Simpson Thacher

The Cartels and Leniency Review

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John Terzaken, Global Co-Chair of Simpson Thacher's Antitrust and Trade Regulation Practice, is the Co-Editor of *The Cartels and Leniency Review*. The tenth edition, which is now available online, is a leading reference on the laws and policies aimed at combating cartel activity from the world's principal competition authorities. It brings together leading competition lawyers from 25 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 book seeks to provide both breadth of coverage and analytical depth for practitioners and corporates alike who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices. It further addresses emerging issues surrounding unlawful agreements with competitors and analyzes recent enforcement trends and regulatory changes.

The full edition is available through the publisher's website and can be obtained here.

Inside the Tenth Edition

THE CARTELS AND LENIENCY REVIEW

TENTH EDITION

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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 have managed to remain intact for as long as a decade before being 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 25 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. 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.

This book serves as a useful resource for the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as considering the collateral implications of the potential involvement of non-antitrust regulators.

The authors 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 a chapter on each of the 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 10th edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not 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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January 2022

Chapter 25

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 declared to be illegal'.[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 (the 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 in

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 § 1.

3 ibid.; 18 USC § 3571(d).

4 15 USC § 1.

the past 10 years have been 18 months;[5] the highest sentence yet imposed is 60 months.[6] The Antitrust Division insists upon a prison term for every individual defendant, including any 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 they 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 (the 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 charges of this kind 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, cartel behaviour increasingly has reached across borders, requiring an integrated response from enforcement authorities of multiple jurisdictions. The United States relies on close working relationships with those

5 US Department of Justice (DOJ), 'Criminal Enforcement Trends Charts Through Fiscal Year 2019' (6 May 2020), available at www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

6 Press Release, DOJ, 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 Dec. 2013), www.justice.gov/opa/pr/former-sea-star-line-president-sentenced-serve-five-years-prison-role-price-fixing-conspiracy.

7 *See* DOJ, *Corporate Leniency Policy*; DOJ, https://www.justice.gov/atr/file/810281/download, DOJ, Leniency Policy for Individuals, https://www.justice.gov/atr/individual-leniency-policy.

8 *See* Plea Agreement, United States v. UBS Securities Japan Co. Ltd., (D. Conn. 19 Dec. 2012) (No. 3:12-CR-00268).

authorities to identify and investigate violations.[9] For example, on 2 September 2020, the Federal Trade Commission, along with the US Department of Justice (DOJ), signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities with competition agencies in Australia, Canada, New Zealand and the United Kingdom. The Framework is meant 'to strengthen cooperation among the signatories and provides the basis for a contemplated series of agreements that would permit sharing confidential information and using compulsory process to aid each other's antitrust investigations'.[10] On 18 November 2020, the DOJ signed a memorandum of understanding with the Korean Prosecution Service 'to promote increased cooperation and communication on criminal antitrust enforcement and policy'.[11] The Biden administration has promised a continued focus on international cartel behaviour that affects the US market, identifying this activity as one of the central vectors through which the federal antitrust laws are violated.[12]

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. Proceedings against foreign defendants still depend largely upon them submitting voluntarily to the jurisdiction of the US courts or being arrested opportunistically during a visit to the United States. In January 2020, a Dutch national, a former senior vice president of cargo sales and marketing who participated in an air cargo price-fixing conspiracy, was extradited from Italy to the United States after the Court of Appeals of Palermo ruled that she be extradited.[13] Italy was at the time only the 'seventh country to extradite a defendant in an Antitrust Division case in recent years, and the second to do so based solely on an antitrust charge'.[14]

9 *See* 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, at 14 (25 Feb. 2010) 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.').

10 Federal Trade Commission (FTC), FTC Chairman Joseph J. Simons Signs Antitrust Cooperation Framework with Australia, Canada, New Zealand, and United Kingdom, (2 Sept. 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftc-chairman-simons-signs-antitrust-cooperation-framework; *see also* FTC, *Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities Memorandum of Understanding*, https://www.ftc.gov/system/files/documents/cooperation_agreements/multilateralcompetitionmou.pdf.

11 Press Release, DOJ, Justice Department Signs Antitrust Memorandum of Understanding with Korean Prosecution Service (18 Nov. 2020), https://www.justice.gov/opa/pr/justice-department-signs-antitrust-memorandum-understanding-korean-prosecution-service.

12 Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy (9 July 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

13 DOJ, Extradited Former Air Cargo Executive Pleads Guilty for Participating in a Worldwide Price-Fixing Conspiracy (23 Jan. 2020), https://www.justice.gov/opa/pr/extradited-former-air-cargo-executive-pleads-guilty-participating-worldwide-price-fixing.

14 DOJ, Former Air Cargo Executive Extradited From Italy for Price-Fixing (13 Jan. 2020), https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing.

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 hardcore 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 because of 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) two or more competitors party to the agreement, (3) a restraint on trade in the agreement, and (4) an effect on interstate commerce or commerce with foreign nations resulting from the agreement. 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 by either 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 violate Section 1. Note, however, that some conduct that does not violate Section 1 and does not result in an agreement or deceptive behaviour, such as invitations to collude, may be prosecuted civilly under Section 5 of the Federal Trade Commission Act.[15]

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

15 For a recent example, see Complaint, Fortiline, LLC, F.T.C. No. C-4592 (23 Sept. 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 these situations, the FTC will refer the matter to the US DOJ Criminal Division. For another example of a violation of Section 5, see Complaint, Drug Testing Compliance Group, LLC, F.T.C. No. C-4565 (21 Jan. 2016). Here, 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. ibid. The FTC claimed that the defendant violated Section 5 by inviting its competitor to collude.

controlled subsidiaries or divisions of a single corporate entity cannot conspire with one another to violate the antitrust laws.[16] 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 standard of review 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 25 years, cartel cases have gone global, involving industries that operate both in the United States and abroad. This has prompted the DOJ to increase its collaboration with foreign governments in disrupting and prosecuting transnational cartel behaviour.[17] It has also 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),[18] 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.

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. There are also 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 railways, 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.[19] The state action doctrine similarly exempts actions taken pursuant to a state regulatory scheme,[20] whether such an

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

17 See *supra* notes – and accompanying text.

18 15 USC § 6a.

19 Credit Suisse Secs. (USA) LLC v. Billing, 551 US 264, 283 (2007) (finding that underwriters of Securities and Exchange Commission-regulated securities have implied immunity from the antitrust laws).

20 Parker v. Brown, 317 US 341, 351–52 (1943).

action was taken by the state itself or by non-state actors with delegated authority to act or regulate anticompetitively.[21] Finally, certain activities and agreements related to labour and collective bargaining are exempt.[22]

Federal statutes give some regulatory agencies the exclusive right to set rates for the utilities they regulate, including railways and electricity suppliers. 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.[23] 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.[24] 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.[25]

Noerr-Pennington, named after two Supreme Court cases,[26] is a judge-made doctrine that attempts to harmonise the goals of competition policy with the First Amendment rights of private citizens under the US Constitution. *Noerr-Pennington* limits enforcement of the antitrust statutes against certain acts that attempt to influence government processes, including various forms of lobbying, statements made in litigation and submissions to regulatory agencies. The implications of *Noerr-Pennington* for cartels would seem to be limited, since cartelists generally seek to hide their conduct from the government rather than petition in support of it. To the extent that cartel members seek to use government processes to influence prices or output, however, that conduct may implicate *Noerr-Pennington*. Note, however, that the doctrine contains a 'sham' exception, the contours of which are not entirely clear, and which covers acts of fraud – bribery, among others – that wilfully distort

21 *See* Patrick v. Burget, 486 US 94, 102–04 (1988); FTC v. Phoebe Putney Health Sys, Inc., 568 US 216, 229 (2013) (finding that, in application of the standard set out 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).

22 *See*, 29 USC §§ 52, 105 (2006) (The Norris-LaGuardia Act); Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 US 616, 621–22 (1975) (noting that the Clayton Act and Norris-LaGuardia Act 'declare that labour unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws'); see also generally United States v. Hutcheson, 312 US 219 (1941).

23 *See* Keogh v. Chicago & N.W. Ry. Co., 260 US 156, 161–64 (1922).

24 *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 US 409, 422 (1986) (rejecting the argument that the filed rate doctrine should be construed as an immunity).

25 *See, e.g.*, Carlin v. DairyAmerica, Inc., 705 F.3d 856, 878 (9th Cir. 2013) (holding that 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).

26 Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 US 127 (1961); United Mine Workers of Am. v. Pennington, 381 US 657 (1965).

that process.[27] Fraud committed on the US Patent Office, for example, is not exempted by *Noerr-Pennington*.[28] 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. Despite federal courts having struggled for several decades to give a firm shape to these doctrines, considerable uncertainty remains.

Foreign Trade Antitrust Improvements Act (1982)

The FTAIA 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,[29] but more recent cases have revisited this view,[30] and courts now treat the FTAIA as creating a substantive requirement for stating a claim on the merits under the Sherman Act.[31] Courts reason that the FTAIA serves to clarify the text of the Act, which reaches trade 'among the several States, or with foreign nations'.[32] This has important consequences in the criminal context. As a substantive element

27 Cal. Motor Trans. Co. v. Trucking Unlimited, 404 US 508 (1972).

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

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

30 The Supreme Court's decisions 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 that have addressed 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 F.3d 462, 468 (3d Cir. 2011) (applying the Supreme Court's holding 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 F.3d 845, 848, 852–53 (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 F.3d 942 (7th Cir. 2003)); United States v. Hui Hsiung, 778 F.3d 738, 752–53 (9th Cir. 2015), *cert. denied*, 576 US 10229 (2015).

31 Departing from its prior decision in *LSL Biotechs.*, 379 F.3d at 679–80, the Ninth Circuit held that '[t]he FTAIA does not limit the power of the federal courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations'. *Hui Hsiung*, 778 F.3d at 753. In Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd., 753 F.3d 395, 404–05 (2d Cir. 2014), the Second Circuit likewise characterised the FTAIA as substantive, overruling its prior decision in Filetech S.A. v. France Telecom S.A., 157 F.3d 922 (2d Cir. 1998).

32 15 USC §§ 1–2; *see, e.g.*, In re TFT-LCD (Flat Panel) Antitrust Litig., 822 F. Supp. 2d 953, 959 (N.D. Cal. 2011) (concluding that 'the FTAIA is not jurisdictional'); *Animal Sci. Prods.*, 654 F.3d at 469 ('[I]n 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').

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.[33] Outside the pleading context, courts must also take a 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.

Foreign Sovereign Immunities Act (1976)

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)[34] is the sole basis through which US courts can obtain jurisdiction over these 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 applies to commercial activity.[35] Immunity does not extend to suits based on commercial activity having a sufficient tie to US commerce. Commercial activity is 'either a regular course of commercial conduct or a particular commercial transaction or act', 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'.[36] The question is not one of motive but of whether the actions in question are akin to those undertaken by a private party engaged in trade or commerce.

The act of state doctrine

In some foreign jurisdictions, companies may still be subject to regulatory requirements that put them at risk of violating US law. The act of state doctrine dictates that the US courts must decline jurisdiction over a case when to decide that case might entail the court's refusal 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 to adjudicate the case.[37] The act of state doctrine is based on concerns about judicial branch interference with foreign

33 In the 'Antitrust Guidelines for International Enforcement and Cooperation', issued in January 2017 by the Antitrust Division and the FTC, 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.' DOJ & FTC, *Antitrust Guidelines for International Enforcement and Cooperation* at n. 82 (13 Jan. 2017), www.justice.gov/atr/internationalguidelines/download.

34 28 USC §§ 1330, 1332(a), 1391(f) and 1602–1611.

35 28 USC § 1605(a)(2).

36 28 USC § 1603(d).

37 DOJ & FTC, *Antitrust Guidelines for International Enforcement and Cooperation* at 4.2.1 (13 Jan. 2017), www.justice.gov/atr/internationalguidelines/download.

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

Foreign sovereign compulsion

Foreign sovereign compulsion is a narrow doctrine that is invoked only when a defendant can demonstrate that it was actually compelled by a foreign sovereign to violate US law, such that there was no way that it could possibly have complied with the law of both jurisdictions.[39] What constitutes compulsion is likely to be a fact-specific inquiry, but compulsion is probably demonstrated when the defendant can show that its failure to comply with the directive of the foreign sovereign would have resulted in penal or other severe sanctions. In two cases based on roughly analogous facts,[40] the district court in *In re Vitamin C Antitrust Litigation* found that the Chinese company arguing that it had been compelled to follow export regimes created by the Chinese Ministry of Commerce could not demonstrate compulsion when it appeared to have engaged in 'consensual cartelization'.[41] However, in *In re Vitamin C*, the Second Circuit overturned this conclusion, on comity grounds.[42] The Second Circuit gave great weight to a formal proffer by the Chinese government that its laws compelled the challenge of coordination. However, the Supreme Court vacated and remanded the Second Circuit decision, holding that, while domestic courts should give respectful consideration to a foreign government's submission, judges are not 'bound to accord conclusive effect to the foreign government's statements'.[43]

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 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* and the Supreme Court's subsequent remand offer a rare illustration of an application of comity principles and underscore the value of a direct appearance of a foreign sovereign.[44]

38 Banco Nacional de Cuba v. Sabbatino, 376 US 398, 423 (1964), *superseded by statute as stated in* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 711 (2021) (explaining that the act of state doctrine is driven by 'the basic relationship between branches of government in a system of separation of powers').

39 *See Hartford Fire*, 509 US at 798–99.

40 Animal Sci. Prods., Inc. v. China Nat'l Metals & Mins. Imp. & Exp. Corp., 702 F. Supp. 2d 320, 423–29 (D.N.J. 2010), *vacated and remanded on other grounds*, 654 F.3d 462 (3d Cir. 2011); In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011), *rev'd on other grounds*, 837 F.3d 175 (2d Cir. 2016).

41 *In re Vitamin C.*, 810 F. Supp. 2d at 566.

42 In re Vitamin C Antitrust Litig., 837 F.3d 175, 179 (2d Cir. 2016), *cert. granted in part sub nom.* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 734 (2018), *and vacated and remanded*, 138 S. Ct. 1865 (2018).

43 *Hebei Welcome Pharm.*, 138 S. Ct. at 1868 (2018).

44 *In re Vitamin C*, 837 F.3d at, 180.

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.

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, the Division filed a total of 173 criminal cartel cases between 2004 and 2010, 129 of which involved a successful leniency applicant (75 per cent).[45] The success of the Leniency Program has been such that more than 50 jurisdictions have adopted similar programmes of their own.

The Antitrust 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 these situations is often striking.[46] 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 cooperating completely with the Antitrust Division.

Recently, the Antitrust Division emphasised that the Leniency Program applies only to Sherman Act violations that are enforced by the Division.[47] In other words, the programme does not provide protection from criminal prosecutions by other federal or state prosecuting agencies – including other divisions of the DOJ, such as the Criminal Division.[48] While the Antitrust Division encourages leniency applicants 'with exposure to both antitrust and

45 United States Gov. Accountability Office, *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection, United States Government Accountability Office Report to Congressional Committees* at 59 nn. 2–3 (July 2011), www.gao.gov/new.items/d11619.pdf.

46 DOJ, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (19 Nov. 2008, updated 26 Jan. 2017) at Question 4, www.justice.gov/atr/public/criminal/239583.pdf [hereinafter *Frequency Asked Questions*] ('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.').

47 id. at Question 6.

48 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* DOJ, *Non-Prosecution Agreement Between UBS AG and US DOJ* (Dec. 2012), www.justice.gov/iso/opa/resources/13920121219117458457 57.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 US$100 million. *See* Plea Agreement, *UBS Securities Japan*.

non-antitrust crimes' to 'report all crimes to the relevant prosecuting agencies', it notes that 'leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes'.[49] 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 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.[50]

The Corporate Leniency Policy[51] includes two types of leniency: Type A and Type B. Type A leniency is available only when the Antitrust Division has not received information about the activity being reported from any other source. Type B leniency, the benefits of which are not as great, is available even after the Division has commenced an investigation.

The requirements for Type A leniency are that:

a at the time the corporation comes forward, the Division has not received information about the activity from any other source;

b upon its 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 cooperates with the Division fully, continuously and completely 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.[52]

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.[53] Recent updates to the Division's Frequently Asked Questions emphasised that these individuals will not be protected if they do not fully cooperate with the Division's investigation.[54] In that situation, those individuals will be 'carved

49 Frequently Asked Questions, *supra* note, at Question 6. The Antitrust Division has stated that it will not prosecute 'acts or offenses integral to' the antitrust violation for which leniency has been granted. ibid.

50 Regarding immunity, prosecutors from the Criminal Division follow the policies set out in the Justice Manual and are not obliged 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 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 DOJ, Justice Manual § 9-47.120 (2019), www.justice.gov/criminal-fraud/file/838416/download.

51 DOJ, *Corporate Leniency Policy* (10 Aug. 1993), www.justice.gov/atr/public/guidelines/0091.pdf.

52 id. at 1–2.

53 id. at 4.

54 *Frequently Asked Questions*, *supra* note, at Question 22.

out' from the conditional leniency letter.[55] Paragraph 4 of the model corporate conditional leniency letter[56] details the specific conditions for leniency protection for directors, officers and employees.

The requirements for Type B leniency are that:

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 its 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 cooperates with the Division fully, continuously and completely in advancing the investigation;

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.[57]

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.[58] 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.[59] Updates to the 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'.[60] According to the Antitrust Division, '[l]eniency must be fully earned'.[61] 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 cooperates with the Division fully, continuously and completely throughout the investigation; and

55 ibid.

56 The model corporate conditional leniency letter may be found at www.justice.gov/atr/page/file/1112911/download.

57 *Corporate Leniency Policy*, *supra* note, at 2–3.

58 id. at 4.

59 *Frequently Asked Questions*, *supra* note, at Question 23.

60 *Frequently Asked Questions*, *supra* note, at Question 22.

61 ibid.

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.[62]

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'.[63] Prior to this announcement, the Division's position was that it was not under any obligation to grant leniency to former directors, officers or employees. This 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 of obtaining 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.[64] 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.[65]

iii Penalty Plus

Penalty Plus is the converse of Leniency Plus. The latter 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.[66] 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.[67] In egregious cases, the Antitrust Division may also seek

62 DOJ, *Leniency Policy for Individuals* (10 Aug. 1994), www.justice.gov/atr/public/guidelines/lenind.htm.

63 *Frequently Asked Questions*, *supra* note, at Question 24.

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

65 id. at Question 9.

66 id. at Question 10.

67 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 at 6 (8 Mar. 2001), www.justice.gov/atr/speech/when-calculating-costs-and-benefits-applying-corporate-amnesty-how-do-you-put-price-tag.

the appointment of an external monitor 'to ensure that the company develops an appropriate culture of corporate compliance'.[68] For individuals, the difference in failing to self-report could be between a lengthy jail sentence and no jail sentence.[69]

In 2014, the Division 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*. In this case, 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 US$425 million fine imposed.[70] The Division stated that it would 'take a hard line when repeat offenders fail to disclose additional anticompetitive behaviour'.[71]

iv Government contracting

In 2019, the Antitrust Division announced a partnership with 13 US attorneys' offices, the FBI, the Department of Defense Office of Inspector General, the US Postal Service Office of Inspector General and other federal offices of Inspector General to form a Procurement Collusion Strike Force.[72] The Strike Force leads a national effort to protect taxpayer-funded projects from antitrust violations and related crimes through outreach and training for procurement officials and government contractors on antitrust risks in the procurement process. The members of the Strike Force also jointly investigate and prosecute cases that result from their targeted outreach efforts. In 2020, the DOJ announced that the Procurement Collusion Strike Force would focus on identifying any collusive practices of organisations and individuals attempting to sell personal protective equipment (PPE) and other public health products to federal, state and local agencies in the wake of the covid-19 pandemic.[73] The DOJ's prioritisation and scrutiny towards organisations and individuals supplying PPE and other public health supplies further illustrate on a broader level how the DOJ's antitrust enforcement actions and priorities adapt to and reflect the ever evolving state of the world. The Division has reported that over one-third of its open investigations relate to conduct affecting public procurement and that despite its short tenure, the Strike Force has already contributed to the opening of several pending grand jury investigations and guilty pleas.[74] For example, in June 2021, the Strike Force announced its first international resolution against

68 *Frequently Asked Questions*, *supra* note, at Question 10.

69 Hammond, 'Calculating The Costs And Benefits', *supra* note, 8 March 2001, at 6.

70 Press Release, DOJ, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (13 Feb. 2014), www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

71 ibid.

72 Press Release, DOJ, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (5 Nov. 2019), www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

73 William Hughes & Craig Carpenito, *Statement Before the Committee on the Judiciary United States Senate* at 10 (9 June 2020), https://www.judiciary.senate.gov/imo/media/doc/Hughes-Carpenito%20Testimony.pdf.

74 Press Release, Assistant Attorney General Makan Delrahim Presents Procurement Collusion Strike Force to the International Competition Community (16 June 2020), https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-presents-procurement-collusion-strike-force.

Belgian security company G4S Secure Solutions NV.[75] G4S conspired with others to rig bids, allocate customers and fix prices for bids submitted to the United States Department of Defense for security services contracts. GS4 Secure Solutions NV pleaded guilty and paid US$15 million as a fine.[76] Three former executives from GS4 Secure Solutions NV were also criminally charged in connection with the conspiracy.[77]

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 the extent of the conspiracy. Nonetheless, counsel should move quickly to secure a marker from the Antitrust Division. The Division grants only one leniency application per conspiracy, and 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.[78]

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 Frequently Asked Questions, as updated in January 2017, make it clear that an anonymous marker is available only 'in limited circumstances'; in these cases, the anonymous marker may last for only two to three days before counsel must report the client's identity to the Division.[79]

The marker is good for a finite period intended to give the applicant an opportunity to conduct an internal investigation into the alleged conduct; 30 days for an initial marker

75 Press Release, DOJ, Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement (25 June 2021), https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting.

76 ibid.

77 Press Release, DOJ, Belgian Security Services Company and Three Former Executives Indicted for Bid Rigging on US Department of Defense Contracts (30 June 2021), https://www.justice.gov/opa/pr/belgian-security-services-company-and-three-former-executives-indicted-bid-rigging-us.

78 *Frequently Asked Questions*, *supra* note, at Question 2.

79 ibid.

is common. The marker may be extended at the Division's discretion if the applicant demonstrates that it is making efforts in good faith to complete its investigation in a timely manner.[80]

In some instances, a 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 (the 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'.[81] An applicant would be well advised to make a marker request orally, since written communications with the Division are potentially discoverable in subsequent civil litigation.

ii Confidentiality

The increasing willingness of jurisdictions to cooperate with one another in cartel investigations necessarily raises concerns for the leniency applicant as to the confidentiality both of its identity and of any information that it provides to the government. The Antitrust Division's policy has always been to treat this information as confidential without agreement with the applicant, prior disclosure by the applicant or by order of a court.[82] 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.[83]

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'.[84] 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

80 ibid.

81 id. at Question 1.

82 id. at Question 33.

83 Scott D. Hammond, Beating Cartels at Their Own Game: Sharing Information in the Fight Against Cartels, Speech at the Inaugural Symposium on Competition Policy, at 10 (20 Nov. 2003), www.justice.gov/atr/public/speeches/201614.pdf.

84 *Frequently Asked Questions*, *supra* note, at Question 34.

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

The Antitrust Division's policy with respect to charging individual employees has evolved significantly during the 21st century. Formerly, corporate plea agreements typically protected most or all individual employees from criminal prosecution. Committed to holding 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.[85]

In 2013, the Division implemented two changes.[86] First, it announced that it was no longer carving out individuals for reasons other than potential culpability.[87] Second, the Division abandoned its much-criticised policy of identifying carved-out individuals by name in plea agreements, and instead began listing their names in an appendix and requesting that the court file that document under seal.[88]

However, in the January 2017 update to its Frequently Asked Questions, the Division announced that it will carve out a company's current director, officer or employee if he or she does not fully cooperate with an investigation.[89] And in 2018, the Division also made those cooperation obligations more onerous, requiring that covered individuals 'participat[e] in affirmative investigative techniques, including but not limited to making telephone calls, recording conversations, and introducing law enforcement officials to other individuals'.[90]

A September 2015 policy memorandum clarified that the DOJ's principal focus in corporate fraud prosecutions, including for antitrust violations, is the pursuit of individual prosecutions.[91] 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.[92] Although the Department clarified that this change would not affect 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

85 Press Release, Statement of Assistant Attorney General William Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements (12 Apr. 2013), www.justice.gov/atr/public/press_releases/2013/295747.pdf.

86 ibid.

87 ibid.

88 ibid.

89 *Frequently Asked Questions*, *supra* note, at Question 22.

90 This new requirement appears in Section 4(e) of the model corporate conditional leniency letter. *See* DOJ, *Model Corporate Conditional Leniency Letter* (last visited 22 Oct. 2021), www.justice.gov/atr/page/file/1112911/download.

91 Memorandum from Deputy Att'y Gen. Sally Quillian Yates re. Individual Accountability for Corporate Wrongdoing 1–2 (9 Sept. 2015), www.justice.gov/dag/file/769036/download.

92 id. at 3.

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.[93]

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.[94] 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.[95] 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.[96] The Antitrust Division will consider the number and significance of the individuals who do not cooperate in deciding whether the company has actually confessed its wrongdoing and whether the Division is receiving the full benefit of the leniency agreement.[97] 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.[98]

If the Antitrust Division determines prior to granting a final, unconditional leniency letter that the applicant has not provided the cooperation set out 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 to the Division its participation in an unlawful customer allocation conspiracy.[99] 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.[100] The 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, revoked Stolt-Nielsen's conditional leniency grant and indicted a company executive.[101]

93 William J. Baer, Assistant Att'y Gen., DOJ, Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Centre Global Antitrust Enforcement Symposium at 3 (10 Sept. 2014), https://www.justice.gov/atr/file/517741/download.

94 *See* DOJ, *Model Corporate Conditional Leniency Letter* (last visited 22 Oct. 2021), www.justice.gov/atr/page/file/1112911/download.

95 *Frequently Asked Questions*, *supra* note, at Question 17.

96 id. at Question 18.

97 ibid.

98 ibid.

99 Stolt-Nielsen, S.A. v. United States, 352 F. Supp. 2d 553, 565 (E.D. Pa. 2005), *rev'd*, 442 F.3d 177 (3d Cir. 2006).

100 ibid.

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

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; the court also found that Stolt-Nielsen had not breached the agreement. This injunction was vacated by the court of appeals, which held that the district court lacked the authority to issue an injunction to prevent merely a wrongful indictment.[102] 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.[103]

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.[104]

v Limitation on treble damages under the Antitrust Criminal Penalty Enhancement and Reform Act (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 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.[105] Joint and several liability is also unavailable to the plaintiff.[106] It is important to note that after an extension of its duration in 2010,[107] ACPERA was set to expire on 22 June 2020.[108] On 25 June 2020, however, the US House of Representatives and Senate passed H.R. 7036 and S. 3377, which permanently authorised ACPERA, repealing its sunset provision.[109] ACPERA was incorporated into H.R. 8337, which subsequently became law on 1 October 2020.[110]

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

102 id. at 184.

103 United States v. Stolt-Nielsen, S.A., 524 F. Supp. 2d 609, 627–28 (E.D. Pa. 2007).

104 *See* Global Competition Review, *Scott Hammond on Stolt-Nielsen* (1 May 2008), www.justice.gov/atr/public/speeches/234840.pdf.

105 Pub. L. No. 108–237, § 213, 118 Stat. 661, 666 (2004).

106 id. at § 214.

107 Pub. L. No. 111-190, § 3, 124 Stat. 1275, 1275–76 (2010).

108 DOJ, 'ACPERA Roundtable Executive Summary', 11 Apr. 2019, at 1, www.justice.gov/atr/page/file/1184396/download. ('ACPERA's detrebling provisions will sunset on 22 June 2020 without Congressional action.')

109 Press Release, DOJ, Department of Justice Applauds Congressional Passage of Reauthorization of The Antitrust Criminal Penalty Enhancement And Reform Act (26 June 2020), https://www.justice.gov/opa/pr/department-justice-applauds-congressional-passage-reauthorization-antitrust-criminal-penalty; *see also* H.R. 7036, 116th Cong. (2020), S. 3377, 116th Cong. (2020).

110 Pub. L. No. 116-159, § 4303, 134 Stat. 709, 742 (2020); *see also* H.R. 8337, 116th Cong. (2020).

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.[111] 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'.[112]

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.[113]

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.[114]

The Leniency Program's protections for individuals associated with a corporate leniency applicant have softened the representational conflict issue for companies that receive corporate leniency.[115] 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.[116] 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.[117] When both the company and its officers, directors and employees are protected under the same

111 Pub. L. No. 108-237, § 213, 118 Stat. 661, 666–67 (2004).

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

113 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* (Aug. 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.').

114 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. *See* id. at 394. 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. *See generally* Miranda v. Arizona, 384 US 436 (1966).

115 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 supra* Section IV.i of this chapter.

116 *Frequently Asked Questions*, *supra* note, at Question 22.

117 ibid.

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.

vii Whistle-blower protection

Signed into law in December 2020,[118] the Criminal Antitrust Anti-Retaliation Act (CAARA) amends 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 is entitled to reinstatement, back pay and litigation costs, including attorney's fees. Unlike some whistle-blower statutes, CAARA does not include financial incentives for employees to report wrongdoing.

VI PENALTIES

The primary determinant for sentencing in cartel cases is the US Sentencing Guidelines[119] (the Sentencing Guidelines). Although most cartel cases brought by the Division result in plea agreements in which the Division negotiates an agreed 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 when they impose sentences after trial; in both cases, their discretion is informed by the Sentencing Guidelines.[120] 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

118 Press Release, DOJ, Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act (24 Dec. 2020), https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

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

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

imprisonment is determined primarily by reference to an offence level.[121] Cartel offences have a base offence level of 12, with an increase of up to 16 levels depending on the volume of commerce affected.[122] 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.[123] 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.[124] As a result, 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, with the Division seeking the widest possible definition of volume of commerce and the target seeking 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 against 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 a 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

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

122 USSG Section 2R1.1.

123 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. ibid.

124 According to the Sentencing 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'. ibid.

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.[125]

iii Discounts

A number of potential sentencing discounts are 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 to cooperate 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 rests largely on the discretion of the Division. In exercising this discretion, the Division attempts to balance the value of the company's cooperation against the disproportionality in sentencing between defendants that results from discounts.[126] 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).[127]

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

125 The Division exercised this authority most recently in connection with plea agreement reached in connection with its investigation of the broiler chicken industry. See *US v. Pilgrim's Pride Corporation*, 20-cr-00330-RM (D. Colo. Feb. 16. 2021) (requiring defendants to pay a criminal fine in excess of US$100 million pursuant to 18 U.S.C. § 3751(c)).

126 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/speech/measuring-value-second-cooperation-corporate-plea-negotiations. The Division has since clarified that the extent of any discount will be reflective of not merely 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 assists 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 www.justice.gov/opa/file/826721/download. 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/file/517741/download.

127 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, obliged 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).

from the requirements under Section 8C4.1 of the Sentencing Guidelines;[128] the Division often recommends discounts to second-in cooperators in the range of 30 to 35 per cent.[129] 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 lead role in the cartel or that the cooperator merits Penalty Plus treatment.[130] Third, the Division often agrees to fewer carve-outs for high-ranking employees when the defendant is a second-in cooperator.[131] Fourth, second-in cooperators may stand a better chance of enjoying credit under the Division's Amnesty Plus or Affirmative Amnesty programmes.[132] 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.[133]

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 corporation that provides 'substantial assistance' to the investigation or prosecution; the Division has often done so in antitrust cartel cases.[134] The Division may include a promise to request downward departure, subject to certain conditions, in a plea agreement.[135] In determining the appropriate discount sought for both 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.[136] 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.[137]

128 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.

129 See Scott D Hammond, footnote 164, at 5.

130 id. at 6–7; see Section IV.iii of this chapter for a discussion of Penalty Plus for corporations.

131 id. at 7; see Section V.iii of this chapter for a discussion of carve-outs for individuals.

132 See Scott D Hammond, footnote 164, at 9–11.

133 id. at 3–4.

134 *See, e.g.*, Government's Sentencing Memorandum and Government's Motion for a Guidelines Downward Departure, *US v. Robert J Hart*, 99-cr-595 (E.D. Pa. filed 19 October 1999); Government's Sentencing Memorandum and Motion for a Guidelines Downward Departure, *US v. Bjorn Sjaastad*, 03-cr-652 (E.D. Pa. filed 16 October 2003); Hannah Albarazi, 'No Prison For Ex-Bumble Bee VPs Involved in Price-Fixing,' Law360 (Apr. 28 2021) (https://www.law360.com/articles/1379634/no-prison-for-ex-bumble-bee-vps-involved-in-price-fixing) (explaining that the government recommended downward departures and no prison time for two individuals as a 'benefit for cooperating with a yearslong investigation.').

135 See Model Annotated Individual Plea Agreement, Paragraph 10 (29 August 2016), available at www.justice.gov/atr/file/888481/download, and Model Annotated Corporate Plea Agreement, Paragraph 10 (29 August 2016), available at www.justice.gov/atr/file/889021/download; 'The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All', from remarks made by Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division in Paris, France (17 October 2006), available at www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all.

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

137 USSG Section 5K1.1.

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 2017, the average prison sentence imposed against all individual cartel defendants – both foreign and US nationals – was 20 months,[138] whereas the average sentence imposed against the 49 foreign defendants sentenced between fiscal years 2010 and 2015 was 15.5 months.[139]

Companies with compliance programmes may also receive a discount in the sentencing calculus and thus lower fines. In July 2019, the DOJ officially announced it will consider the adequacy and effectiveness of the corporation's compliance programme at the time of the offence as well as at the time of the charging decision.[140] The effectiveness of the compliance programme will help determine the appropriate form of any resolution or prosecution, monetary penalty, if any, and compliance obligations contained in any corporate criminal resolution.

Prosecutors must consider three fundamental questions in their evaluation of a company's compliance programme.

a Is the corporation's compliance programme well designed?
b Is the programme being applied earnestly and in good faith?
c Does the corporation's compliance programme work?

In assessing the first requirement (whether a compliance programme is well designed), the DOJ will consider nine factors:

a the design and comprehensiveness of the plan;
b the culture of compliance within the company;
c the authority of those responsible for the compliance programme;
d the programme's relation to the company's risk assessments;
e the compliance training and communication provided to employees;
f the periodic review, monitoring and auditing conducted;
g the ability for employee reporting;
h the incentives and discipline systems in place; and
i the remedial actions taken upon discovery of the violation.[141]

Should a prosecutor find that the corporate compliance programme is effective, the DOJ may reduce the scope of a penalty sought or even decide not to pursue a penalty. If no compliance programme was in place at the time of the violation, but the company has made remedial efforts and implemented a policy by the time of sentencing, that programme can still count towards a reduction at sentencing.[142] However, the DOJ will not consider a reduction where

138 US DOJ, 'Criminal Enforcement Trends Chart Through Fiscal Year 2017' (12 March 2018), available at www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

139 See Brent Snyder, 'Individual Accountability for Antitrust Crimes' (19 February 2016) (footnote 164), at 9.

140 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations', US DOJ, Antitrust Division (July 2019), www.justice.gov/atr/page/file/1182001/download.

141 id. at 3–4.

142 id. at 15.

there was unreasonable delay in reporting the illegal conduct to the government.[143] The DOJ will also apply a rebuttable presumption that a compliance programme is not effective when high-level personnel participated in, or were wilfully ignorant of, the alleged offences.[144]

The DOJ's July 2019 announcement is generally consistent with its comments and actions in recent years. On 29 September 2015, for example, 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.[145] And in February 2018, the Division recommended no probation for BNP Paribas for its involvement in the *FX* conspiracy, because of its 'substantial efforts' towards compliance and remediation to prevent future violations.[146]

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.[147] Second, determining the amount of loss suffered by particular victims is difficult and complex, and may unduly complicate and delay the sentencing process.[148] 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.[149]

The Division may also recommend, and the court may impose, a period of probation upon a corporate defendant in a cartel case.[150] Probation may include a variety of conditions, including that the corporation does not commit another federal, state or local crime during

143 id. at 14.

144 id. at 14–15.

145 United States Sentencing Memorandum and Motion for a Downward Departure at 7, *United States v. Kayaba Industry Co.*, No. 1:15-cr-00098-MRB (S.D. 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'.)

146 Plea Agreement at 9, *United States v. BNP Paribas USA, Inc.*, No. 18-cr-00061 JSR (S.D.N.Y. 2 February 2018), available at www.justice.gov/opa/pr/bnp-paribas-usa-inc-pleads-guilty-antitrust-conspiracy.

147 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 (N.D. 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'.)

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

149 See US DOJ and FTC, 'Antitrust Guidelines for International Enforcement and Cooperation' (13 January 2017) n.100, available at www.justice.gov/atr/internationalguidelines/download.

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

the term of probation, pays restitution if required, and implements an antitrust compliance programme or addresses deficiencies in an existing compliance programme.[151] Notably, the Antitrust Division now seeks the 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 that an educational or correctional treatment of this kind was necessary, considering the defendant refused to admit the illegality of its conduct and had been engaged in anticompetitive conduct since its creation.[152] The Division subsequently recommended the appointment of an external monitor more generally as a condition of probation.[153] Most recently, Deutsche Bank AG agreed to hire an 'independent compliance and ethics monitor' for three years as part of a deferred prosecution agreement relating to the *LIBOR* investigation,[154] and Höegh Autoliners, a participant in the *roll-on, roll-off cargo* conspiracy, agreed to a three-year compliance monitor as part of a plea agreement.[155]

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.

v Extradition

In accordance with its position that punishing individuals is essential to effective cartel enforcement,[156] the Division often indicts foreign nationals who either led or were 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

151 id. at Section 8D1.3.

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

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

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

155 Plea Agreement at 18, *United States v. Höegh Autoliners AS*, No. 17-cr-00505 GLR (D. Md. 8 December 2017), available at www.justice.gov/atr/case-document/file/347164/download.

156 See Belinda A Barnett, Senior Counsel, Antitrust Division, US DOJ, 'Criminalization of Cartel Conduct – The Changing Landscape', address in Adelaide, Australia (3 April 2009), available at www.justice.gov/sites/default/files/atr/legacy/2009/07/10/247824.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, DOJ: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, footnote 102. ('One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.')

under the laws of both countries (a concept referred to as dual criminality).[157] Most foreign jurisdictions do not criminalise price-fixing by individuals, hence the Division's historical difficulty in securing formal extradition from other countries.[158]

Even in the *Norris* case, 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 the grounds that Norris should face trial on his obstruction of justice charge rather than the price-fixing charge. Even so, the Division touted Norris' extradition as a sign that 'the safe harbors for offenders are rapidly shrinking' given the 'increased willingness [of foreign governments] to assist the United States in tracking down and prosecuting cartel offenders'.[159] In fact, it was not long before the Antitrust Division announced the first successfully litigated extradition on an antitrust charge. In April 2014, Romano Pisciotti, an Italian national and an executive of Parker ITR SRL, was extradited from Germany for his involvement in the *Marine Hose* conspiracy.[160] In 2020, the Division successfully secured the extradition of Maria Christina 'Meta' Ullings,[161] a Dutch national living in Italy, and Eun Soo Kim, a South Korean national extradited from Germany.[162]

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

Of course, the defendant has no motive to subject himself 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, the Division entered into a memorandum of understanding in 1996 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

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

158 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, have adopted or have considered adopting criminal punishments for price-fixing activity by individuals. See Belinda A Barnett, footnote 188 (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).

159 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/speech/update-antitrust-divisions-criminal-enforcement-program.

160 Press release, US DOJ, 'First Ever Extradition on Antitrust Charge' (4 April 2014), available at www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge.

161 'Former Air Cargo Executive Extradited From Italy for Price-Fixing,' U.S. DOJ (4 Apr. 2014), available at https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing.

162 'Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge,' U.S. DOJ (3 Mar. 2020), available at https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge.

who have provided or will provide 'significant assistance' to the Division in prosecuting an antitrust case.[163] 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 civil exposure

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. In addition to pursuing criminal charges, the Antitrust Division will also seek civil recovery from cartel offenders under the Clayton Act when the federal government has been the victim of an antitrust violation.[164] The Division pursued such recovery most recently in a matter involving alleged bid rigging on Korean fuel supply contracts.[165]

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 about 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 context may also trigger other criminal statutes, including 18 USC Section 1001, which criminalises false statements to federal officials. The Antitrust Division has been charging defendants under these 'companion' statutes with increasing frequency.

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,

163 Memorandum of Understanding between the Antitrust Division and the Immigration and Naturalization Service (15 March 1996), available at www.justice.gov/sites/default/files/atr/legacy/2010/08/05/9951.pdf.

164 Makan Delrahim, Assistant Attorney General, Antitrust Div., 'Remarks at the American Bar Association Antitrust Section Fall Forum,' (Nov. 15, 2018), International Cartel Workshop, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust. Note, however, that the Division's stance on potential use of civil recovery mechanisms against Leniency applicants remains unclear, with some fearing that pursuit of these remedies would create a further disincentive for self-reporting under the Division's Leniency Program. *See* American Bar Association Antitrust Law Section, § 5(b) Corporate and Individual Leniency Policies, 'Presidential Transition Report The State of Antitrust Enforcement February 2021.'

165 *See* 'More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea' (20 Mar. 2020), available at https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense.

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.

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. However, the Division's position has softened 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.

i Non-prosecution agreements

The Antitrust Division's policy traditionally has not favoured the use of non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) in criminal cartel investigations.[166] This was consistent with the Division's general view that the criminal sanction is essential as a deterrent.[167] But the trend has been towards greater acceptance of these remedial tools.[168]

While NPAs are likely to remain an anomaly for the Antitrust Division, the Division now expressly sanctions use of DPAs to resolve cartel offences in appropriate circumstances.[169] Since 2013, the Division has used DPAs in certain limited circumstances involving highly regulated industries, such as the financial services and generic pharmaceuticals markets.[170] But

166 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.

167 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.')

168 *See* Makan Delrahim, Ass't Att'y Gen., Antitrust Div., Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement: Wind of Change: A New Model for Incentivizing Antitrust Compliance Program, New York, NY (July 11, 2019) (https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0).

169 Makan Delrahim, Assistant Attorney General, Antitrust Div., 'Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement,' (July 11, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-universityschool-l-0 ('The Antitrust Division Manual has also been updated to direct Division prosecutors to evaluate all the Factors including pre-existing compliance programs in every corporate charging recommendation.').

170 *See, e.g.*, *United States v. Heritage Pharmaceuticals Inc*., Case 2:19-cr-00316-RBS, Deferred Prosecution Agreement (June 11, 2019), available at https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. The Royal Bank of Scotland PLC*, Deferred Prosecution Agreement (Feb. 5, 2013), available at https://www.justice.gov/atr/case-document/file/509081/download.

the issuance of the Corporate Guidance formalises the Division's broader acceptance of DPAs as an appropriate remedial tool.[171] Since the Corporate Guidance was released, the Division has used DPAs several times in high-profile generic pharmaceuticals investigations.[172]

For the same policy reasons as those discouraging the use of NPAs in criminal cartel investigations, the Antitrust Division also does not favour 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 despite the objection of the Antitrust Division.[173] 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.[174]

The Antitrust Division has previously articulated certain guiding principles it may employ when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action. Specifically, the Division articulated a four-step analysis.

a Is there a single, overarching international conspiracy?

b Is the harm to US business and consumers similar to the harm caused abroad?

c Does the sanction imposed abroad take into account the harm caused to US businesses and consumers?

d Will the sentence imposed abroad satisfy the deterrent interests of the United States?[175]

171 Makan Delrahim, Assistant Attorney General, Antitrust Div., 'Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement,' (July 11, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-universityschool-l-0.

172 *See* Antitrust Division Spring Update 2021, Generic Drugs Investigation Targets Anitcompetitive Scheme (March 24, 2021) (https://www.justice.gov/atr/division-operations/division-update-spring-2021/generic-drugs-investigation-targets-anticompetitive-schemes); see also US v. Taro Pharmaceuticals U.S.A., Inc. 20-cr-213 (E.D.P.A. June 23 2020) (deferred prosecution agreement of Taro Pharmaceuticals).

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

174 *See* Richard Powers, Deputy Ass't Att'y Gen., Antitrust Div., Dept. of Justice, Remarks at the 13th International Cartel Workshop: A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement (explaining that the Division sometimes defers to other jurisdictions where appropriate or reaches coordinated resolutions that seek to meet the deterrence goals of multiple jurisdictions) https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powersdelivers-remarks-13th-international.

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

According to the Antitrust Division, the result of this analysis is not an all-or-nothing proposition. That is to say, 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.[176]

All the Division's efforts to coordinate corporate resolutions in international cartel matters, however, pre-date more recent guidance issued by the Division in May 2018, which formally codifies a requirement that prosecutors across the Division take steps to coordinate corporate resolutions in circumstances where there are parallel proceedings arising from the same misconduct.[177] This new guidance is not antitrust-specific and outlines a number of factors prosecutors are now asked to consider when coordinating a corporate resolution. The factors outlined included: 'the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department'.[178] It remains to be seen how, if at all, the Division's new guidance may alter the analysis the Division has historically applied and articulated to coordinate corporate resolutions in international cartel matters.

VIII 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. When leniency is available in the United States, it is generally a good idea for counsel to move expeditiously to consider seeking a marker. The benefits of leniency are compelling. However, the decision to cooperate with the US investigation should not be made lightly as there are substantial collateral risks that must be considered at the outset, including criminal liability for excluded individual employees,[179] and the potential for information disclosed to the Antitrust Division being used by the Criminal Division[180] and discovered in follow-on litigation. Fortunately, the

176 *See* Ron Knox, *DOJ willing to defer to foreign enforcers – if the punishment is right*, Global Competition Review (17 April 2012), www.globalcompetitionreview.com/news/article/31674/doj-willing-defer-foreign-enforcers-punishment-right.

177 USAM 1-12.100 – Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.

178 id.

179 If the company successfully obtains leniency, leniency may extend to certain individuals. See Section IV.i of this chapter.

180 Information sharing between the Antitrust and Criminal Divisions, through joint investigations, has become an important part of the Antitrust Division's investigative tools as it 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. 3:12-cr-00268-RNC (D. Conn. 19 December 2012). (UBS' 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 because of the corporate parent's participation in the Antitrust Division's Leniency Program.)

Antitrust Division aims to be transparent and predictable in its dealings with cooperators, whom it views as furthering US enforcement goals. Thus, where the benefits of leniency outweigh the risks inherent in the process, 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 regarding cooperation.

Appendix 1

ABOUT THE AUTHORS

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John Buretta is a partner in Cravath's litigation department and a former senior US Department of Justice (DOJ) official. His practice focuses on advising corporations, board members and senior executives with respect to internal investigations, criminal defence, regulatory compliance and related civil litigation, including matters concerning US antitrust laws and representation of clients before the DOJ's Antitrust and Criminal Divisions.

Mr Buretta returned to Cravath in November 2013 following 11 years of service in the DOJ, where he most recently held the position of principal deputy assistant attorney general and chief of staff, which is ranked number two in the Criminal Division. In this role, he oversaw nearly 600 prosecutors on complex matters, including joint investigations between the Criminal and Antitrust Divisions of alleged market fraud and price-fixing.

JOHN TERZAKEN

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John Terzaken is the global co-chair of Simpson Thacher & Bartlett LLP's antitrust and trade regulation practice. He advises US and international clients involved in domestic and cross-border antitrust and other regulatory investigations and litigation. His practice spans government enforcement and private litigation of cartel and other antitrust infringements, market sector investigations and general antitrust compliance, across all industry sectors.

Previously, John was director of criminal enforcement at the US Department of Justice (DOJ), Antitrust Division, where he had management responsibility for the Division's criminal investigations and litigation nationwide. During his tenure with the Antitrust Division, John investigated, litigated and presided over some of the largest global cartel investigations undertaken by the DOJ. He also served as the Division's primary liaison with state, federal and foreign law enforcement authorities, and as the Division's financial fraud coordinator for inter-agency prosecutions, investigations and information sharing. John's DOJ service earned him awards of distinction from the Attorney General of the United States and the Assistant Attorney General for the Antitrust Division.

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