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*, which is now in its eleventh edition. This leading reference explores the laws and policies from the world's principal competition authorities aimed at combating cartel activity. Prominent competition lawyers from 23 jurisdictions 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.

With the risk in this space steadily growing, 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 analyzes enforcement trends and regulatory changes, including how many jurisdictions have moved to give their competition authorities additional investigative tools and the burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter.

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

Inside the Eleventh Edition

Preface • United States Chapter

THE CARTELS AND LENIENCY REVIEW

ELEVENTH EDITION

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CONTENTS

PREFACE......v
John D Buretta and John Terzaken

Chapter 1 ARGENTINA......1
Camila Corvalán

Chapter 2 BELGIUM......11
Stefaan Raes and Vincent Mussche

Chapter 3 CANADA......22
Subrata Bhattacharjee, Denes Rothschild and Pierre N Gemson

Chapter 4 CHINA......32
Michael Han, Caroline Huang, Joy Wong and Sakura Lee

Chapter 5 CYPRUS......44
Nicolas Constantinides

Chapter 6 EUROPEAN UNION......58
Philippe Chappatte and Paul Walter

Chapter 7 GREECE......72
Dimitris Loukas and Athanasios Taliadouros

Chapter 8 HONG KONG......86
Felix K H Ng, Olivia M T Fung and Christina H K Ma

Chapter 9 INDIA......103
Farhad Sorabjee, Vaibhav Choukse, Ela Bali and Aditi Khanna

Chapter 10 ITALY......118
Gian Luca Zampa, Ermelinda Spinelli and Alessandro Di Giò

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Chapter 11 JAPAN 134
Yuhki Tanaka and Takuto Ishida

Chapter 12 NEW ZEALAND 146
Jennifer Hambleton, April Payne and Anna Percy

Chapter 13 PAKISTAN 159
Saifullah Khan

Chapter 14 POLAND 170
Małgorzata Szwaj and Wojciech Podlasin

Chapter 15 PORTUGAL 187
Tânia Luísa Faria, Margot Lopes Martins and Afonso Marques dos Santos

Chapter 16 SAUDI ARABIA 204
Rakesh Bassi and Yazeed Al Juhani

Chapter 17 SINGAPORE 214
Daren Shiau, Elsa Chen and Scott Clements

Chapter 18 SPAIN 227
Alfonso Gutiérrez and Jokin Beltrán de Lubiano

Chapter 19 SWITZERLAND 240
Monique Sturny and Michael Schmassmann

Chapter 20 TAIWAN 251
Stephen Wu, Rebecca Hsiao and Wei-Han Wu

Chapter 21 TURKEY 267
Gönenç Gürkaynak

Chapter 22 UNITED KINGDOM 281
Philippe Chappatte and Paul Walter

Chapter 23 UNITED STATES 294
John D Buretta and John Terzaken

Appendix 1 ABOUT THE AUTHORS 305
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 323

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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 23 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,

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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 11th 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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Chapter 23

UNITED STATES

John D Buretta and John Terzaken[1]

I ENFORCEMENT POLICY

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. However, only some of the categories of conduct that violate Section 1, including agreements to fix prices, rig bids or allocate markets, are regularly punished criminally. The Antitrust Division has exclusive jurisdiction to prosecute these crimes.

The Antitrust Division uses a wide variety of investigative tools to detect cartel conduct, but corporate and individual leniency programmes remain the primary means by which the Division uncovers potential cartel agreements.[3] The Leniency Program creates a race among conspirators to disclose the cartel to authorities 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.

II JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Of the conduct deemed unlawful by US federal antitrust statutes, the Antitrust Division criminally prosecutes 'hardcore' antitrust violations, including agreements among competitors to fix prices, rig bids and allocate markets and customers. 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 (e.g., fixing prices, rigging bids or allocating markets or customers); and (4) an effect on

1 John D Buretta is a partner at Cravath, Swaine & Moore LLP and John Terzaken is a partner at Simpson Thacher & Bartlett LLP.
2 15 USC Section 1.
3 See US Dep't of Justice (DOJ), Justice Manual Subsections 7-3.310–3.340.

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interstate commerce or commerce with foreign nations resulting from the agreement. The burden is on the Antitrust Division to prove these elements beyond a reasonable doubt, which is the highest burden of proof in the US legal system.

Congress has expressly granted immunity from these prohibitions to certain highly regulated industries (e.g., insurance and freight railways) and passed laws and regulations that provide implied immunity to still other areas, such as the sale of securities.[4] Certain agreements are also exempt from prosecution under antitrust laws when they relate to actions taken pursuant to a state regulatory scheme,[5] petitioning the government,[6] labour and collective bargaining,[7] and other activities. Finally, there are a number of statutory and common law doctrines that may frustrate prosecution of a cartel violation that is cross-border in nature, such as the jurisdictional limitations of the Foreign Trade Antitrust Improvements Act (FTAIA),[8] the Foreign Sovereign Immunities Act (FSIA),[9] foreign sovereign compulsion doctrine, and general principles of comity.

III LENIENCY PROGRAM

The Leniency Program is the cornerstone of the Antitrust Division's cartel enforcement regime. 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.[10] Subsequent cooperators nonetheless may

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4 *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).

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

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

7 See 29 USC Subsections 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 labor 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 *United States v. Hutcheson*, 312 US 219 (1941).

8 15 USC Section 6a. The Supreme Court's decisions in *Arbaugh v. Y&H Corp*, 546 US 500 (2006) (Arbaugh) 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)); *Lotes Co v. Hon Hai Precision Indus Co*, 753 F.3d 395, 405 (2d Cir. 2014); *United States v. Hui Hsiung*, 778 F.3d 738, 752–53 (9th Cir. 2015), cert. denied, 576 US 10229 (2015).

9 28 USC Subsections 1330, 1332(a), 1391(f) and 1602–1611.

10 DOJ, Frequently Asked Questions About the Antitrust Division's Leniency Program (4 April 2022) at Question 3, https://www.justice.gov/atr/page/file/1490311/download (Frequently Asked Questions) ('Only one organization or individual can receive leniency per conspiracy, so time is of the essence . . . Organizations have lost the race for leniency by a matter of hours and faced significant fines, and prosecution of their senior executives, as a result.').

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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.

i Types of leniency

The Leniency Program affords opportunities for corporations and individuals to secure immunity. The Corporate Leniency Policy[11] 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 is available even after the Division has commenced an investigation. While both types of corporate leniency require similar cooperation and corporate admissions, only Type A leniency guarantees immunity for all directors, officers and employees of the corporation who admit their involvement in the violation and fully cooperate with the Antitrust Division's investigation.[12] 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.[13] Once a corporation applies for leniency, however, individual directors, officers and employees may be considered for leniency only under the Corporate Leniency Policy.

ii Securing a marker for leniency

The first step in pursuing leniency is securing a marker. The evidentiary standard for obtaining a marker is relatively low. To obtain a marker, counsel must 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 and report that he or she has discovered some evidence indicating that his or her client has engaged in a criminal antitrust violation; disclose the general nature of the conduct discovered; identify the industry, product or service involved with sufficient specificity to allow the Division to determine whether leniency is still available; and identify the client.[14] Counsel may request a marker by email or calling the Antitrust Division.[15] 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 or 45 days for an initial marker 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.[16]

iii Cooperation with the Antitrust Division

Paragraph 3 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

11 DOJ, Justice Manual Subsections 7-3.310, 7-3.320.
12 id.
13 id. Section 7-3.330.
14 Frequently Asked Questions at Question 4.
15 DOJ, Leniency Program (6 May 2022), https://www.justice.gov/atr/leniency-program.
16 Frequently Asked Questions at Questions 9, 10.

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restitution to victims.[17] 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.[18] 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.[19] 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.[20] 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.[21] And 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. Notably, however, the Division's only attempt to revoke leniency ultimately failed.[22]

iv 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 is to treat this information as confidential unless there is agreed disclosure by the applicant or by order of a court.[23] 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.[24]

v Employee carve-outs

The Antitrust Division will carve out of a corporate leniency a company's current director, officer or employee if he or she does not fully cooperate with an investigation.[25] Full cooperation by an employee requires that individual confess his or her participation in the offence, make himself or herself available for interviews and testimony, and 'participat[e] in affirmative investigative techniques, including but not limited to making telephone calls, recording conversations, and introducing law enforcement officials to other individuals'.[26]

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17 See DOJ, Model Corporate Conditional Leniency Letter (last visited 22 October 2022), https://www.justice.gov/atr/page/file/1490291/download.

18 Frequently Asked Questions at Question 77.

19 id. at Question 33.

20 id.

21 id.

22 *United States v. Stolt-Nielsen, SA*, 524 F. Supp. 2d 609, 627–28 (E.D. Pa. 2007).

23 Frequently Asked Questions, at Question 33.

24 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 November 2003), www.justice.gov/atr/public/speeches/201614.pdf.

25 Frequently Asked Questions, at Question 33.

26 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 October 2022), https://www.justice.gov/atr/page/file/1490291/download.

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vi Leniency Plus and Penalty Plus

The Leniency Program also contains benefits for a company that cannot claim leniency for a conspiracy already under investigation by the Division but uncovers and self-reports evidence of a second conspiracy during that investigation (Leniency Plus), as well as penalties for those similarly situated companies that fail to take advantage of the Leniency Plus opportunity (Penalty Plus). Under Leniency Plus, that company is not only eligible to receive leniency for the second conspiracy reported, but may receive additional consideration from the Division in the first conspiracy under investigation in the form of an added discount for the imposed fine.[27] Conversely, 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.[28] 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.[29] For individuals, the difference in failing to self-report the second conspiracy could be between a lengthy jail sentence and no jail sentence.[30]

vii 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.[31] Joint and several liability is also unavailable to the plaintiff.[32]

viii Whistle-blower protection

Signed into law in December 2020,[33] the Criminal Antitrust Anti-Retaliation Act (CAARA) amends ACPERA to allow an employee who believes his or her employer has retaliated against him or her for reporting wrongful conduct to file a complaint with the Secretary of Labor. Any such complaints are reviewed and investigated by the Occupational Safety and Health Administration, a federal agency that primarily regulates private sector employers and

27 Frequently Asked Questions, at Question 78.

28 id. at Question 80.

29 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.

30 id.

31 15 USC Subsection 7a–7a-2.

32 id. Section 7a-1(a).

33 id. Section 7a-3; see also Press Release, DOJ, 'Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act' (24 December 2020), https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

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their workers. If the complaint is substantiated, the employee is entitled to reinstatement, back pay and litigation costs, including attorneys' fees. Unlike some whistle-blower statutes, CAARA does not include financial incentives for employees to report wrongdoing.

IV PENALTIES

Under Section 1, a corporation that does not receive leniency may be fined up to US$100 million or twice the gain from the illegal conduct or twice the loss to the victims.[34] A corporation convicted of cartel conduct may also be debarred from participation in federal contracts. Individuals may be fined up to US$1 million and face prison sentences of up to 10 years.[35] Notably, the Antitrust Division has had policy of insisting upon a prison term for every individual defendant, including any foreign national, who pleads guilty to a Section 1 violation.

i US sentencing guidelines

The primary determinant for sentencing in cartel cases is the US Sentencing Guidelines.[36] 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.[37]

Although the Sentencing 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 cartel participants. The sentencing calculation differs between individuals and corporations, but in both cases the volume of commerce is the most important factor. For individuals, the sentencing recommendation is composed of both imprisonment and a fine. The recommended term for imprisonment is determined primarily by reference to an offence level.[38] Cartel offences have a base offence level of 12, with an increase of up to 16 levels depending on the volume of commerce affected.[39] 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.

The Sentencing Guidelines offer virtually no guidance on determining the volume of commerce, 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

34 See Press Release, supra note 33; 18 USC Section 3571(d).

35 15 USC Section 1.

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

37 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.

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

39 See USSG Section 2R1.1.

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issue.[40] 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.

ii 18 USC Section 3571

Under the Sherman Act, 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 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.[41]

iii Discounts

A number of potential sentencing discounts are available to both corporate and individual cartel defendants. Among the most important for corporate defendants are sentencing discounts for cooperation. A first-in cooperator 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 subsequent 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 subsequent cooperator may still stand 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

40 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'.

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

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against the disproportionality in sentencing between defendants that results from discounts.[42] 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).[43]

Compliance programmes are also playing an increasing role in the DOJ's sentencing considerations. 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.[44] 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.[45] However, the DOJ will not consider a reduction where there was unreasonable delay in reporting the illegal conduct to the government.[46] 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.[47]

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.[48] Second, determining

42 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.

43 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).

44 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, US Department of Justice, Antitrust Division (July 2019), www.justice.gov/atr/page/file/1182001/download, at 15/.

45 id. at 12.

46 id. at 14.

47 id. at 14–15.

48 See USSG Section 8B1.1; see, e.g., United States' and Defendant Polo Shu-Sheng Hsu's Joint Sentencing Memorandum at 3, *United States 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

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the amount of loss suffered by particular victims is difficult and complex, and may unduly complicate and delay the sentencing process.[49] 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 required to pay restitution as a condition of leniency, but that criteria is often met by the applicants resolution of private civil actions.[50]

The Division may also recommend, and the court may impose, a period of probation upon a corporate defendant in a cartel case.[51] Probation may include a variety of conditions, including that the corporation does not commit another federal, state or local crime during the term of probation, pays restitution if required, and implements an antitrust compliance programme or addresses deficiencies in an existing compliance programme.[52] Notably, the Antitrust Division may also seek to impose a compliance monitor as a condition of probation.[53]

v Follow-on civil exposure

Private plaintiffs often bring private antitrust suits in the wake of a criminal prosecution by the Antitrust Division.[54] 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.[55]

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recovery of a multiple of actual damages'.)

49 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.')

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

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

52 id. at Section 8D1.3.

53 See, e.g., 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; *United States v. Florida West Int'l Airways, Inc*, No. 10-20864-CR-SCOLA (SD Fla 5 November 2012); *United States v. Apple, Inc*, 2013 US Dist LEXIS 129727, 2013-2 Trade Cas (CCH) P78,506, 2013 WL 4774755 (SDNY 5 September 2013); 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.

54 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.

55 See Makan Delrahim, Assistant Attorney General, Antitrust Div., 'Remarks at the American Bar Association Antitrust Section Fall Forum' (15 November 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

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vi 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.

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 prosecution may be warranted. The Division has long restricted its exercise of this discretion to grants of leniency pursuant to the Leniency Program and to cooperating witnesses, disfavouring use of non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) in criminal cartel investigations.[56] But while NPAs remain an anomaly for the Antitrust Division, the Division has begun to use DPAs to resolve cartel cases in highly regulated industries, such as the financial services and generic pharmaceuticals markets.[57] The Antitrust Division's policy has similarly disfavoured 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.[58]

The Division can also always opt to proceed to trial on all of the potential charges that may be warranted. However, the Division faced criticism for such an approach recently, with a federal judge questioning the Division's decision to proceed to try, for a third time, chicken-company officials who allegedly conspired to fix prices after the first two trials ended in mistrials after jurors deadlocked.[59]

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remedies would create a further disincentive for self-reporting under the Division's Leniency Program. See American Bar Association Antitrust Law Section, Section 5(b) Corporate and Individual Leniency Policies, 'Presidential Transition Report The State of Antitrust Enforcement February 2021'.

56 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.

57 See, e.g., *United States v. Heritage Pharmaceuticals Inc*, Case 2:19-cr-00316-RBS, Deferred Prosecution Agreement (11 June 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 (5 February 2013), available at https://www.justice.gov/atr/case-document/file/509081/download.

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

59 See, e.g., Bob Van Voris, 'Chicken Trial Failures Have Judge Asking Why Do This Over Again', https://news.bloomberglaw.com/us-law-week/chicken-price-fixing-trial-ends-in-mistrial-for-a-second-time (30 March 2022); Patrick Thomas & Dave Michaels, 'Justice Department Fails for Third Time to Convict Chicken Executives in Price-Fixing Trial', available at https://www.wsj.com/articles/chicken-industry-officials-acquitted-in-price-fixing-case-11657287202 (8 July 2022).

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In May 2018, the Division also formally codified a requirement that prosecutors across the Division take steps to coordinate and exercise discretion in corporate resolutions in circumstances of parallel enforcement actions arising from the same misconduct.[60] This new guidance is not antitrust-specific and outlines a number of factors prosecutors are now asked to consider, including: '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'.[61] These factors are to be considered at both the charging and sentencing phase of a prosecution.

V 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 can be 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,[62] and the potential for information disclosed to the Antitrust Division being used by other DOJ components[63] and discovered in follow-on litigation. Fortunately, the Antitrust Division aims to be transparent and predictable in its dealings with cooperators, whom it views as furthering US enforcement goals. Thus, 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 of the applicant.

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

61 id.

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

63 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.)

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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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