LEXOLOGY®
Navigator

Cartels

in USA

Table of contents

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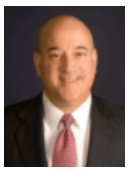

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Trends and climate

Trends

Have there been any recent changes to the cartel regime? If so, have they had a significant impact on enforcement activity?

The Department of Justice's (DOJ) efforts to prosecute cartelists remain vigorous. The most significant recent change by the DOJ is its emphasis that in cases where it already has some information about a cartel, it will not automatically grant conditional leniency to cooperating employees. The DOJ has also emphasised that protection of cooperating former employees is not automatic under any circumstances and that a grant of leniency applies only to crimes "integral to the [antitrust] violation". Finally, the DOJ announced in late 2016 that it would treat certain agreements between competitors in the HR context as criminal violations of the antitrust laws. Some have questioned whether the DOJ's approach, combined with developments in other jurisdictions, will lessen the attractiveness of seeking leniency and lead to a decline in applications.

Are there any proposals to reform or amend the existing cartel regime?

From time to time there are proposals to amend the statutory framework, but no action appears likely in the foreseeable future.

Have there been any recent key cases?

The most recent key cases concern the extent to which US antitrust laws apply to foreign commerce and the deference that US courts should give to a foreign government's statements when determining foreign law.

In Motorola Mobility LLC v AU Optronics Corp (775 F3d 816 (7th Cir 2015), cert denied, (15 June 2015)) the Seventh Circuit held that Motorola could not pursue Sherman Act claims for purchases made outside the United States by Motorola's overseas subsidiaries.

In United States v Hui Hsiung (778 F3d 738, 751-753 (9th Cir 2015), cert denied, (15 June 2015)) the Ninth Circuit affirmed the criminal conviction of two individuals and two companies because sales by foreign members of a cartel directly to US purchasers were import commerce.

In Animal Science Products, Inc v Hebei Welcome Pharmaceutical Products Co (___ US ___ (2018)) the Supreme Court held that the Second Circuit Court of Appeals erred in giving conclusive effect to a filing by the Chinese government stating that Chinese law required the defendants to set prices and reduce the quantities of vitamin C sold outside China, and remanded the case for the Second Circuit to determine, after giving "respectful consideration" to the Chinese government's statements, whether the defendants could not simultaneously comply with Chinese law and US antitrust law, and whether principles of international comity required the dismissal of the plaintiff's US claims.

Legal framework

Legislation

Which legislation applies to cartels and what are the relevant substantive provisions?

At the federal level, the Sherman Act (15 USC Section 1) prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Most states have substantially similar statutes.

Institutions

Which bodies are the relevant regulatory and prosecutory authorities and what are their specific roles?

The Department of Justice (DOJ) has the exclusive authority to pursue criminal penalties for violations of the Sherman Act. The Antitrust Division of the DOJ investigates and prosecutes violations of the antitrust laws, but often coordinates its efforts with other units within the DOJ (eg, the Fraud Division) and the US Attorney's Office in the federal judicial district in which the investigation or prosecution is being pursued. Both the DOJ and the Federal Trade Commission may pursue civil penalties for price-fixing violations. Cartels are nearly always prosecuted criminally.

Some state attorney generals have the authority to prosecute violations of state laws as criminal offences. In practice, however, state criminal prosecutions are rare and generally involve a state-specific impact.

Are there any sectoral regulators with concurrent powers?

Various sectoral regulators such as the Surface Transportation Board, the Federal Maritime Commission and the Department of Transportation have the authority to pursue administrative and other non-criminal sanctions for cartel behaviour; none have criminal authority.

Application

Does the legislation apply to both formal agreements and informal practices?

The Sherman Act and comparable state laws require proof of an agreement, but the agreement need not be written or formal. A "conscious commitment to a common scheme" is all that is required and the existence of an agreement may be proven entirely by circumstantial evidence. A common mistake is a failure to appreciate the expansiveness of 'agreement' under US law.

Does the legislation apply to individuals, companies or both?

The Sherman Act and many state laws apply to both companies and individuals.

Does the legislation subject companies to civil liability, criminal liability or both?

The Sherman Act subjects companies to both criminal and civil liability. Some state laws impose only civil liability.

Does the legislation subject individuals to civil liability, criminal liability or both?

The Sherman Act subjects individuals to both criminal and civil liability. Some state laws impose only civil liability.

Where cartel conduct is punishable by both civil and criminal penalties, can the enforcement authority pursue both types of penalty? How does the authority decide which penalties to seek?

In theory, the DOJ could pursue both criminal and civil penalties, but it has long followed a policy of seeking either criminal or civil penalties. At the beginning of an investigation, the DOJ will decide, based on the nature of the suspected conduct and the nature of the likely evidence, whether to proceed with a criminal or civil investigation.

Are there any sector-specific offences or exemptions?

There are a variety of general exemptions, including:

- the state action exemption, which exempts certain conduct that is undertaken pursuant to state or local government policy;
- the Noerr-Pennington exemption, which immunises conduct seeking to influence government action;
- the labour exemption, which exempts collective bargaining;
- the filed-rate doctrine, which bars antitrust suits based on tariffs filed with a federal or state regulatory agency; and
- the limited implied exemption as a result of laws regulating the sales of securities.

Regulations of sectors such as agriculture, communications, energy, insurance and transportation may also act as exemptions in certain circumstances.

To what extent, if any, does the legislation apply to extraterritorial conduct?

The Foreign Trade and Antitrust Improvements Act provides that if extraterritorial conduct involves import commerce, US law will apply. It further provides that if conduct in foreign commerce does not involve import commerce, US law will apply if:

- the conduct has a "direct, substantial, and reasonably foreseeable effect" on US domestic commerce or import commerce; and
- that effect "gives rise" to Sherman Act claims.

Investigations

Initiating an investigation

Who can initiate an investigation of potential cartel conduct?

The Department of Justice (DOJ) and other US competition authorities receive information regarding potentially anti-competitive conduct from a wide variety of sources: newspaper accounts, private antitrust litigation, grand jury investigations into non-antitrust crimes, merger reviews and other civil investigations, competitor or customer complaints, complaints from disgruntled existing or former employees, government agencies, state attorneys general and leniency applicants. In addition, DOJ staff economists monitor local and regional price movements in selected industries.

If an investigation is initiated by complainants or third parties, what rights (if any) do they have?

US law provides no specific rights to complainants. However, depending on the nature of the reported conduct, an individual may have rights (eg, the ability to recover under the False Claims Act for fraud in government procurement and grant awards or protection from retaliation for whistleblowing) under various non-antitrust statutes.

What obligations does a company have on learning that an investigation has commenced?

On learning that an investigation has commenced, a company likely has an obligation to preserve all documents and information relating to the subject matter of the investigation. If a company has received a grand jury subpoena or search warrant, the DOJ will rigorously examine the company's diligence in preserving relevant documents and information. Companies that issue publicly traded securities may have disclosure or other obligations under the securities laws.

What obligations does a company have if it believes that an investigation is likely?

If a company believes that an investigation is likely, it likely has an obligation to preserve all documents and information relating to the subject matter of the investigation.

What are the potential consequences of failing to act or delaying action?

Failure to preserve documents and other information could subject the company and its employees to criminal penalties (including imprisonment of individuals) for obstruction of justice and other process-related crimes and to monetary and other penalties in subsequent civil actions.

Formal stages of investigation

What are the formal stages of and approximate timeframe for investigations?

DOJ staff will typically gather and review publicly available documents and information before requesting authority to begin a grand jury investigation. Thus, before an industry learns about an investigation, the government probably will have already been working on it for several months.

If authority is granted to begin a grand jury investigation, the DOJ may then seek from a grand jury either a subpoena duces tecum, which requires the recipient to submit documentary materials to the grand jury, or a subpoena ad testificandum, which requires an individual to appear before the grand jury to testify. A subpoena must provide a "reasonable" time to respond – usually approximately 30 days. Extensions are typically available.

The DOJ may also use search warrants if it determines that there is a "substantial basis" for doing so. Such a basis may be provided by a concern that documents will be destroyed, concealed or fabricated. To obtain a search warrant, the government must demonstrate to a magistrate judge that there is probable cause to believe that a crime has been committed and that evidence of that crime is likely to be at the location to be searched. Lawyers from the Antitrust Division of the DOJ or agents of the Federal Bureau of Investigation (FBI) may also conduct drop-in witness interviews.

Investigations often extend for many years, but unless a target of an investigation agrees to toll the running of the statute of limitations, the DOJ must file charges within five years from the last act in furtherance of the conspiracy. Some investigations are closed for lack of evidence of a criminal violation within the statutory limitations period. The DOJ may negotiate an agreement for a target to plead guilty to specified charges in exchange for the DOJ's recommendation of a particular sentence. To prosecute targets that decline to agree to plead guilty, the DOJ must ask the grand jury to indict the company or individual.

Before asking a grand jury to return an indictment, the DOJ will offer defence counsel an opportunity to persuade it

not to do so. Counsel may choose to present oral argument, fact or expert witnesses, and a written 'white paper' memorandum. If the government nevertheless decides to proceed, the conclusion of the investigation will be marked by the return of an indictment specifying the charges. Indictment begins the formal prosecution process that culminates with a trial.

Investigative powers

What investigative powers do the authorities have?

The DOJ may apply to a magistrate judge for a search warrant, which allows federal agents to search a company's facilities and seize documents and data. The DOJ may also obtain subpoenas duces tecum and subpoenas ad testificandum, and conduct drop-in interviews. The DOJ may use undercover agents and secretly cooperating individuals to obtain evidence covertly, for example, by introducing an FBI agent as a new member of the cartel or by gaining the consent of a cooperating individual to record or videotape meetings among suspected cartel participants. With court approval, the DOJ may also conduct non-consensual taping of suspected cartel communications.

The DOJ may also seek the issuance of an Interpol red notice. The red notice operates as an international 'wanted' notice that, in some Interpol member countries, serves as a request, should a fugitive individual enter their jurisdiction, to arrest the subject with a view toward extradition. The DOJ can request that a foreign jurisdiction extradite a fugitive defendant located in that jurisdiction to the United States.

What is the geographic reach of public enforcement actions?

Although US antitrust law extends to extraterritorial conduct under certain circumstances, the DOJ's investigatory powers are largely territorial in scope. The DOJ Antitrust Division Manual cautions that efforts to obtain evidence outside the United States present special considerations and are conducted in coordination with the Foreign Commerce Section of the Antitrust Division. The DOJ may obtain information located abroad from letters rogatory. The DOJ may also obtain information from other competition authorities through:

- antitrust cooperation agreements;
- antitrust mutual assistance agreements; and
- mutual legal assistance treaties.

The geographic reach of the US civil antitrust litigation process is broader. In the discovery process, a corporate defendant must often produce materials from outside the United States. In at least one case, the DOJ served subpoenas on parties in private litigation to obtain documents in their possession that a foreign company had produced.

When is court approval required to invoke these powers?

Court approval is required to issue letters rogatory, but otherwise is not required.

Are searches of business and personal premises authorised? If so, which bodies carry out searches and will they wait for legal advisers to arrive?

On a showing of probable cause to believe that a crime has been committed and that evidence is likely to be found at particular locations, a magistrate judge may issue a search warrant authorising the search of business and personal premises. FBI agents and DOJ attorneys will execute the search and may seize evidence found at the described locations. A company may ask for a short delay in executing the warrant to wait until its legal advisers arrive; the officers executing the warrant have discretion as to how long to wait, if at all.

What level of cooperation with the authorities is required and what are the consequences for failing to cooperate?

A company or an individual may not interfere with a government investigation. Interference (eg, blocking access to a location described in a valid search warrant or destroying or modifying documents or other information) may lead to prosecution for obstruction of justice. Notwithstanding, companies and individuals have no duty to cooperate. The general practice is to provide 'passive' cooperation, such as directing agents to locations described in the warrant and providing network passwords so that server files can be accessed, but to avoid actively assisting the agents conducting the search. Once federal agents present a search warrant, a search cannot be stopped unless the warrant is invalid.

Is in-house legal advice or attorney work product protected by the law of privilege? Does this extend to the advice of in-house counsel?

The DOJ respects privilege with respect to both attorney-client communications and attorney work product. This includes advice by in-house counsel.

Are any other limitations imposed on investigatory powers in order to safeguard the rights of those under investigation?

An invalid search warrant may be challenged either informally with the individuals executing the warrant or by request to the issuing court. An individual has the right to:

- remain silent and decline to answer government questions;
- set a limit on what he or she will discuss with a government agent;
- have counsel present during any interview with a government agent; and
- terminate an interview and leave at any time unless arrested or otherwise lawfully detained.

What is the process for objecting to an authority's exercise of its claimed powers?

A facially defective search warrant may be challenged with the officers executing the warrant or with the issuing court. If an invalid search warrant is executed or evidence is otherwise seized improperly (eg, because it is beyond the scope of the warrant), a defendant may file a motion to suppress the use of that evidence. However, Federal Rule of Criminal Procedure 41(h) permits a defendant to bring a motion to suppress only after the government has filed an indictment and if there is a basis on which to claim certain property was illegally seized.

Publicity and confidentiality

What information about investigations will be made publicly available and at which stage(s) of the process?

The DOJ strives to keep investigations confidential until it formally files charges by information or indictment. In addition, Federal Rule of Criminal Procedure 6(e)(2)(B) imposes secrecy obligations on government attorneys, grand jurors and others for a "matter occurring before the grand jury". This typically extends to all information collected or obtained during an investigation. However, companies or individuals may choose to disclose the existence of an investigation and have free speech rights to comment on an investigation when and as they choose.

Once the DOJ files charges, typically only the charging documents are public. If a defendant decides to plead guilty, the plea agreement will be filed publicly and the defendant will, as part of the process of pleading guilty, testify publicly under oath as to the conduct that gives rise to the criminal charge. In the event of a trial against a company or individual defendants, evidence and testimony offered at trial is presumptively public, although the parties can ask the judge to keep secret especially highly confidential information (eg, information affecting national security). Such requests are rarely granted.

Is any information automatically confidential and is confidentiality available on request?

The DOJ generally automatically accords confidential treatment to information gathered in connection with an investigation. Counsel typically nevertheless request confidential treatment, to which the DOJ generally agrees. If an investigation results in either criminal prosecution or a civil lawsuit, there is a strong presumption in favour of information becoming public and the confidentiality enjoyed during the investigation phase may be lost.

International cooperation

Do the authorities in your jurisdiction cooperate with authorities in other jurisdictions?

The DOJ cooperates with authorities in other jurisdictions through formal cooperation pursuant to mutual legal assistance treaties, formal negotiated cooperation agreements and other bilateral or multilateral treaties or arrangements that facilitate the formal sharing of information. The DOJ also engages in extensive informal cooperation, including joint investigations and simultaneous joint searches.

Do the relevant enforcement authorities request waivers so as to allow for increased

cooperation with authorities in other jurisdictions? What are the consequences of declining to grant a waiver?

The DOJ often requests waivers to allow for increased cooperation. The decision whether to provide a waiver rests solely with the party producing information. Refusal to provide a waiver will not prejudice the outcome of an investigation. However, the DOJ may consider a company or individual's grant or denial of a waiver when assessing the extent to which to recommend a reduction in the proposed fine or prison term as a result of the company or individual's cooperation.

Decisions

How is a cartel investigation resolved? Are settlements, plea bargains or other negotiated resolutions available?

A cartel investigation may be resolved through a plea bargain or the indictment of an individual or company. In the event of an indictment, the prosecution will continue until the charges are resolved by motion, by plea agreement or trial. The DOJ may also close an investigation without action, although this is usually not public absent a disclosure by a subject of the investigation.

What is the process for negotiating a settlement, plea bargain or other negotiated resolution? Do such resolutions require court or other approval?

The DOJ Antitrust Division Manual describes the process for negotiating a plea agreement. A plea agreement must be approved by a district judge.

If a settlement is not reached, what is the procedure for adjudicating a charge of cartel conduct?

If a settlement is not reached, the DOJ may seek the indictment of a company or individual by a grand jury. If a company or individual is indicted and appears to face the charges, the matter is tried in a district court before at least 12 jurors.

Which party must prove its case? What is the relevant standard of proof?

In a criminal case the DOJ must prove each element of the charged offence "beyond a reasonable doubt". In civil cases the government or private plaintiffs must prove each element of the offence by "a preponderance of the evidence", meaning more likely than not.

Is there a hearing? If so, what is the process for submitting evidence and testimony?

In a criminal case the DOJ must prove any charges in a criminal trial to at least 12 jurors. In civil cases a defendant may waive its right to a jury trial and juries may be composed of fewer than 12 jurors. Evidence and testimony must be introduced consistent with the Federal Rules of Evidence, either the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure (depending on whether the case is a civil or criminal case) and all applicable local rules. In addition, all trials must comport with a defendant's constitutional and due process rights.

What are the accused's procedural rights?

An accused's procedural rights include the right to:

- a jury;
- constitutional due process (ie, notice and an opportunity to be heard);
- equal treatment under the law;
- a pre-trial hearing by a grand jury;
- protection from unreasonable searches and seizures;
- a speedy trial by an impartial jury;
- be informed of the charges and evidence;
- be present when witnesses testify against him or her;
- call witnesses in defence; and
- a sentence suited to the crime.

An individual defendant also has a right to an attorney and to decline to answer self-incriminating questions. Two prosecutions by the same sovereign for the same crime ('double jeopardy') is prohibited. In theory (but almost never in practice) the United States and an individual state could prosecute a defendant for the same conduct because the United States and a state are separate sovereigns.

Appeal process

What is the appeal process?

A convicted defendant may automatically appeal to the applicable court of appeals after judgment. Appellate review before judgment is available only in limited circumstances. There is no right to appeal an adverse decision by the court of appeals, but a defendant may file a petition for a writ of certiorari requesting the Supreme Court to exercise its discretion to review the decision.

To what extent can the appeal body review the agency's findings of fact, legal assessment and penalties?

The appellate court accords great deference to findings of fact and will overturn those only if it determines that no reasonable jury could have made the findings based on the evidence properly admitted at trial. The appellate court will conduct a de novo review of legal determinations such as rulings regarding the introduction of evidence, jury instructions and whether the conduct was subject to US laws. The appellate court will review decisions on penalties (including fines and prison terms) for an abuse of discretion.

Penalties

Penalties for companies

What are the potential penalties for companies involved in a cartel?

The Sherman Act provides for a maximum fine of $100 million. However, 18 USC Section 3571(d) provides that a company may be fined up to twice the amount of its pecuniary gain or twice the amount of the pecuniary loss suffered by others. In practice, this significantly increases the magnitude of the potential fine. As of 1 September 2018, the highest fine imposed on a company for a violation of the Sherman Act was $925 million.

Are there guidelines in place for penalties? If not, how are penalties normally calculated?

In the federal courts, the judge has discretion to determine the sentence to be imposed on a convicted cartel defendant, but must consider the US Sentencing Guidelines when exercising his or her discretion. The US Sentencing Guidelines set forth a multi-step process for determining the range of a proposed fine.

Do the authorities take into account any penalties imposed in other jurisdictions?

The US Sentencing Guidelines do not expressly take into account penalties imposed in other jurisdictions, but the Department of Justice (DOJ) has said that it does consider such penalties in its recommendations to the judge.

How can a company mitigate its exposure to fines?

As discussed below, companies that qualify for leniency may entirely avoid any fine for a violation. Companies that do not qualify for leniency for the particular violation may reduce their fine by obtaining leniency (also known as 'leniency plus') for reporting a different violation. They may also reduce their fine by providing the DOJ with "substantial assistance" with its prosecution of others, which may lead to the DOJ recommending to the judge that the fine be reduced as credit for the company's cooperation.

Penalties for individuals

What are the potential penalties for individuals involved in a cartel?

The Sherman Act provides that individuals may be fined up to a maximum of $1 million and may also be imprisoned for up to a maximum of 10 years. The DOJ has a long-standing policy of seeking terms of imprisonment in nearly all prosecutions of individuals.

Do the authorities take into account any penalties imposed in other jurisdictions?

The US Sentencing Guidelines do not expressly take into account penalties imposed in other jurisdictions, but the DOJ has said that it does consider such penalties in making its sentencing recommendation.

Is a company permitted to pay a penalty imposed on its employee?

There are no prohibitions on a company paying a financial penalty imposed on its employee.

Is a company permitted to continue to employ an employee involved in cartel conduct?

Yes. However, the DOJ may take this into account when deciding what sentence to recommend for the company. If a company continues to employ a culpable employee who has not accepted responsibility for his or her conduct (typically by agreeing to plead guilty and serve time in prison), the DOJ may recommend a term of probation and possibly the appointment of a monitor to oversee the company's future efforts to comply with the antitrust laws.

Private actions

Private damages actions

Can private actions for damages be brought in your jurisdiction? If so, who may assert such actions?

Yes. Private actions for damages may be brought under both federal law and most state laws.

15 USC Section 15(a) permits "any person" who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to recover damages. 'Any person' includes individuals, partnerships, corporations, associations or other legal entities. State governments may assert private damages actions for antitrust violations both on behalf of state entities as injured parties and in parens patriae on behalf of their citizens.

Under federal law, only direct purchasers may recover damages, even if the direct purchaser passed on the full amount of the overcharge to the indirect purchasers (Illinois Brick Co v Illinois (431 US 720 (1977)), Hanover Shoe, Inc v United Shoe Mach Corp (392 US 481 (1968))). Although indirect purchasers cannot recover damages under federal law, they may obtain injunctive relief under federal law and may recover damages under the laws of more than half of the states.

What relief may be awarded to successful claimants (eg, damages, costs, injunctive relief or attorneys' fees)?

Federal law permits successful private claimants to recover three times their actual damages ('treble damages'), plus the costs of suit, including reasonable attorneys' fees. The trebling of damages is automatic. The court may also award pre-judgment interest on actual damages, but only under certain narrow circumstances.

Under federal law, any person threatened with "loss or damage by a violation of the antitrust laws" may obtain injunctive relief to stop or prevent the anti-competitive conduct. Injunctive relief may be obtained without showing that actual injury has occurred; the threat of injury is sufficient.

The relief that may be awarded to successful claimants bringing private damages actions under state laws varies from state to state. Many state laws permit treble damages, but a few permit only actual or double damages. Many state antitrust statutes also permit recovery of costs and attorneys' fees.

How are the amounts of any damages, costs or attorneys' fees calculated?

In private damages actions, the amount of damages is typically measured based on the difference between the price actually paid and the price that would have been paid in the absence of the cartel. Actual damages are automatically trebled and liability is joint and several, meaning that a plaintiff may collect three times the entire amount of damages from any defendant. There is no right of contribution.

Importantly, the Antitrust Criminal Penalty Enhancement and Reform Act 2004 provides that an applicant for leniency who fully and sufficiently cooperates with private claimants is not subject to joint and several liability and is liable for only actual, single damages instead of treble damages.

Have there been any notable recent cases in which a private action was the subject of adjudication?

Private actions are so common in the United States that there are numerous cases in which the merits of private litigants' claims have been evaluated by courts.

For example, in one of the many cases involving liquid-crystal display panels, Toshiba, which was not charged criminally, went to trial in civil cases. Although other companies either pleaded guilty or were convicted in a criminal trial, a jury in one civil case declined to find that Toshiba participated in the conspiracy. In another case that went to trial, Toshiba was found liable for $87 million in damages but ultimately settled the case for $30 million by arguing that the $87 million was subject to offsets of $443 million as a result of the plaintiffs' recoveries from other defendants.

Class actions

Can class actions be brought in your jurisdiction? If so, what is the procedure for such cases?

Yes. To bring a class action, the class of plaintiffs must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure or its state analogues. Rule 23 requires plaintiffs to demonstrate that:

- the class must be so numerous that joinder of all members is impracticable;
- the action must involve questions of law or fact that are common to the class;
- the claims or defences of the class representative must be typical of the claims or defences of the class; and
- the class representatives must fairly and adequately protect the interests of the class.
- In addition, for most class actions seeking damages, plaintiffs must also demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that the class action method is superior to other available methods of adjudication.

Once a court certifies a Rule 23(b)(3) class, potential class members must be provided with notice of the class action by the best practical means, usually correspondence or publication. Potential class members are automatically included in the class unless they affirmatively exclude themselves or 'opt out'. Opting out prevents an individual from being bound by the judgment in the class action and also reserves an individual's right to file his or her own action. A decision to opt out also means that an individual is not entitled to any share of the recovery in the case.

Immunity and leniency

Immunity and leniency programmes

Is an immunity and leniency programme available for companies? If so, how does it operate?

Yes. The Department of Justice (DOJ) has adopted a Corporate Leniency Policy, which provides complete immunity from criminal prosecution for the first company or individual that reports cartel conduct and meets the other leniency requirements (described below). The DOJ permits an applicant to place a 'marker', which holds an applicant's place in line while it gathers more information to support its request for leniency. On perfecting a marker, the Antitrust Division of the DOJ will issue a conditional leniency letter. The Antitrust Division will usually issue a final, unconditional leniency letter only after the completion of the investigation and any resulting prosecutions of the applicant's co-conspirators.

To obtain leniency before the DOJ has commenced an investigation (Type A leniency), an applicant must satisfy the following six conditions:

- The DOJ must not yet have received information about the activity from another source.
- The company must take prompt and effective action to terminate its role in the illegal activity.
- The company must report the illegal activity with candour and completeness and provide continuous cooperation throughout the investigation.
- The company must confess a truly corporate act (as opposed to having isolated confessions from individual officers or directors).
- The company must make restitution where possible.
- The company must not have been the ringleader of the illegal activity or coerced another party to participate.

If the DOJ has already opened an investigation, a company may still be eligible for Type B leniency if it satisfies the following seven conditions:

- The company must be the first to come forward and qualify for leniency with respect to the illegal activity.

• The DOJ must not yet have received evidence against the company that is likely to result in a sustainable conviction.

• The company must take prompt and effective action to terminate its part in the illegal activity.

• The company must report the illegal activity with candour and completeness and provide continuous cooperation throughout the investigation.

• The company must confess a truly corporate act (defined above).

• The company must make restitution where possible.

• The Antitrust Division must determine that granting leniency would not be unfair to others.

Can the enforcement authority decline or withdraw leniency? If so, on what basis?

Yes. The DOJ can decline leniency if an applicant does not satisfy the conditions listed above. Similarly, the DOJ can revoke an applicant's conditional acceptance into the leniency programme if it determines, before granting a final unconditional leniency letter, that the applicant either is not eligible for leniency or has not provided the cooperation required in the conditional leniency letter. Similarly, the DOJ may revoke any conditional leniency, immunity or non-prosecution agreement granted to a director, officer or employee of a corporate leniency applicant if it determines that the employee has:

• failed to fully comply with his or her obligations under the letter;

• caused the corporate applicant to be ineligible for leniency;

• continued to participate in the illegal activity after the corporation took action to terminate its participation and instructed the individual to cease his or her participation; or

• obstructed or attempted to obstruct an investigation into the illegal activity.

Are there benefits for cooperators that do not qualify for immunity? If so, how are these benefits determined?

Yes. Companies and individuals that do not qualify for leniency, but that admit wrongdoing, agree to cooperate and enter into a plea agreement, may be eligible for more lenient treatment by the DOJ. The extent of the benefits will depend on the timing, value and completeness of the cooperation.

In addition, under the Leniency Plus programme, the DOJ will provide more lenient treatment in one cartel investigation if a party is the first to disclose the existence of a second cartel.

What benefits (if any) are available for employees and former employees of a company that seeks leniency?

Existing employees (ie, existing directors, officers and employees) of a company that qualifies for Type A leniency will receive leniency if they admit their wrongdoing with candour and completeness and continue to assist the DOJ throughout the investigation. Existing employees who do not cooperate during the investigation will be ineligible for leniency protections. For companies that qualify only for Type B leniency, the DOJ reserves the right to prosecute any existing directors, officers and employees whom it determines to be 'highly culpable'.

For Type A and Type B leniency, former employees (ie, former directors, officers and employees) are presumptively excluded from any grant of corporate leniency. However, the DOJ may exercise discretion to include specific former directors, officers and employees of the company in the corporate conditional leniency letter for non-prosecution protection or, alternatively, in a separate non-prosecution agreement. To be eligible for such protections, former directors, officers and employees must provide substantial, non-cumulative cooperation against remaining potential targets, or their cooperation must be necessary for the leniency applicant to make a confession of illegal activity sufficient to be eligible for conditional leniency. Eligible former directors, officers and employees must provide full, truthful, continuing and complete cooperation throughout the investigation and resulting prosecutions.

Is an immunity or leniency programme specifically available for individuals? If so, how does it operate?

The Antitrust Division has adopted a Leniency Policy For Individuals. individuals may apply for leniency in the same manner as described for companies.

Have there been any notable recent cases in which a leniency application was the subject of adjudication?

In the United States, the decision whether to grant leniency is a matter of prosecutorial discretion subject to only limited judicial review. However, the courts have assessed whether the DOJ breached the agreements contained in a letter conditionally granting leniency. Stolt-Nielsen, a Luxembourg shipping company, admitted to participating in a conspiracy to allocate customers, fix prices and rig bids in conjunction with two other shipping companies. The company sought and received conditional leniency after the DOJ had already started its investigation. Despite the company's cooperation in providing highly incrimination evidence regarding the conspiracy, the DOJ ultimately concluded that Stolt-Nielsen had not ended its illegal activities "promptly" and had instead continued to participate in anti-competitive conduct. The DOJ revoked the company's leniency.

In subsequent legal proceedings, defendants moved to dismiss the indictments of the company and two of its executives, asserting as a defence that the DOJ violated the non-prosecution agreement. The court found that the DOJ had violated the agreement and dismissed the indictment, concluding that the DOJ bears the burden of demonstrating that a defendant materially breached a non-prosecution agreement and that the most important factor in determining whether a breach is material is the incriminating nature of the evidence provided by the defendant.

Criminal liability

Is immunity from criminal prosecution available? If so, how and under what conditions is immunity granted?

Yes. Immunity is available pursuant to the Antitrust Division's Corporate Leniency Policy or Leniency Policy for Individuals.

Application procedure

What is the procedure for a leniency application?

A leniency applicant should contact the Antitrust Division's deputy assistant attorney general for criminal enforcement to request a marker, which holds its place at the front of the line for leniency.

What is the typical timeframe for consideration of a leniency application?

If a marker is available, the DOJ will typically provide the applicant with 30 days within which to perfect its leniency application. In its discretion the DOJ may extend this period if the applicant demonstrates that it is making a good-faith effort to complete its application in a timely manner.

What information and evidence is required?

To obtain a marker, a leniency applicant's counsel must:

- report that he or she has discovered information indicating that the client has engaged in a criminal antitrust violation;
- disclose the general nature of the conduct;
- identify the industry, product or service involved in terms specific enough to allow the DOJ to determine whether leniency is available; and
- identify the client.

After the DOJ grants a marker, the applicant will attempt to perfect its leniency application for either Type A or Type B leniency, per the process described above.

What information and evidence is disclosed to subjects of the investigation other than the leniency applicant?

Without the agreement of the leniency applicant, the Antitrust Division will not publicly disclose the applicant's identity or information it provided unless required to do so by court order.

What level of cooperation is required from applicants?

Applicants for leniency must report the illegal activity with candour and completeness and provide full, continuing and complete cooperation to the Antitrust Division throughout the investigation. To the extent that the application is made by a company, the applicant's confession must be a corporate act, as opposed to one composed of isolated confessions from individual executives. In addition, the applicant must provide documents, information and

materials discovered during the investigation, use its best efforts to secure the cooperation of its current directors, officers and employees and pay restitution to its victims.

What confidentiality protection is offered to applicants?

The Antitrust Division treats the identity of and information provided by leniency applicants as confidential and will not publicly disclose the identity of a leniency applicant or information provided by the applicant unless the applicant consents or a court order requires disclosure. The Antitrust Division also will not disclose information obtained from a leniency applicant to foreign antitrust agencies unless the applicant first agrees to the disclosure.

Can the company apply for a marker? If so, under which conditions?

Yes. The conditions for obtaining a marker are described above.

Law stated date

Correct as of

Please state the date as of which the law stated here is accurate.

1 September 2018.