave great weight to a formal proffer by the Chinese government that its laws compelled the challenge of coordination. While the holding expressly eschewed reliance on the foreign sovereign compulsion doctrine, the Second Circuit’s reasoning suggests that a foreign government’s position in support of compulsion is another significant factor for the courts to weigh.

Comity

International comity is a flexible, 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*.⁵⁹ 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. The Second Circuit’s decision in *In re Vitamin C Antitrust Litig* offers a rare illustration of an application of comity principles and underscores the value of a direct appearance of a foreign sovereign.⁶⁰ There, in its very first appearance before a US federal court, the Chinese government submitted an *amicus curiae* brief to the court, consisting of ‘a sworn evidentiary proffer regarding the construction and effect of its laws and regulations . . .’. The Second Circuit held that a US court is ‘bound to defer’ to a ‘foreign government’s official statement regarding its own laws and regulations’ that

55 *Hartford Fire Ins Co v. Cal*, 509 US 764, 798–99 (1993).

56 *Animal Sci Prods v. China Nat’l Metals & Minerals Import & Export Corp*, 702 F Supp 2d 320, 423–24 (DNJ 2010), rev’d on other grounds, 654 F3d 462 (3d Cir 2011) and *In re Vitamin C Antitrust Litig*, 810 F Supp 2d 522 (EDNY 2011), rev’d on other grounds, 837 F.3d 175 (2d Cir 2016).

57 *In re Vitamin C Antitrust Litig*, 810 F Supp 2d at 566.

58 *In re Vitamin C Antitrust Litig*, 837 F3d 175 (2d Cir 2016). As of the publication date, the case is pending before the US Supreme Court.

59 *Hartford Fire Ins Co v. California*, 509 US 764 (1993).

60 *In re Vitamin C Antitrust Litig*, 837 F3d 175 (2d Cir 2016).

is ‘reasonable under the circumstances presented’.⁶¹ Finding that the Chinese government’s official statements submitted in the case ‘should be credited and afforded deference’, the Second Circuit reversed the district court on comity grounds.⁶²

It remains to be seen, however, whether the Second Circuit’s ruling in *In re Vitamin C Antitrust Litig* will stand. As of the publication date, the case is pending before the US Supreme Court. In deciding whether to hear this case, the Court took the usual step of inviting the US Acting Solicitor General to submit a brief explaining the United States’ views on this case.⁶³ In its brief, filed in November 2017, the US Acting Solicitor General urged the Court to hear the case, arguing that the Second Circuit should not have treated the Chinese government’s interpretation of its laws as conclusive.⁶⁴

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, the US Attorney’s 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 towards uncovering conspiracies in which distrust has already developed among the conspirators, meaning that the most successful and durable cartels go undetected.⁶⁵ 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, which can have a significant destabilising effect on a conspiracy. The Leniency Program has had a significant effect on enforcement. According to a 2011 report by the Government Accountability Office,

61 *In re Vitamin C Antitrust Litig*, 837 F3d at 189. The Second Circuit cautioned that the absence of ‘documentary evidence or reference of law proffered to support a foreign sovereign’s interpretation of its own laws’ might render such deference ‘inappropriate.’ *Id.* at 30 n.10.

62 *Id.* at 189.

63 Order Inviting the Acting Solicitor General to File Briefs, *Animal Sci Prods v. Hebei Welcome*, No. 16-1220 (filed 26 June 2017).

64 Brief for the United States as Amicus Curiae, *Animal Sci Prods v. Hebei Welcome Pharm Co Ltd*, No. 16-1220 (filed 14 November 2017).

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

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).⁶⁶ 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 several conspirators that the agreement is on the verge of collapse. The difference in outcomes in such situations is often striking.⁶⁷ Subsequent cooperators nonetheless may receive significant benefits, although those benefits will decrease the longer a party waits to cooperate. A leniency applicant must admit to a criminal violation of the antitrust laws 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.

Recently, the Antitrust Division emphasised that the Leniency Program applies only to Sherman Act violations that are enforced by the Division.⁶⁸ In other words, the programme does not provide protection from criminal prosecutions by other federal or state prosecuting agencies – including other divisions of the US Department of Justice, such as the Criminal Division.⁶⁹ While the Antitrust Division encourages leniency applicants ‘with exposure to both antitrust and non-antitrust crimes’ to ‘report all crimes to the relevant prosecuting agencies’, the Division notes that ‘leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes’.⁷⁰ In light of this clarification from the Antitrust Division, potential applicants involved in multifaceted criminal activities will have to weigh the potential benefits of obtaining leniency from the Antitrust Division with the risk that other government prosecutors could bring charges for non-antitrust violations. This complex calculus is further influenced by the fact that the Criminal Division’s policies differ from those of the Antitrust Division in important respects concerning immunity.⁷¹

66 ‘Stakeholder Views 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.

67 US Department of Justice, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 4, 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 the criminal liability of corporations whose respective leniency applications to the Division were very close in time.’)

68 Id. at Question 6.

69 An example is the Antitrust and Criminal Divisions’ investigations into manipulation of the London InterBank Offered Rate (LIBOR). UBS AG received amnesty under the Leniency Program and entered into a non-prosecution agreement with the Fraud Section of the Criminal Division. See Non-Prosecution Agreement Between UBS AG and US Department of Justice, 18 December 2012, available at <https://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf>. Despite this grant of amnesty, the Criminal Division charged UBS AG’s Japanese subsidiary with a violation of the wire fraud statute and imposed a fine of \$100 million. See Plea Agreement, *United States v. UBS Securities Japan Co Ltd*, No. 12-cr-268 (D. Conn. 19 December 2012).

70 US Department of Justice, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 6, available at www.justice.gov/atr/public/criminal/239583.pdf. The Antitrust Division has stated that it will not prosecute ‘acts or offenses integral to’ the antitrust violation for which leniency has been granted. Id.

71 Regarding immunity, prosecutors from the Criminal Division follow the policies set forth in the US Attorneys’ Manual and are not obligated to grant immunity to leniency recipients. The Criminal Division has adopted leniency only for violations of the Foreign Corrupt Practices Act (FCPA). Under the FCPA

The Corporate Leniency Policy⁷² includes two types of leniency: Type A and Type B. 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 by individual executives or officials;
- e* where possible, the corporation makes restitution to injured parties; and
- f* the corporation did not coerce any other 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. Recent updates to the Antitrust Division's Frequently Asked Questions emphasised that such individuals will not be protected if they do not fully cooperate with the Antitrust Division's investigation.⁷³ In that situation, those individuals will be 'carved out' from the conditional leniency letter.⁷⁴ Paragraph 4 of the model corporate conditional leniency letter⁷⁵ 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;
- d* the corporation reports the wrongdoing with candour and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

policy announced in December 2017, the Criminal Division will adopt a presumption of declination if the company meets the standards for voluntary self-disclosure, full cooperation, and timely and appropriate remediation. US Attorneys' Manual, Section 9-47.120 – FCPA Corporate Enforcement Policy, available at <https://www.justice.gov/criminal-fraud/file/838416/download>.

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

73 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 22, available at www.justice.gov/atr/public/criminal/239583.pdf.

74 Id.

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

- e* the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions by 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 the past, the Division provided leniency to qualifying employees of a Type B applicant on the same basis as it did for employees of a Type A applicant.⁷⁶ Updates to the Antitrust Division's Frequently Asked Questions, published in January 2017, changed this approach, noting that the Division may exclude 'those current directors, officers, and employees who are determined to be highly culpable'.⁷⁷ According to the Antitrust Division, '[l]eniency must be fully earned'.⁷⁸ This change could lead to certain individuals deciding not to cooperate with their employer's efforts to obtain leniency on behalf of the company.

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 into participating in the activity, and clearly was not the leader in, or the originator of, the activity.⁷⁹

The Antitrust Division announced in January 2017 that former directors, officers and employees of a company that obtains leniency 'are presumptively excluded from any grant of corporate leniency'.⁸⁰ Prior to this announcement, the Antitrust Division's position was that the Division had no obligation to grant leniency to former directors, officers or employees.

76 US Department of Justice, '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.pdf.

77 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 22, available at www.justice.gov/atr/public/criminal/239583.pdf.

78 *Id.*

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

80 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 24, available at www.justice.gov/atr/public/criminal/239583.pdf.

This recent change could result in former directors, officers and employees deciding not to cooperate with, or provide information to, the Division because of the low likelihood that they will obtain leniency.

ii Leniency Plus

The Leniency Plus Program, also referred to as the Amnesty Plus Program, has also been a powerful source of investigative leads for the Antitrust Division.⁸¹ Leniency Plus is available to a company that cannot claim leniency for a conspiracy already under investigation by the Division (the 'A' conspiracy) but that, 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 Leniency Plus, 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 the strength of the evidence provided by the cooperating company in the 'B' investigation, the potential significance of the violation reported in the 'B' investigation and the likelihood that the Division would have uncovered the 'B' conspiracy without self-reporting by the company.⁸²

iii Penalty Plus

'Penalty Plus' is the converse of 'Leniency Plus'. Leniency 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.⁸³ Failing to take advantage of the Leniency Plus Program could cost a company a potential fine as high as 80 per cent or more of the volume of affected commerce as opposed to no fine at all on the Leniency Plus product.⁸⁴ In egregious cases, the Antitrust Division may also seek the appointment of an external monitor 'to ensure that the company develops an appropriate culture of corporate compliance'.⁸⁵ For individuals, the difference in failing to self-report could be between a lengthy jail sentence and no jail sentence.⁸⁶

81 Id., at Question 8. ('Many of the Division's investigations result from evidence developed during an investigation of a completely separate conspiracy.')

82 Id., at Question 9.

83 Id., at Question 10.

84 Scott D Hammond, 'When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?' speech at Fifteenth Annual National Institute on White Collar Crime, available at <https://www.justice.gov/atr/speech/when-calculating-costs-and-benefits-applying-corporate-amnesty-how-do-you-put-price-tag>.

85 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 10, available at www.justice.gov/atr/public/criminal/239583.pdf.

86 Scott D Hammond, 'When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?' speech at Fifteenth Annual National Institute on White Collar Crime, available at <https://www.justice.gov/atr/speech/when-calculating-costs-an>

The Division recently secured a higher fine for a defendant's failure to disclose a separate conspiracy, while pleading guilty to another conspiracy in *United States v. Bridgestone*. There, the Division noted that Bridgestone's failure to disclose its participation in a second cartel involving anti-vibration rubber parts at the time it pleaded guilty to a prior conspiracy involving marine hoses was an aggravating factor in the \$425 million fine imposed.⁸⁷ The Division stated that it would 'take a hard line when repeat offenders fail to disclose additional anticompetitive behaviour'.

iv Government contracting

The 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 MAPS⁸⁸ 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.⁸⁹ The MAPS programme continues to be staple training for procurement officers serving state and federal agencies.

V LENIENCY PROGRAMME 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 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

d-benefits-applying-corporate-amnesty-how-do-you-put-price-tag.

87 Press Release, US Department of Justice, 'Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars' (13 February 2014), <https://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars>.

88 MAPS stands for 'market, applications, patterns and suspicious behaviour'.

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

application per conspiracy, and 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:

- a* report that he or she has discovered some evidence indicating that his or her client has engaged in a criminal antitrust violation;
- b* disclose the general nature of the conduct discovered;
- c* identify the industry, product or service involved with sufficient specificity to allow the Division to determine whether leniency is still available; and
- d* identify the client.⁹⁰

Prior to 2017, the Antitrust Division allowed companies to make use of an ‘anonymous marker’, which allowed counsel to obtain a short-term marker and preserve the client’s place in line without revealing the client’s identity. An anonymous marker could be obtained if counsel disclosed the other required information but needed additional time to verify certain information before revealing the client’s name to the Antitrust Division. However, the Division’s updated Frequently Asked Questions from January 2017 make clear that an anonymous marker is available only ‘in limited circumstances’; in such cases, the anonymous marker may last for only two to three days before counsel must report the client’s identity to the Division.⁹¹

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.

Counsel for leniency applicants should contact the Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement (Criminal DAAG) or the Director of Criminal Enforcement to request a marker. Any requests for a marker that are submitted to one of the Division’s criminal offices will be sent immediately to the Criminal DAAG for his or her determination. The Criminal DAAG is responsible for reviewing and evaluating ‘all requests for leniency, including the scope of any leniency marker extended’.⁹² 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.

90 US Department of Justice, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 2, available at www.justice.gov/atr/public/criminal/239583.pdf.

91 Id.

92 Id., at Question 1.

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 without agreement with the applicant, prior disclosure by the applicant or by order of a court.⁹³ Most other major enforcement jurisdictions have followed the Division's policy on this issue, such that, generally speaking, the leniency applicant has control over the flow of its information between governments.⁹⁴

Regarding information sharing with non-US antitrust authorities, the Antitrust Division's policy is to 'not disclos[e] to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure'.⁹⁵ However, 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 several 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. Committed to hold individual executives accountable for cartel offences for a more effective deterrence, the Division started 'carving out' individuals believed to be culpable, as well as employees who refused to cooperate or had potentially relevant information but could not be located.

In 2013, the Division implemented two changes.⁹⁶ First, the Division announced that it was no longer carving out individuals for reasons other than potential culpability.⁹⁷ Second, the Division abandoned its much-criticised policy of identifying carved-out individuals by name in the plea agreements, and instead began listing their names in an appendix and

93 Id., at Question 33.

94 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.

95 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 33, available at www.justice.gov/atr/public/criminal/239583.pdf.

96 Press release, 'U.S. Department of Justice, Statement of Assistant Attorney General William Baer on Changes to Antitrust Division's Carve-Out Practice regarding Corporate Plea Agreements' (12 April 2013), www.justice.gov/atr/public/press_releases/2013/295747.pdf.

97 Id.

requesting that the court file that document under seal.⁹⁸ However, the Antitrust Division's January 2017 update to Frequently Asked Questions announced that it will carve out a company's current director, director or employee if he or she does not fully cooperate with the Division's investigation.⁹⁹

A September 2015 policy memorandum clarified that the Department of Justice's principal focus in corporate fraud prosecutions, including for antitrust violations, is the pursuit of individual prosecutions.¹⁰⁰ As a prime tenet of that focus, senior leadership at the Department announced that '[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct', clarifying that the policy applies to civil and criminal proceedings alike. Although the Department clarified that this change would not impact the protection of those individuals who otherwise qualify for protection under the Division's Corporate Leniency Policy, the memorandum has led the Division to be far more restrictive in its view of which employees may ultimately be entitled to that protection, particularly concerning the cooperation it may require of a carved-in employee. For example, in Leniency Plus cases where a company under investigation reports a new conspiracy, the Division will require full and timely cooperation from employees to obtain protection under the company's leniency letter. Thus, an individual who chooses to participate in the leniency investigation but refuses to cooperate in the non-leniency investigation will not be covered by the company's leniency letter.¹⁰¹

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.¹⁰² The leniency agreement does not require the company to turn over documents protected by attorney–client privilege or attorney work product doctrine, although of course the company may do so voluntarily.¹⁰³ 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.¹⁰⁴ 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

98 Id.

99 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 22, available at www.justice.gov/atr/public/criminal/239583.pdf.

100 Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, 9 September 2015, available at www.justice.gov/dag/file/769036/download.

101 William J Baer, 'Prosecuting Antitrust Crimes', Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium, 10 September 2014, available at www.justice.gov/atr/public/speeches/308499.pdf.

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

103 US Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 November 2008, updated 26 January 2017, Question 17, available at www.justice.gov/atr/public/criminal/239583.pdf.

104 Id., at Question 18.

receiving the full benefit of the leniency agreement.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ Stolt-Nielsen sought acceptance into the Leniency Program and received a marker, although the leniency application may have been triggered by the newspaper 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 steps to end its participation in the cartel.¹⁰⁸ 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.¹⁰⁹

Stolt-Nielsen and the arrested executive sought an injunction barring the Antitrust Division from prosecuting them. The district court granted the injunction, finding 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 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.¹¹⁰ 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.¹¹¹

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.¹¹²

v Limitation on treble damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004

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

¹⁰⁵ *Id.*, at Question 18.

¹⁰⁶ *Id.*, at Question 18.

¹⁰⁷ *Stolt-Nielsen, SA v. United States*, 352 F Supp 2d 553 (ED Pa 2005).

¹⁰⁸ *Id.* at 565.

¹⁰⁹ *Stolt-Nielsen, SA v. United States*, 442 F3d 177, 181 (3d Cir 2006).

¹¹⁰ *Id.* at 184.

¹¹¹ *United States v. Stolt-Nielsen, SA*, No. 06-cr-466, 2007 US Dist LEXIS 88011 (ED Pa 29 November 2007).

¹¹² See 'Scott Hammond on Stolt-Nielsen' (1 May 2008), available at www.justice.gov/atr/public/speeches/234840.pdf.

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.¹¹³ Joint and several liability is also unavailable to the plaintiff.¹¹⁴

A court hearing the civil antitrust case is tasked with determining whether a leniency recipient has provided ‘satisfactory cooperation’; however, the precise contours of what constitutes ‘satisfactory cooperation’, as the term is used in ACPERA, remains somewhat unclear. The text of the Act specifies that it includes providing the civil plaintiff with all facts known to the leniency applicant that are ‘potentially relevant to the civil action’, furnishing potentially relevant documents, and making him or herself (in the case of individual applicants) available for depositions or testimony, or (in the case of corporate applicants) using best efforts to secure depositions or testimony from cooperating individuals.¹¹⁵ 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’.¹¹⁶

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.¹¹⁷

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 two decisions have addressed the duty of a leniency applicant to cooperate with civil plaintiffs under ACPERA. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*,¹¹⁸ 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 criminal investigation.¹¹⁹ 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

113 Pub L No. 108-237, Section 213.

114 Id.

115 Id.

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

117 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.’).

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

119 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 filed in *In re TFT-LCD (Flat Panel) Antitrust Litig*, No. M07-1827 (ND Cal.).

benefit of ACPERA.¹²⁰ More recently, in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*,¹²¹ the district court recalled that the Congressional Committee Report indicated the term ‘potentially relevant’ was intended to preclude a ‘parsimonious view of the facts or documents to which a claimant is entitled’.¹²² It held that the obligation of a leniency applicant to provide a ‘full account’ of ‘all facts known’ and ‘all documents [. . .] that are potentially relevant to the civil action’ implies more than mere compliance with discovery obligations under the federal rules.

These decisions do not provide much insight into the scope of the applicant’s duty to cooperate, and the necessary quantum and timeliness of ‘satisfactory’ cooperation remain closely contested issues in civil litigation. Until the law in this area is clarified, defendants are likely to continue to do just enough not to imperil the benefit they receive under ACPERA.¹²³

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.¹²⁴

The Leniency Program’s protections for individuals associated with a corporate leniency applicant has softened the representational conflict issue for companies that receive corporate leniency.¹²⁵ 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.¹²⁶ For companies that receive Type B leniency, the Division has the discretion to extend leniency to the same set of individuals under the same circumstances.¹²⁷ When

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

121 *In re Aftermarket Auto Lighting Prods Antitrust Litig.*, No. 09 MDL 2007-GW PJWX, 2013 WL 4536569 (C.D. Cal. 26 Aug. 2013).

122 *Id.* at *4 (quoting 150 Cong Rec H3657 (2 June 2004) (statement of Rep. Sensenbrenner)).

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

124 *Upjohn Co v. United States*, 449 US 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 principle 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 US 436 (1966).

125 Recall that Type A leniency is available only to the first cartel participant that files for a marker, and then only under certain conditions. See Section IV.i.

126 Department of Justice Corporate Leniency Policy, available at www.justice.gov/atr/public/guidelines/0091.pdf; see 15 USC Section 1.

127 US Department of Justice, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 22, available at www.justice.gov/atr/public/criminal/239583.pdf.

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 choose to assert his or her innocence rather than share in the corporation’s leniency, which would be likely to 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 that event, 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.

United States v. Norris,¹²⁸ 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.¹²⁹ Norris provided the scripts to Morgan Crucible’s corporate counsel, who in turn produced the documents to the Antitrust Division.¹³⁰

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.¹³¹ 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 email in which the attorney said he had told the Antitrust Division that ‘the firm represents the parent company, its affiliates and its current employees’.¹³² 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.¹³³

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.

128 *United States v. Norris*, 722 F Supp 2d 632 (ED Pa 2010).

129 Second Superseding Indictment, *United States v. Norris*, No. 03-cr-632 (ED Pa 28 September 2004).

130 722 F Supp 2d at 635.

131 Second Superseding Indictment; see footnote 95.

132 Ian P Norris’s Memorandum in Opposition to Antitrust Division’s Motion *In Limine* to Permit Testimony of Sutton Keany; Request for Evidentiary Hearing, at 5, 2:03-cr-00632-ER (ED Pa filed 5 June 2010).

133 Norris’s 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).

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 Act (CAARA) would amend ACPERA to allow an employee who feels his or her employer has retaliated against him or her for reporting wrongful conduct to file a complaint with the Secretary of Labor. If the complaint is 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 2012 iteration of CAARA died in a Senate Committee without a vote. The bill was reintroduced in 2013, and the Senate voted unanimously to pass the bill in November 2013.¹³⁴ The bill was again reintroduced in 2015 and unanimously passed by the Senate on 22 July 2015.¹³⁵ The bill was reintroduced in 2017 and was passed by the Senate on 22 November 2017.¹³⁶ The Antitrust Division has not taken a position on the legislation, apparently believing that whistle-blowers are protected by existing federal law.

VI PENALTIES

The primary determinant for sentencing in cartel cases is the US Sentencing Guidelines¹³⁷ (Sentencing Guidelines). 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 Sentencing 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 sentences after trial; in both cases, their discretion is informed by the Sentencing Guidelines.¹³⁸ 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 Sentencing 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.¹³⁹ Cartel offences have a base offence level of 12, with an increase of up to 16 levels depending on the volume of

134 S 42, 113th Cong (2013).

135 S 1599, 114th Cong (2015).

136 S 807, 115th Cong (2017).

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

138 After *United States v. Booker*, 543 US 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.

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

commerce affected.¹⁴⁰ 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 with 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 there.¹⁴¹ Corporate fines are subject to adjustment by a multiplier depending on the corporation's 'culpability score', but the multiplier cannot fall below three-quarters or 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.¹⁴²

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.¹⁴³ 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,¹⁴⁴ the Division has nevertheless considered foreign sales when determining

¹⁴⁰ USSG Section 2R1.1.

¹⁴¹ The percentage calculation for individual fines is subject to a lower cap of US\$20,000 – that is, the recommended fine for an individual can never fall below US\$20,000. *Id.*

¹⁴² 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.*

¹⁴³ See Plea Agreement at 3, *United States v. Korean Air Lines Co.*, Criminal No. 07-184 JDB (D DC 1 August 2007), available at www.justice.gov/atr/cases/f225500/225524.pdf (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').

¹⁴⁴ See Brief for the United States and the Federal Trade Commission as Amici Curiae, *Statoil ASA v. Heeremac VOF*, No. 00-1842 (3 January 2002), available at www.ftc.gov/sites/default/files/documents/amicus_briefs/statoil-asa-petitioner-v.heeremac-v.o.f.et-al./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.').

finer. The most recent example comes from the ongoing *Auto Parts* 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:

- a* sales of auto parts that were manufactured abroad, but sold into the United States for installation in cars made or sold in the United States;
- b* sales of auto parts that were actually manufactured in the United States and sold to automotive manufacturers in the United States; and
- c* in part, 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.¹⁴⁵

In *Auto Parts* and other 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 USC 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 USC 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 verdict in *AU Optronics*, the Division had seen little success in pursuing alternative fines under Section 3571 outside the context of a plea agreement.¹⁴⁶ *AU Optronics* was the first case in which a court imposed a sentence greater than the Sherman Act's

¹⁴⁵ 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.

¹⁴⁶ See *US v. Andreas*, 96-cr-762 (ND 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 pecuniary gain or twice the gross pecuniary loss – cannot be calculated without unduly prolonging or complicating the sentencing process and is, therefore, not considered.').

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.¹⁴⁷

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*,¹⁴⁸ it would have to prove to the jury, beyond a reasonable doubt, the amount of gross gain or loss.¹⁴⁹ The Northern District reached this ruling despite the Division's argument that *dicta* in *Oregon v. Ice*¹⁵⁰ 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.¹⁵¹ 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'.¹⁵² 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.¹⁵³

The Antitrust Division's 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 after *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.¹⁵⁴ The Court answered this question in the affirmative.¹⁵⁵ Accordingly, it is fair 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

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

148 530 US 466 (2000) ('[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.').

149 Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 USC Section 3571(d), *US v. AU Optronics Corp*, 09-00110 (ND Cal 18 July 2011).

150 555 US 160 (2009).

151 See footnote 109. The First Circuit had followed this logic a year earlier, affirming a district court's imposition of an US\$18 million 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 F3d 17 (1st Cir 2010).

152 Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 USC Section 3571(d), *United States v. AU Optronics Corp*, 09-00110 (ND Cal 18 July 2011).

153 *Id.*

154 *Southern Union Co v. United States*, 567 US 343 (2012).

155 *Id.*

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 to do so when sentencing a defendant in an antitrust cartel case. The US\$500 million fine on AU Optronics was recently affirmed by the Ninth Circuit. Ruling on an issue of first impression, the court of appeals held that the alternative fine statute does not prevent the imposition of a fine based on the collective gains to all members of the conspiracy, nor does it require holding them jointly and severally liable.¹⁵⁶

Since then, the Division has secured several fines exceeding the Sherman Act statutory maximum. In 2015, the Division has imposed four of the largest fines ever for a criminal violation of the Sherman Act against banks for manipulation of the foreign exchange markets: Citicorp (US\$925 million, which also is the largest fine ever imposed on a single entity); Barclays PLC (US\$650 million); JPMorgan Chase & Co (US\$550 million); and Royal Bank of Scotland PLC (US\$395 million).¹⁵⁷ In previous investigations, the Division imposed two US\$300 million fines against participants in the *Air Cargo and Passenger* conspiracy (2007), a US\$350 million fine in the *Air Cargo* conspiracy (2008), fines of US\$470 million and US\$425 million against participants in the *Auto Parts* conspiracies (2012 and 2014, respectively), and a US\$500 million fine against a participant in the *LCD Panel* conspiracy (2012).¹⁵⁸

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

156 *US v. Hui Hsiung*, 758 F3d 1074, 1088, 1095-1096 (9th Cir 2014). The case was appealed to the Supreme Court, but cert was denied in 2015. *Hsiung v. US*, 135 S.Ct. 2837 (2015).

157 US Department of Justice, 'Division Update Spring 2016', Criminal Program: Division Achieves Important Milestones in Financial Industry Cleanup, available at <https://www.justice.gov/atr/division-operations/division-update-2016/milestones-financial-industry-cleanup>.

158 All figures taken from 'Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More', available at <https://www.justice.gov/atr/file/627221/download>.

the disproportionality in sentencing between defendants that results from discounts.¹⁵⁹ 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).¹⁶⁰

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 departure from the requirements under Section 8C4.1 of the Sentencing Guidelines;¹⁶¹ the Division often recommends discounts to second-in cooperators in the range of 30 to 35 per cent.¹⁶² 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 Guidelines – although the Division will choose 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.¹⁶³ Third, the Division often agrees to fewer carve-outs for high-ranking employees when the defendant is a second-in cooperator.¹⁶⁴ Fourth, second-in cooperators may stand a better chance of enjoying credit under the Division’s Amnesty Plus or Affirmative Amnesty programmes.¹⁶⁵ 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.¹⁶⁶

Under Sections 5K1.1 and 8C4.1 of the Sentencing Guidelines, the Antitrust Division may move the court for a downward departure from the guidelines for an individual or

159 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. The Division has recently clarified that the extent of any discount will not merely be reflective of the timing of cooperation, but also the nature, extent, and value of that cooperation to the Division. It is essential that the company’s cooperation fully and truthfully assist the Division’s attempts to hold other corporate and individual conspirators accountable. See Brent Snyder, ‘Individual Accountability for Antitrust Crimes’, address to the Yale Global Antitrust Enforcement Conference, New Haven, Conn. (19 February 2016), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>. This shift in emphasis is consistent with a trend that places increasing weight on the value prong of the discount consideration and marks a change from the Division’s prior practice. William J Baer, ‘Prosecuting Antitrust Crimes’, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium, 10 September 2014, available at www.justice.gov/atr/public/speeches/308499.pdf.

160 The Federal Rules of Criminal Procedure offer three potential forms for plea agreements. In an ‘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).

161 USSG Section 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 the ‘significance and usefulness’, the ‘nature and extent’, and the ‘timeliness’ of the company’s assistance.

162 See Scott D Hammond, footnote 130, at 5.

163 Id. at 6–7; see Section IV.iii for a discussion of Penalty Plus for corporations

164 Id. at 7; see Section V.iii for a discussion of carve-outs for individuals.

165 See Scott D Hammond, footnote 130, at 9–11.

166 Id. at 3–4.

corporation who provides ‘substantial assistance’ to the investigation or prosecution; the Division has often done so in antitrust cartel cases.¹⁶⁷ The Division may include a promise to request downward departure, subject to certain conditions, in a plea agreement.¹⁶⁸ In determining the appropriate reduction sought both for individuals and corporations as defendants, the court may consider various factors, including the significance and usefulness of the defendant’s assistance, the nature and extent of that assistance, as well as its timeliness.¹⁶⁹ Solely for individual defendants, the court may also consider the ‘truthfulness, completeness, and reliability’ of the defendant’s testimony, and any danger or injury to the defendant caused by the assistance.¹⁷⁰

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. From fiscal year 2010 to 2016, the average prison sentence imposed against all individual cartel defendants – both foreign and US nationals – was 22 months.¹⁷¹ By comparison, the average sentence imposed against the 49 foreign defendants sentenced between fiscal years 2010 and 2015 was 15.5 months.¹⁷²

Companies that have ‘effective’ compliance programmes may also receive a ‘discount’ in the sentencing calculus and thus lower fines. In May 2015, the Antitrust Division recommended for the first time that a company receive sentencing credit for implementing and maintaining an effective compliance programme following the initiation of an investigation.¹⁷³ The Division previously hinted at its seriousness about recommending compliance credit in September 2014,¹⁷⁴ stating that it was ‘actively considering ways [to] credit companies that

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

168 See Model Annotated Individual Plea Agreement, Paragraph 10 (18 February 2014), available at www.justice.gov/atr/public/criminal/302600.pdf, and Model Annotated Corporate Plea Agreement, Paragraph 10 (20 December 2013), available at www.justice.gov/atr/public/criminal/302601.pdf; ‘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 in Paris, France (17 October 2006), available at www.justice.gov/atr/public/speeches/219332.pdf.

169 USSG Sections 5K1.1 and 8C4.1.

170 USSG Section 5K1.1.

171 US Department of Justice, ‘Criminal Enforcement Trends Chart Through Fiscal Year 2016’ (30 January 2017), available at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

172 See Brent Snyder, Individual Accountability for Antitrust Crimes (19 February 2016), at 9.

173 In a plea deal Barclays PLC entered into in the investigation into the alleged conspiracy to manipulate the price of US dollars and euros sold in the foreign exchange (FX) spot market, the language notating the credit for an effective compliance programme states:

The parties further agree that the Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 USC Sections 3553(a) and 3572(a), in considering, among other factors, the substantial improvements to the defendant’s compliance and remediation program to prevent recurrence of the charged offense.

United States v. Barclays PLC, Plea Agreement Section 13, available at www.justice.gov/file/440481/download.

174 Prior to this, some commentators observed that in contrast to other divisions of the Department of Justice, the Antitrust Division generally did not give fine reductions to corporations for maintaining compliance programmes. See, e.g., Joseph Murphy and William Kolasky, ‘The Role of Anti-Cartel Compliance

proactively adopt or strengthen compliance programmes after coming under investigation'.¹⁷⁵ The Division's May 2015 recommendation that Barclays receive compliance credit reflects confirmation of the Division's willingness to credit effective compliance programmes in certain circumstances. On 29 September 2015, the Antitrust Division recommended that Kayaba Industry Co Ltd receive a discount on its fine for its participation in the auto parts price-fixing conspiracies because it adopted an effective compliance programme following the initiation of the investigation.¹⁷⁶

The Division has refrained from imposing a 'one size fits all' criterion for an 'effective' compliance programme, but has set out a number of basic tenets of such a programme.¹⁷⁷ First, the compliance programme must be combined with 'a real commitment by senior management' – that is, top officials of the company must lead by example and support, participate in and take seriously the compliance programme. Second, the company should educate and train the entire organisation (particularly executives, managers and employees with sales and pricing responsibilities) to ensure their full commitment with its compliance efforts. Third, the compliance programme should be 'proactive' in re-evaluating, monitoring and auditing risk activities regularly. Finally, the company should have disciplinary procedures in place for individuals who run afoul of the compliance programme and violate antitrust laws.

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 whole.¹⁷⁸ Second, determining the amount of loss suffered by particular victims is difficult and complex, and may unduly

Programs in Preventing Cartel Behavior', Vol. 26 *Antitrust*, No. 2, Spring 2012, 61, at 63; see also Jonathan M Jacobson, Antitrust Law Developments 790–91 (Am Bar Association 6th ed. 2007) ('The Division has never recommended a reduction based on an effective antitrust compliance programme'). Other commentators had highlighted the 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 programme' as one of several factors when determining how to treat a corporate target. United States Attorneys' Manual, 9-28.300 'Factors to Be Considered', available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300; see also Murphy & Kolasky at 63.

175 US Department of Justice, Speech by Deputy Assistant Attorney General Brent Snyder 'Compliance is a Culture, Not Just a Policy' (9 September 2014), www.justice.gov/atr/file/517796/download.

176 United States Sentencing Memorandum and Motion for a Downward Departure at 7, *United States v. Kayaba Industry Co*, No. 1:15-cr-00098-MRB (SD Ohio 5 October 2015), (recommending a discount in fine because 'KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy').

177 US Department of Justice, Speech by Deputy Assistant Attorney General Brent Snyder Compliance is a Culture, Not Just a Policy (9 September 2014), www.justice.gov/atr/file/517796/download.

178 See USSG Section 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 (ND Cal 15 March 2011) (the government did not seek restitution because a follow-on private civil suit 'potentially provide[s] for a recovery of a multiple of actual damages').

complicate and delay the sentencing process.¹⁷⁹ This concern is sharpened by the availability of private civil suits as a mechanism to determine the amount of money owed to particular victims. Leniency applicants are not required to pay restitution to victims whose antitrust injuries are independent of and not proximately caused by an adverse effect on (1) trade or commerce within the United States, (2) import trade or commerce, or (3) the export trade or commerce of a person engaged in such trade or commerce in the United States.¹⁸⁰

The Division may also recommend, and the court impose, a period of probation upon a corporate defendant in a cartel case.¹⁸¹ Probation may include a variety of conditions, including that the corporation not commit another federal, state or local crime during the term of probation, pay restitution if required, and implement an antitrust compliance programme or address deficiencies in an existing compliance programme.¹⁸² Notably, the Antitrust Division has recently begun seeking imposition of compliance monitors, which can prove to be a costly and time-consuming constraint on corporate defendants. This measure was first taken in *AU Optronics*, in which the Division argued such an educational or correctional treatment was necessary, considering the defendant refused to admit the illegality of its conduct and had been engaged in anticompetitive conduct since its creation.¹⁸³ The Division subsequently recommended the appointment of an external monitor more generally as a condition of probation.¹⁸⁴ Recently, Deutsche Bank AG agreed to hire an ‘independent compliance and ethics monitor’ for a period of three years as part of a deferred prosecution agreement related to the LIBOR investigation.¹⁸⁵

In addition, 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.

179 See USSG Section 8B1.1; see, e.g., United States’ Sentencing Memo. at 5–6, *US v. UCAR Int’l Inc.*, No. 98-177 (ED 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.’)

180 See US Department of Justice & Federal Trade Commission, ‘Antitrust Guidelines For International Enforcement And Cooperation’ (13 January 2017) n.100, available at <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017>.

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

182 *Id.* at Section 8D1.3.

183 US Sentencing Memorandum at 53, *United States v. AU Optronics Corp.*, No. cr-09-0110 SI (ND Cal 20 September 2012), available at www.justice.gov/atr/cases/f286900/286934_1.pdf.

184 *United States v. Florida West International Airways, Inc.*, No. 10-20864-CR-SCOLA (SD Florida, November 2012) and *United States v. Apple, Inc.*, 2013 US Dist LEXIS 129727, 2013-2 Trade Cas (CCH) P78,506, 2013 WL 4774755 (SDNY 5 September 2013).

185 Deferred Prosecution Agreement at 6–7, *US v. Deutsche Bank AG*, Case No. 3:15-cr-00061-RNC (D. Conn. Apr. 23, 2015).

v Extradition

The Division has focused increasingly on prosecuting international cartels. In accordance with its position that punishing individuals is essential to effective cartel enforcement,¹⁸⁶ the Division often indicts foreign nationals who were leaders of or involved in a conspiracy. Until the 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 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).¹⁸⁷ Most foreign jurisdictions do not criminalise price fixing for individuals, hence the Division's historical difficulty in securing formal extradition from other countries.¹⁸⁸

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's 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'.¹⁸⁹ In fact, it was not long before the Antitrust Division announced the first successfully litigated extradition on an antitrust charge. In April 2014, Romano Piscioti, an Italian national and an executive of Parker ITR SRL, was extradited from Germany for his involvement in the *Marine Hose* conspiracy.¹⁹⁰

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

186 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.pdf. ('[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].'). See also more recently, Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, footnote 72 ('One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.').

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

188 See Daryl A Libow and Laura K D'Allaird, Recent Developments and Key Issues in US Cartel Enforcement, presentation before the American Bar Association (28 October 2009). 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 154 (listing foreign jurisdictions that have adopted or considered adopting criminal penalties for cartel offences); Scott D 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).

189 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.pdf.

190 Press release, US Department of Justice, 'First Ever Extradition on Antitrust Charge' (4 April 2014), available at www.justice.gov/atr/public/press_releases/2014/304888.pdf.

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 US court if his or 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 provided or will provide 'significant assistance' to the Division in prosecuting an antitrust case.¹⁹¹ 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 maintains the Excluded Party List System, 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

¹⁹¹ 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.pdf.

context may also trigger other criminal statutes, including 18 USC 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 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 United Kingdom and Australia, also have debarment procedures for individuals implicated in cartel activity. In the United States, the Food and Drug Administration has similar procedures for executives involved in fraudulent conduct before the agency, as does the Securities and Exchange Commission. At present, however, the United States does not debar individuals convicted of or implicated in antitrust violations from serving as an officer or director of a public company. In 2016, the UK’s Competition and Markets Authority applied a debarment sanction for the first time against Daniel Aston, a director of the company Trod Ltd, for his direct involvement in an agreement with a competitor not to undercut each other’s prices.¹⁹² Aston was disqualified from serving as a director of any UK company for five years.

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 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, such as the financial services industry, and as a result of the increasingly crowded global cartel enforcement environment.

¹⁹² See Press Release, ‘CMA secures director disqualification for competition law breach’ (1 December 2016), available at <https://www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach>.

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.¹⁹³ This is consistent with the Division's general view that the criminal sanction is essential to appropriate deterrence.¹⁹⁴

Although the Antitrust Division did employ NPAs with respect to a number of corporate defendants in the municipal bond investigation in 2011 and 2012,¹⁹⁵ counsel should not draw the conclusion that the Division did this out of solicitude for the defendants.

The cases against the municipal bonds corporate defendants predominantly 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.¹⁹⁶ 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.¹⁹⁷ 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. Note that individual defendants were not offered NPAs, and over a dozen former financial institution employees entered guilty pleas.¹⁹⁸

In February 2013, the Antitrust Division entered into a DPA with the Royal Bank of Scotland (RBS) for its admitted involvement in the LIBOR conspiracy and in recognition

193 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-Prosecution Agreements, but Should Evaluate Effectiveness', December 2009, at 15 No. 29, available at www.gao.gov/new.items/d10110.pdf.

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

195 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's non-prosecution agreement in municipal bonds investigation, 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.

196 Principles of Federal Prosecution of Business Organizations (Principles), USAM 9-28.000, available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. It is worth noting that the Principles expressly recognise the Antitrust Division's alternative use of the Leniency Program in the context of antitrust violations. *Id.* at 9-28.400 (Comment).

197 *Id.*

198 For example, three General Electric executives 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 (SDNY 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. The judgments of conviction of all defendants were, however, recently reversed on statute-of-limitations grounds. *United States v. Carollo*, 738 F3d 498 (2nd Cir 2013).

of the valuable information provided by RBS.¹⁹⁹ Under the agreement, the Department of Justice will dismiss the wire fraud and antitrust charges against RBS if the bank cooperates with the LIBOR investigation, pays a criminal penalty of US\$150 million and implements an enhanced compliance programme.

In May 2015, in a rather exceptional move, the Department of Justice voided the NPA reached by the Antitrust Division and Fraud Section in December 2012 with UBS AG (UBS) for its involvement in the LIBOR conspiracy.²⁰⁰ The Department determined that UBS breached the LIBOR NPA, in which it had agreed to ‘commit no further crimes’, by engaging in fraudulent and anticompetitive conduct in relation to the FX rates market. As a result of the breach, UBS agreed to plead guilty to one count of wire fraud for involvement in the LIBOR conspiracy, and also agreed to pay a criminal penalty of US\$203 million. This result was particularly surprising in light of the fact that it was UBS that self-reported its FX-related conduct to the Department under the Division’s leniency programme.

For the same policy reasons as those discouraging the use of NPAs or DPAs in criminal cartel investigations, 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 *United States v. Florida West International Airways*, a *nolo contendere* plea was accepted over the objection of the Antitrust Division.²⁰¹ 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 except in similarly 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 the prosecution and punishment of 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 such as 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.²⁰² Moreover, numerous bilateral agreements have been concluded

199 Allen & Overy publications, ‘DOJ’s First Ever Criminal Antitrust Charge of a Corporation for Trader-Based Market Manipulation’ (24 June 2013); press release, US Department of Justice, ‘RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR Benchmark Interest Rates’ (6 February 2013), www.justice.gov/atr/public/press_releases/2013/292421.pdf.

200 See press release, US Department of Justice, ‘Five Major Banks Agree to Parent-Level Guilty Pleas’ (20 May 2015), www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas. The Antitrust Division also found that in engaging in collusive conduct in relation to the FX market, Barclays PLC violated a principal term of its own June 2012 non-prosecution agreement resolving the department’s investigation of the manipulation of LIBOR and other benchmark interest rates. *Id.* The Division did not invalidate the NPA, unlike it did with the UBS NPA. Barclays agreed to pay a US\$60 million criminal penalty based on its violation of the NPA.

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

202 Multilateral organisations like the ICN, the OECD and the IBA have developed guidelines and best practices to harmonise enforcement actions. See, e.g., the ICN Work Product Catalogue,

to govern the level of assistance and the exchange of information in the case of joint investigations.²⁰³ In addition, as evidenced by numerous antitrust investigations such as the *Air Cargo* and *Auto Parts* investigations, dawn raids are routinely taking place with 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.²⁰⁴ The overriding concern is that in the absence of global coordination, defendants in international cartel cases may risk potential over-punishment as several 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 the guiding principles it 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 United States?²⁰⁵ 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 altogether.²⁰⁶

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.

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

204 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.

205 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.

206 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.

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.²⁰⁷ The practical result of these agreements was that none of the UK three had to return to serve prison time in the United States.

The need for global coordination was further highlighted in the July 2017 decision by the US Court of Appeals for the Second Circuit in *U.S. v. Allen*, which held that the prohibition on the use of compelled testimony applied even when a foreign regulator compelled the testimony.²⁰⁸ In *U.S. v. Allen*, the Second Circuit overturned the conviction and dismissed indictments against two defendants in the LIBOR bid-rigging scandal because a key witness's evidence was tainted when he reviewed statements by the defendants that were compelled by UK regulators. The Antitrust Division, and all other US enforcement bodies, are now wary of how foreign evidence is obtained, particularly when building a case against cartel participants using voluntary statements of leniency applicants.

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 towards hotly contested litigation over the appropriate bounds of the extraterritorial reach of US antitrust laws. All 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.

The risk for companies and individuals that participate in cartels affecting US commerce has never been higher. Fines for corporations have risen in the past 10 years, both in terms of the total amount of the fines imposed and the maximum fines imposed against particular corporations.²⁰⁹ Fiscal year 2015 was a record-breaking year, with nearly US\$3.6 billion in fines imposed, owing in large part to the fines levied in the foreign exchange investigation. That amount was more than the combined totals imposed in two prior record-breaking fine years, fiscal years 2013 (US\$1 billion) and 2014 (US\$1.3 billion).²¹⁰ And while the fine totals

207 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.

208 See *United States v. Allen*, No. 19-CR-898 (JAC), 2017 WL 3040201 (2d Cir. 2017).

209 See US Department of Justice, 'Criminal Enforcement Trends Chart Through Fiscal Year 2016' (30 January 2017), available at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

210 Id.

for fiscal years 2016 and 2017 were significantly below prior years, the number of active investigations known to be under way at the Antitrust Division suggest fine totals are likely to return to former levels in the coming years.

Prison terms for individuals also increased dramatically in the 2000s. The total prison days the Antitrust Division imposed on individuals more than doubled from eight months in 1990–1999 to 20 months in 2000–2009. Average sentence lengths also rose again slightly to 22 months in the 2010–2016 period, a 275 per cent increase since the 1990s.²¹¹

There is good reason to believe the trend towards 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. Although the court did not agree to the Division's request for 10-year terms of imprisonment for individual defendants or a US\$1 billion fine for the corporate defendant in the *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 has also succeeded in securing significant prison sentences, including a five-year term, which remains the longest ever imposed for a single Sherman Act violation.²¹² There is also a rejuvenated focus on individual culpability and accountability in the wake of the Yates memorandum. 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* 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 believes strongly that such a trend would contribute to appropriate deterrence.²¹³

The trend towards 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. Recently, on 13 January 2017, the Department and the FTC issued revised Antitrust Guidelines for International Enforcement and Cooperation to replace the similar guidelines they issued in 1995, which provides guidance to businesses engaged in international activities.²¹⁴ The revised Guidelines acknowledge the

211 Id. See also Assistant Attorney General Bill Baer of the Antitrust Division Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, March 9, 2016, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary>.

212 US Department of Justice, 'Division Update Spring 2014', Criminal Program, available at www.justice.gov/atr/public/division-update/2014/criminal-program.html. Note that the Division imposed a 14-year sentence on Gary McDonald in a multi-count indictment for participating in multiple bid-rigging, fraud and kickback schemes in the environmental services investigation. The 14-year sentence is the longest prison sentence ever imposed involving an antitrust crime. See US Department of Justice, 'Division Update Spring 2015', Criminal Program, available at www.justice.gov/atr/division-update/2015/criminal-program-update.

213 See Brent Snyder, Individual Accountability for Antitrust Crimes, footnote 130 ('[C]orporate prosecutions and fines have their place in our enforcement toolkit. They punish firms that are in business to make money by taking money away from them. Fines divest corporate offenders of at least some of the ill-gotten gains that they would otherwise enjoy – gains from conduct that undermines the competition on which we should be able to depend. And, word of corporate prosecutions and big fines travels fast, showing there is a real cost to the bottom line from bad behaviour. That promotes deterrence.').

214 See US Department of Justice & Federal Trade Commission, 'Antitrust Guidelines For International Enforcement And Cooperation' (13 January 2017), available at <https://www.justice.gov/atr/guidelines->

increased trade between the United States and other countries, and the increased role of US federal antitrust laws in protecting US customers and businesses from anticompetitive conduct as they are engaged in the purchase of US import commerce or the sale of US export commerce. The revised Guidelines also recognise the increased action by foreign authorities to investigate anticompetitive conduct, particularly conduct that is multi-jurisdictional. To this end, the Guidelines articulate the guiding principles that it will employ when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action. Aimed at ‘building and maintaining strong relationships with foreign authorities’, the revised Guidelines’ goals are to: (1) ‘increas[e] global understanding of different jurisdictions’ respective antitrust laws, policies, and procedures’; (2) ‘contribut[e] to procedural and substantive convergence toward best practices; and (3) ‘facilitat[e] enforcement cooperation internationally’.²¹⁵ 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 the prosecution of a defendant or matter altogether. The Antitrust Division is also advocating that other authorities take steps to adopt similar principles to ensure consistency across international investigations. However, the Guidelines’ newly added commentary on the FTAIA and the illustrative examples included demonstrate the many ways that foreign commerce may still fall inside the reach of the Sherman Act and FTC Act.

The Antitrust Division is likely to continue to give credit in sentencing to corporations that implement and maintain effective compliance programmes. The trend seems to be in favour of awarding such credit²¹⁶ where a compliance programme was implemented or augmented following the initiation of the investigation as the Division ‘almost never recommends that companies receive credit at sentencing for a pre-existing compliance program’.²¹⁷ The Division has also provided unique insight into what it will consider to be an ‘effective’ antitrust compliance programme. A key factor is that senior management is engaged in and models the compliance programme. The Division fully credited the compliance policy in *Kayaba*, noting that the policy ‘has the hallmarks of an effective compliance policy, including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy’.²¹⁸

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 criminal context, the newfound agreement around the FTAIA’s substantive nature imposes additional hurdles in criminal cases, requiring the government to plead and prove the elements of the FTAIA to bring a criminal prosecution. In the civil arena, courts do not appear to be interpreting the FTAIA to permit plaintiffs to obtain relief from US courts, either where the pleaded impact on US commerce was merely an indirect result of a foreign conspiracy to fix prices in a global market, or where the immediate harmful

and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017.

215 Id at 2.

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

217 US Department of Justice, Speech by Deputy Assistant Attorney General Brent Snyder ‘Compliance is a Culture, Not Just a Policy’ (9 September 2014), www.justice.gov/atr/file/517796/download.

218 United States Sentencing Memorandum and Motion for a Downward Departure at 7, *United States v. Kayaba Industry Co*, No. 1:15-cr-00098-MRB (SD Ohio 5 October 2015).

effects of the conspiracy take place abroad. Recently, the Seventh Circuit made use of the extraterritorial application of the Sherman Act in the civil antitrust suit brought by Motorola against members of the *LCD* cartel.²¹⁹ The relevance of the Seventh Circuit's opinion in *Motorola* is threefold. First, it supports the Division's contention that integrated products subject to collusion can still have a direct, substantial and reasonably foreseeable effect on US commerce under the FTAIA. Second, it addresses the concerns raised in the *amicus curiae* briefs filed by Taiwan, Japan and Korea regarding the potential harm to international comity that an exorbitant extraterritorial application of US antitrust law may involve. Third, it hints at a distinction in the extraterritorial reach of the Sherman Act for civil and criminal cases, so that a higher degree of self-restraint and consideration towards other nations' sovereign authority in the former do not jeopardise the Division's enforcement efforts beyond US borders in the latter.

Despite the growing tension in lower courts, the Supreme Court recently denied *certiorari* in *Motorola* and *Hsuing*.²²⁰ As the intricacies of international services and global manufacturing chains continue to test the courts' application of the FTAIA, this will remain an area to watch closely.

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 clients' potential US exposure at the front of their minds. However, 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 United Kingdom, Japan, Korea, Brazil and, more recently, China,²²¹ among others, are close behind. In recent years, the US agencies have formalised their cooperative relationships with countries such as Peru and China, and have bolstered their relationships with high-level meetings to discuss enforcement roles and developments.²²² The United States need not, indeed cannot, go it 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 United States, 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 employees²²³ and the potential for information disclosed to the Antitrust Division being used by the Criminal

219 *Id.*

220 See *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S Ct 2837 (2015); *Hui Hsuing v. United States*, 135 S Ct 2837 (2015).

221 Faez Samadi and Harry Phillips, 'NDRC and DOJ Likely Cooperating on Capacitor Investigation', *GCR* (6 May 2014), available at www.globalcompetitionreview.com/news/article/35892/ndrc-doj-likely-cooperating-capacitor-investigation.

222 International Program Update 2017, available at <https://www.justice.gov/atr/division-operations/division-update-spring-2017/international-program-update-2017>.

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

Division²²⁴ and 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 towards convergence, the United States remains something of an outlier in the scope and complexity of its private enforcement regime. Many jurisdictions continue to treat cartel enforcement entirely as a matter for public enforcement. Those jurisdictions that have moved towards a private right of action for damages are largely 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 United States 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 United States 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. In its dealings with its partners abroad, the Division will continue to try to lead by example and advocate its policy views while remaining cognisant of the comity considerations that are essential to what is increasingly a cooperative regime of global enforcement.

224 Information sharing between the Antitrust and Criminal Divisions, through joint investigations, has become an important part of the Antitrust Division's investigative tools as the Antitrust Division has sought to prosecute complex cartels, such as those involving market manipulation. In some situations, information sharing between the Antitrust and Criminal Divisions has resulted in charges from the Criminal Division but not the Antitrust Division when a company has received leniency. See, e.g., Plea Agreement, *United States v. UBS Securities Japan Co Ltd*, No. 12-cr- (D. Conn. 19 December 2012) (UBS's Japanese subsidiary pleaded guilty to one count of wire fraud charges in connection with manipulation of LIBOR but did not face charges under the Sherman Act due to corporate parent's participation in the Antitrust Division's Leniency Program).