

United States

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is section 1 of the Sherman Act, 15 USC 1. The Antitrust Division of the Department of Justice (DoJ) enforces it.

The Antitrust Division employs approximately 360 attorneys organised into 13 sections. The national criminal enforcement section has independent responsibility, concurrent with the DoJ's seven field offices, to investigate criminal matters, including investigation and prosecution of cartels. These attorneys report to a deputy assistant attorney general, devoted solely to criminal enforcement, who reports to an assistant attorney general. The associate attorney general of the US oversees the Antitrust Division.

The number and importance of successful international cartel prosecutions brought by the Antitrust Division has increased since the early 1990s. Since 1995, the Antitrust Division has made the prosecution of international cartels one of its highest priorities. In a recent decision the Supreme Court also described collusive behaviour as 'the supreme evil of antitrust' (*Verizon Communications v Curtis V Trinko LLP*, 540 US 398 (2004)). Consequently, the DoJ has devoted more of its resources to uncovering international cartel behaviour that has significant economic consequences for American consumers.

At the close of 2007, the Division had 135 pending grand jury investigations, including over 50 investigations of suspected international cartel activity. This is the highest number of pending grand jury investigations since 1992. Prosecutions of international cartels have resulted in significant criminal fines. Since the beginning of fiscal year 1997, the Antitrust Division has prosecuted international cartels affecting over US\$10 billion in US commerce and has imposed more than US\$4 billion in criminal fines. Well over 90 per cent of those fines were imposed in connection with the prosecution of international cartel activity.

2 What is the substantive law on cartels in the jurisdiction?

A cartel is an association by agreement among a group of companies that is designed to prevent competition. Illegal cartel activity includes price fixing, bid rigging, and allocation of volume, markets or customers.

Section 1 of the Sherman Act prohibits 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade'. It does not specifically identify the type of conduct that is illegal. (However, the conduct described above has been found to violate section 1.) Cartel behaviour can be criminal under section 1. In addition, cartel members may be liable in private civil suits under section 4 of the Clayton Act.

An international cartel arrangement that provides for price fixing, bid rigging or allocation of volume, markets or customers, constitutes a per se violation of section 1.

3 Are there any industry-specific offences and defences?

There are some very limited statutory exemptions from the anti-trust laws that are generally industry-specific and apply to such businesses as export trade associations, agricultural cooperatives, communications, energy, financial institutions and markets, certain research and development and production joint ventures, healthcare, insurance, organised labour, sports, transportation, and government contracts. For example, the Webb-Pomerene Act (15 USC 61–65) provides the exemption for associations of otherwise competing businesses to engage in collective export sales. This exemption, however, is narrow. It applies only to the export of 'goods, wares or merchandise' (15 USC 61). It does not apply to conduct that has an anti-competitive effect in the US or to conduct that injures domestic competitors of the members of an export association. Nor does it provide immunity from prosecution under foreign antitrust laws.

In addition to these limited statutory exemptions, there are also some judicially created exemptions and immunities from the antitrust laws. These exemptions include the state action doctrine and the solicitation of government action, including the 'Noerr-Pennington doctrine' (see *Eastern RR Presidents Conference v Noerr Motor Freight*, 365 US 127 (1961); *United Mine Workers v Pennington*, 381 US 657 (1965)). Federal agencies and federal officials acting in their official capacity are also generally immune from antitrust challenges.

4 Does the law apply to individuals or corporations or both?

The law applies to both corporations and the individuals involved.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

The US antitrust laws apply to conduct occurring outside the US that produces a substantial effect within the US. The 1995 DoJ and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (the International Guidelines) state that '[a]nticompetitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.' (International Guidelines at 3.1).

However, there are two significant challenges to successfully investigating and prosecuting international cartels: gaining access

to evidence and witnesses that are located abroad and out of the reach of US subpoena power and search and seizure authority; and obtaining jurisdiction in the US courts over not only the case itself, but over foreign defendants.

As noted in question 9, the Antitrust Division cooperates with foreign enforcement agencies and enlists their support in assisting with investigations. This cooperation may range from case-specific arrangements, such as executing search warrants and sharing investigative information, and antitrust cooperation agreements with certain countries, to treaties.

With respect to gaining subject-matter jurisdiction over an international cartel case involving conduct outside the US, there are two principal tests. First, with respect to foreign import commerce, the ‘Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’ (*Hartford Fire Ins Co v California*, 509 US 764, 796 (1993)). Second, in considering conduct involving foreign commerce other than import trade or commerce, the International Guidelines refer to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The FTAIA provides that the Sherman Act does not apply to such activity involving foreign commerce outside of the US, except where the conduct has a ‘direct, substantial and reasonably foreseeable effect’ on domestic commerce, and ‘such effect gives rise to a [Sherman Act] claim’ (15 USC 6a(1)(A), (2)).

If the question of subject-matter jurisdiction is resolved in favour of US jurisdiction, a US court may nevertheless decline to exercise jurisdiction (or the US government may choose not to assert jurisdiction or bring an action) based on considerations of international comity. The threshold question in determining whether or not to exercise jurisdiction based on international comity is whether any direct conflict exists between US law and the laws of a foreign nation (*Hartford Fire Ins*, 509 US at 798). Where there is no direct conflict, there is no need ‘to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity’ (*id* at 799). A conflict exists only when a party subject to regulation by two states cannot possibly comply with the laws of both (*id* at 798). In that case, a US court may decline to exercise jurisdiction.

Obtaining personal jurisdiction over foreign individuals has been accomplished largely through close cooperation with the Immigration and Naturalization Service (INS) through border watches (see question 8) and through a memorandum of understanding (MOU), whereby the INS will preadjudicate the immigration status of a cooperating foreign witness before that witness enters into a plea agreement. In fact, the MOU allows the Antitrust Division to petition the INS on behalf of a foreign witness for relief that would allow the witness to continue or resume travel into the US (see question 9).

It is well settled in US law that civil antitrust actions predicated on foreign conduct that have an intended and substantial effect in the US fall within the jurisdictional reach of section 1 of the Sherman Act (see *id* at 796). However, the Supreme Court recently held that the FTAIA bars antitrust actions where the anti-competitive conduct at issue causes independent foreign harm and that harm gives rise to the plaintiff’s claim. Thus, the Sherman Act does not apply where the plaintiff’s claim rests solely on the independent foreign harm (see *F Hoffman-La Roche v Empagran*, 124 S Ct 2359 (2004)). With respect to whether section 1 authorises criminal prosecutions of defendants for their actions committed entirely outside the US, only one court has ruled on the issue (*United States v Nippon Paper Industries Co*, 109 F3d

1, 9 (1st Cir 1997), cert denied, 522 US 1044 (1998)). In *Nippon Paper*, the court held that the jurisdiction of the Sherman Act in civil cases had equal breadth in a criminal case. The Supreme Court has not addressed this issue.

6 Are there any proposals for change to the regime?

See question 9.

Investigation

7 What are the typical steps in an investigation?

The typical steps in a criminal investigation are as follows:

The Antitrust Division opens a grand jury investigation, which must be approved by the deputy assistant attorney general (DAAG) for criminal enforcement and the assistant attorney general (AAG). The primary investigative tool is the grand jury subpoena. In addition to grand jury subpoenas, the Antitrust Division often enlists the assistance of the FBI for such tasks as interviewing witnesses, conducting electronic surveillance, executing search warrants, and evaluating and gathering evidence.

Near the end of the grand jury investigation, the Antitrust Division issues ‘target letters’ to those individuals that it considers to be putative defendants. The targets are then given the opportunity to testify before the grand jury. In addition, counsel for the target is given the opportunity to meet with appropriate Antitrust Division staff if they have not done so already. Target letters specifically state that the target must waive his Fifth Amendment right against self-incrimination and submit to cross-examination by government lawyers as a condition to testifying before the grand jury. Most targets do not avail themselves of this procedure.

If the Antitrust Division staff believes an indictment is appropriate, its recommendation is submitted to the DAAG for criminal enforcement. Counsel for the target typically is given the opportunity to make a presentation to the DAAG. If a case poses a rare policy issue or is particularly significant, the AAG may be present for target counsel’s presentation. After these arguments, the DAAG presents his recommendation to the AAG. If the AAG agrees that an indictment is appropriate, he instructs the staff to recommend indictment to the grand jury.

The grand jury then votes on the indictment. If the grand jury votes to indict, it returns the indictment in federal court to a judge who then issues the appropriate warrants or subpoenas to compel the defendants’ appearance at arraignment.

Starting with arraignment, the matter is adjudicated in federal court to either conviction or acquittal (see questions 11 to 13).

The typical steps in a civil investigation are as follows.

- The Antitrust Division typically issues civil investigative demands (CIDs), which are its main pre-complaint discovery tool. A CID is essentially a general discovery subpoena that may require production of documents, oral testimony or answers to interrogatories. Typically, the recipient of a CID attempts to reduce its scope by engaging in negotiations with Division staff. A recipient of a CID may also refuse to comply by initiating a proceeding in federal district court to modify or set aside the CID. A CID may be challenged on the grounds that it violates the Antitrust Civil Process Act (15 USC 1311–1341 (1994)) or that it violates a legal or constitutional right of the recipient.
- The Division reviews information submitted pursuant to a CID and, if appropriate, a complaint is brought in federal district court. After the complaint is filed, the matter is

adjudicated until either settlement or a verdict on liability is rendered.

- The Division may use information obtained through a CID in any case or proceeding before any court, grand jury or federal administrative or regulatory agency (15 USC 1313(d)(1)). If a civil investigation uncovers evidence of possible criminal violations, the Division normally ceases use of CIDs and convenes a grand jury.

8 What investigative powers do the authorities have?

As noted in question 7, when the Antitrust Division suspects criminal activity that would constitute a clear violation of the Sherman Act, it typically opens a grand jury investigation. The Federal Rules of Criminal Procedure (FRCP) apply to grand jury discovery.

The grand jury subpoena is the basic investigative tool that the Division uses in criminal investigations. A grand jury subpoena may be used to obtain documents or testimony. The DoJ may serve a subpoena on any person in the US (FRCP 17(e)(1)). The DoJ may serve a subpoena on any person in a foreign country, but only to nationals or residents of the US who are residing in a foreign country (FRCP 17(e)(2)). Foreign parties residing outside the US are not subject to subpoenas. Indeed, a party cannot be compelled to obey a grand jury subpoena if the court does not have personal jurisdiction over that party. There are, however, other ways in which the Division may obtain evidence located outside the US, such as case-specific cooperation from foreign enforcement agencies, 'soft' antitrust cooperation agreements that the US has in place with certain countries, 'hard' agreements, such as mutual legal assistance treaties, and other legal means, such as letters rogatory. (The means by which the US obtains evidence located abroad is discussed in detail in question 9.)

In contrast to a subpoena, which allows its recipient to collect and submit information that has been requested, a search warrant allows the government to enter the premises and seize materials, including computer hardware and electronic data. The procedures for obtaining and executing a search warrant are governed by the FRCP. A search warrant may be issued only where a federal judge or magistrate finds that there is probable cause to believe that the property to be seized is evidence of the commission of a criminal offence (FRCP 41). Search warrants are directed at specific files or papers of an individual or corporation. The DoJ has used search warrants to obtain documents from corporations either prior to or in conjunction with the issuance of grand jury subpoenas.

An individual may refuse to testify before the grand jury by invoking his Fifth Amendment right against self-incrimination. However, such an individual may be compelled to testify under a grant of immunity. Compelled testimony is granted 'use' immunity, which prevents the individual's testimony from being used against him. It does not totally preclude prosecution of the individual. However, if the Antitrust Division attempts to prosecute a witness whose testimony was immunised, it must show that the information to be used against the witness is wholly independent of the compelled testimony. The Division also grants informal, or 'letter' immunity. This is simply a letter from the DoJ stating that a witness's testimony, as well as any leads derived from that testimony, will not be used against the witness in a subsequent criminal prosecution.

The DoJ uses border watches in cooperation with the INS whereby individuals who are potential grand jury witnesses may be detained upon entering the US. These individuals may

be interviewed about the subject matter of investigation; served with a corporate or individual subpoena for testimony before the grand jury or for corporate or individual documents located outside the US; or detained, and possibly imprisoned, until a grand jury appearance is arranged. In a number of cases, the DoJ has secured testimony of key foreign witnesses who have been intercepted by INS border watches. For example, in the Egyptian wastewater treatment investigation, which involved bid rigging on water treatment construction contracts in Cairo funded by the US Agency for International Development, a foreign executive was intercepted through a border watch while entering the US, was taken before a grand jury, and his cooperation significantly aided the DoJ's investigation.

In a civil investigation, the Antitrust Division utilises CIDs as its discovery tool. CIDs may require production of documents (including computer records and electronic data), oral testimony or answers to interrogatories. Notably, unlike grand jury subpoenas, CIDs may be served upon foreign individuals and organisations (15 USC 1312). Anyone who withholds, misrepresents, conceals or destroys documentary material demanded by a CID is guilty of a criminal offence, punishable by up to a US\$5,000 fine or up to five years' imprisonment, or both.

At a deposition pursuant to a CID, a witness may refuse to answer only on the grounds of a legal privilege or based on his Fifth Amendment right against self-incrimination (15 USC 1321(i)(2)). As with testimony before the grand jury, a witness who refuses to testify at deposition pursuant to the Fifth Amendment may be compelled to testify under a grant of immunity.

International cooperation

9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The DoJ has several types of cooperation arrangements with foreign antitrust enforcement authorities. These range from informal, case-specific arrangements to cooperation agreements to treaties.

The DoJ's successes in fighting international cartels have resulted in large part from case-specific arrangements, in which foreign governments have assisted in specific instances in locating and contacting witnesses, executing search warrants and searches for documents and have shared information and coordinated enforcement actions. For example, since the beginning of 2000, foreign authorities from a number of different countries have executed search warrants at the DoJ's request in its international cartel investigations. For example, in the Egyptian wastewater treatment investigation, over 100 German police officers assisted in executing simultaneous search warrants on multiple companies all across Germany.

In October 2001, the DoJ and the FTC joined forces with other jurisdictions to create the International Competition Network (ICN). The concept behind the ICN was to form a global network of competition authorities. The goal was to provide support for new antitrust agencies and to promote greater convergence among antitrust authorities on sound competition principles both in enforcing their laws and in building strong competition cultures in their countries. In April 2004, the ICN created a new cartel working group to address the challenges of domestic and international anti-cartel enforcement. Through the ICN, antitrust agencies meet through ICN cartel workshops and cooperate and assist agencies' operational and practical skills.

The US has antitrust agreements in place with Australia, Germany, the EU, Canada, Japan, Israel, Brazil and Mexico. These

agreements are 'soft' agreements that do not override applicable national laws of either party. In particular, soft agreements do not permit the sharing of confidential information that could not otherwise be disseminated pursuant to national laws.

Pursuant to the International Antitrust Enforcement Assistance Act (IAEAA), the US signed an agreement with Australia that permits the two nations' antitrust enforcement agencies to share confidential information on both criminal and civil matters. This agreement is considered a 'hard' agreement because it not only overrides otherwise applicable national laws but is binding on each country.

Mutual legal assistance treaties (MLATs) are not antitrust-specific but may be used in criminal antitrust investigations. Like the bilateral agreement with Australia under the IAEAA, MLATs are 'hard' agreements. The US has more than 40 MLATs in force. In addition to these bilateral arrangements, the DoJ has been working with the Organisation for Economic Cooperation and Development (OECD) toward building a multilateral consensus among its 30 member states on a wide range of antitrust and competition matters. Eg, in 1998, the OECD ministers endorsed a DoJ-introduced Recommendation on Hard-Core Cartels that encourages OECD member countries to enact and enforce laws prohibiting hard-core cartels and to enter into agreements with other countries to permit sharing of evidence with foreign antitrust authorities to the extent permitted by national laws.

The DoJ adopted a policy in 2001 of placing indicted fugitives on Interpol's 'red notice' list, which is an international 'wanted' notice. A red notice serves in many of the 184 Interpol member nations as a request that the subject be arrested with a view towards extradition. A number of fugitives have been apprehended though Interpol red notices and the DoJ is pursuing their extradition to the US.

Concerning interagency cooperation on a domestic basis, the DoJ has a memorandum of understanding with the INS. The MOU establishes a protocol under which the DoJ may petition the INS to preadjudicate the immigration status of a cooperating foreign witness before that witness enters into a plea agreement or pleads to a crime. As a result of this protocol, the foreign witness receives written assurance in the plea agreement as to how the INS will treat a conviction. As noted in response to question 8, the DoJ also works closely with the INS on border watches.

The DoJ is also closely cooperating with the FBI in connection with such tasks as interviewing witnesses and executing search warrants. In addition, FBI agents have been detailed to DoJ field offices.

10 How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The DoJ requires the cooperation of foreign antitrust agencies in most instances to effectively investigate and prosecute an international cartel. Without such cooperation, the Antitrust Division is blocked from gathering essential evidence and gaining access to witnesses located outside its borders. Simply put, most of its successful prosecutions would not have been possible without the cooperation of foreign enforcement agencies.

Adjudication

11 How is a cartel matter adjudicated?

Cartel cases are adjudicated in federal district courts. There is no specialised forum for cartel cases.

12 What is the appeal process?

The appeal process is the same as with any federal case. That is, the case may be appealed to the appropriate Circuit Court and, if unsuccessful in the Circuit Court, an appellant may petition the Supreme Court of the United States for a writ of certiorari. The federal government, however, may not appeal a verdict of acquittal. This is based on the constitutional protection against double jeopardy.

13 With which party is the burden of proof?

In a criminal case, the government bears the burden of proof beyond a reasonable doubt. In a civil case, the government bears the burden of proof on most issues by a preponderance of the evidence.

Sanctions

14 What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Criminal sanctions for cartel activity include fines and imprisonment. On 22 June 2004, President George W Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the 2004 Act). The 2004 Act increased the maximum criminal fine for companies violating the Sherman Act from US\$10 million to US\$100 million, making antitrust fines one of the most severe under US criminal laws. For corporations, the fine may be: US\$100 million; twice the total gain to the conspirators; or twice the total loss to the victims, whichever is greater. The Federal Sentencing Guidelines were amended in 1991 to permit an 'alternative sentencing guideline' under which maximum fines can be calculated at twice the gain or twice the loss to the victims (see 18 USC 3571(d)).

Corporations may also be sentenced to a term of probation ranging from one to five years as a result of a conviction under section 1 (see US Sentencing Commission, Sentencing Guidelines (USSG) 8D1.1, 1.2 (November 1998)).

The 2004 Act increased the maximum individual fine from US\$350,000 to US\$1 million. For individuals, the fines may be (i) US\$1 million; (ii) twice the total gain to the individual; or (iii) twice the total loss to the victims, whichever is greater. The new legislation also increased the maximum term of imprisonment from three to 10 years.

Most sentences in criminal antitrust cases have been imposed pursuant to the provisions of the Federal Sentencing Guidelines (see generally USSG part 8 and 2R1.1 (November 1998)).

Since 2000, more than 150 individuals have served or are currently serving prison sentences in cases prosecuted by the Antitrust Division. In 2007, jail sentences for cartel offences reached an all-time high. Defendants prosecuted by the Division were sentenced to serve over 31,000 days in 2007, more than twice the time imposed in any previous year.

15 What civil or administrative sanctions are there for cartel activity?

A conviction for price fixing brings with it automatic debarment from dealing with the government. Convicted individuals, because they are felons, may lose certain privileges of US citizenship, such as the right to vote.

16 Are private damage claims or class actions possible?

Private treble damage actions, usually in the form of class actions brought by affected customers, ordinarily follow from any public announcement that the Antitrust Division is investigating a purported cartel. Such actions are virtually certain upon a plea agreement or conviction, given that a guilty plea in a criminal case is prima facie evidence of a defendant's liability in a subsequent civil case (see 15 USC 16(a) (1994)). Actions by direct purchasers are most often brought in federal district court. Indirect purchasers do not have standing under federal law to sue for damages resulting from a Sherman Act violation as a result of the Supreme Court's decision in *Illinois Brick v Illinois*, 431 US 720 (1977). However, there are provisions in various state antitrust and consumer fraud statutes that allow indirect purchasers to bring claims under those states' laws for overcharges resulting from price-fixing conspiracies (see, eg, NY Gen Bus 340 (McKinney 2000) (New York State's indirect purchaser statute)).

17 What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated?

Fines have increased dramatically in the last ten years. The highest amount of any fine prior to 1997 was approximately US\$42 million. However, in fiscal year 1997, the Antitrust Division collected more than US\$205 million in fines. This was almost 500 per cent more than the fines collected in any previous year in the history of the Division. In the last ten years, the Division collected more than US\$4 billion in fine. In 2007, the Division obtained over US\$630 million in criminal fines, the second largest total in its history.

This dramatic increase in fines is because the cartels prosecuted have been significantly larger than previous cartels, in both the volume of affected commerce and the degree of harm caused to American consumers. In fact, in some international cartels, the volume of affected commerce is more than US\$1 billion per year. For example, in 2007, the Division prosecuted British Airways and Korean Air for cartel conduct in the air transportation industry and the combined cargo and passenger revenue of these industry leaders was over \$15 billion annually. In over half of the DoJ's investigations, the volume of commerce affected has been more than US\$100 million over the term of the conspiracy.

The Antitrust Division has a 'transparent' policy on calculating fines under the Sentencing Guidelines. Specifically, it has set forth both hypothetical cases in which it calculates fines, and it has published the actual fine calculation worksheets that it submitted in particular cases to the Federal Court at the time of sentencing (see Scott D Hammond, director of criminal enforcement, Antitrust Division, 'A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program', speech before 2002 ABA Section of Antitrust Law, 7 March 2002) (attaching fine calculation worksheet for Mitsubishi Corporation's US\$134 million fine for aiding and abetting the conspiracy between UCAR International, of which it owned a 50 per cent share, and others in the graphite electrodes industry).

Corporate fines of US\$10 million or more have now become commonplace. Fines of US\$10 million or more have been imposed on more than 56 corporate defendants, including 11 fines of \$100 million or more, of which three were fines of \$300 million and one of \$500 million – the largest criminal fine ever imposed in the US under any criminal statute. Of note in 2007 were the \$300 million fines imposed against British Airways and

Korean air, the second largest fine imposed by the Division (the first was the \$500 fine imposed against F Hoffman-La Roche in 1999 for its participation in the vitamins cartel).

Sentencing**18** Do sentencing guidelines exist?

There are Federal Sentencing Guidelines that have been modified in relevant part by the Sentencing Reform Act (18 USC 3571).

With respect to the Sentencing Guidelines' application to organisations, culpability considerations may be adjusted upward or downward on the basis of aggravating or mitigating factors. For example, the 'culpability score' may be lowered if the organisation self-reports the violation, cooperates with an investigation, or accepts full responsibility for its criminal conduct (USSG 8C2.5(g)).

Similarly, for an individual, the base offence level will be adjusted depending on whether that individual played an aggravating or mitigating role in the offence (see USSG 3B1.1, 3B1.2).

19 Are sentencing guidelines binding on the adjudicator?

The Sentencing Guidelines are not binding on the adjudicator. For example, with respect to the fine ranges set forth in the Guidelines, a court may depart from the Guidelines if it 'finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described' (18 USC 3553(b)).

Leniency or immunity programmes**20** Is there a leniency or immunity programme?

The Antitrust Division has both a corporate leniency policy (also known as the 'amnesty programme') and an individual leniency policy. The DoJ issued its corporate leniency policy on 10 August 1993. It issued its leniency policy for individuals on 11 August 1994.

21 What are the basic elements of a leniency or immunity programme?

The corporate leniency policy has three basic parts. First, a corporation can receive amnesty automatically before the Antitrust Division begins an investigation, provided that, in essence, the corporation (i) is 'first in the door', that is, no other corporation has reported the activity to the Division; (ii) cooperates fully; (iii) makes restitution to injured parties, where possible; and (iv) was not the 'ringleader' of the activity (see Corporate Leniency Policy at 1-2, identifying six specific conditions that must be met before a corporation will receive amnesty). The 2004 Act increased the appeal of the amnesty programme by providing the successful application with some protection from large damages awards in any follow-on private antitrust action. Companies qualifying for amnesty will be liable to pay only actual damages, plus costs and attorneys' fees, attributable to their own conduct to the victims of the cartel rather than treble damages based upon joint and several liability. The company seeking amnesty must cooperate fully in the private plaintiff's efforts to seek compensation from the other members of the conspiracy.

Second, a corporation may receive amnesty at the discretion of the Antitrust Division ('alternative amnesty') if it reports illegal antitrust activity after an investigation has begun. To qualify for

post-investigation leniency, a corporation, in essence, must: be the first to come forward; cooperate fully; and make restitution to injured parties, where possible. The Division must also determine that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it and the timing of when the confessing corporation comes forward (see Corporate Leniency Policy at 2-3 (identifying seven specific conditions that must be met before a corporation receives alternative amnesty)).

Third, corporate directors, officers and employees will receive automatic amnesty if the corporation qualifies for the same. Amnesty is not available to corporate 'ringleaders' (see Corporate Leniency Policy at 3-4).

An individual may obtain leniency under the Division's leniency policy for individuals if: when the individual comes to the Division, it has no prior information about the alleged illegal activity; the individual reports the illegal activity completely and continues to cooperate with the Division; and the individual was not the ringleader of the illegal activity (see Leniency Policy for Individuals at 1-2).

22 What is the importance of being 'first-in' to cooperate?

As noted in question 21, being first in to cooperate with the Division is of paramount importance because amnesty is generally not available unless a corporation or individual is the first in. While the first amnesty applicant typically pays no criminal fines and its culpable executives are spared criminal exposure, no such accommodations are granted to subsequent applicants. The DoJ's investigation into alleged price fixing in fine art auctions between Christie's International and Sotheby's Holdings starkly illustrates the advantages of being first in the door for amnesty. There, Christie's applied for and was granted amnesty pursuant to the Division's corporate leniency programme. Christie's paid no criminal fines and none of the executives at the time were indicted. (Christie's former chairman and member of its board of directors, Anthony J Tennant, was indicted, but, as a UK subject, declined to submit to the jurisdiction of the US courts. The DoJ's leniency programme does not extend to former directors or employees of the amnesty applicant except at the discretion of the Division.)

Sotheby's, the second in the door to cooperate, was subjected to both a substantial criminal fine and indictments of two former high-ranking executives. In fact, as a direct result of Christie's cooperation with the DoJ under the leniency programme, Sotheby's decided to plead guilty to fixing the prices of auction commission rates charged to sellers and paid a US\$45 million fine. In addition, a former Sotheby's executive and the former chairman were indicted for price fixing. Diana Brooks, former CEO, pleaded guilty to price fixing. Alfred Taubman, former chairman of the board, pleaded not guilty to charges of price fixing, and was convicted. Ms Brooks, who cooperated in the investigation and testified against Mr Taubman at his trial, was sentenced to six months' house arrest, a US\$350,000 fine, three years' probation and 1,000 hours of community service. Mr Taubman was sentenced to one year in prison, and a US\$7.5 million fine.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

The Antitrust Division announced in 1999 that the corporate leniency policy had been extended to include an 'amnesty plus' provision, in which a corporation may bring evidence of ille-

gal activity in a second market to the Division in exchange for leniency on that conduct and a reduction in the fine resulting from the first investigation (see Gary R Spratling, deputy assistant attorney general, Antitrust Division, 'Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update', address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust at 6-7 (16 February 1999)). For example, in the monochloroacetic acid (MCAA) investigation, Dutch chemical giant Akzo Nobel Chemicals appears to have benefited from amnesty plus. Specifically, Akzo agreed to plead guilty and pay a US\$12 million fine for its participation in the MCAA cartel. The plea agreement between Akzo and the DoJ recognised that the agreed fine was less than the fine range recommended in the Sentencing Guidelines and attributed this downward departure from the Guidelines' fine range not only to Akzo's 'substantial assistance' in the MCAA investigation, but also to Akzo's assistance in the DoJ's investigations 'in other chemical industries' (see *United States v Akzo Nobel Chemicals*, No. CR 01-0242 (SI), USDC, ND Cal, plea agreement at 10, filed 20 July, 2001). Accordingly, it appears that Akzo's fine in the primary MCAA investigation was reduced, at least in part, as a result of its assistance in other investigations in other markets.

Companies electing not to participate in amnesty plus may be subject to the potentially harsh consequences of the 'penalty plus' policy. If a company participated in a second antitrust offence and does not report it and that conduct is later successfully prosecuted, the DoJ, in appropriate circumstances, will recommend that the sentencing court consider the company's (and any culpable executive's) failure to report the conduct voluntarily as an aggravating factor under the Sentencing Guidelines. For a company, the failure to voluntarily report a violation under amnesty plus may result in a fine as high as 80 per cent or more of the volume of commerce affected by the second offence as opposed to no fine at all for the amnesty plus product. For an individual, failing to report under amnesty plus may mean the difference between a lengthy prison sentence and avoiding incarceration altogether.

24 What is the best time to approach the authorities when seeking leniency or immunity?

The best time to approach the Antitrust Division is as soon as practicable. Clearly, a corporation or individual is always in a better position to negotiate while the DoJ needs help in mounting its case rather than when it is near the end of its investigation. However, prior to approaching the Division, a corporation, eg, should already have completed an internal investigation, in which implicated corporate employees have fully cooperated, so that it has sufficient evidence to present to the Division in support of its application. In addition, corporate management must be supportive of the decision to seek leniency.

25 What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The Antitrust Division's policy is to treat as confidential both the identity of the amnesty applicant and any information obtained from that applicant. The Division has also recognised that to maintain the force and integrity of its corporate leniency policy, it must not disclose the identity or information obtained from amnesty applicants to foreign authorities without prior agreement

from that applicant. This is an important inducement for firms to seek amnesty because a growing number of foreign enforcement authorities are increasingly scrutinising international cartels (see Gary R Spratling, deputy assistant attorney general, Antitrust Division, 'Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases', address to the ABA's Criminal Justice Section, 13th Annual National Inst on White Collar Crime (4 March 1999) at 10-12).

Notwithstanding this policy, the DoJ has frequently obtained waivers to share information with another jurisdiction where the applicant has also sought and obtained leniency or amnesty from that jurisdiction.

26 What is needed to be a successful leniency or immunity applicant?

The conditions that an amnesty applicant must meet to be successful are identified in question 22. The applicant does not have to meet evidentiary standards when presenting his application; however, the applicant must present enough substantial and direct evidence to enable the Antitrust Division to effectively evaluate the application.

27 Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

In contrast to other leniency regimes, the US leniency regime does not provide for a reduction in fines or penalties or other incentives for the cooperating cartel participants that lost the race to obtain full immunity. However, the Antitrust Division uses negotiated plea agreement to obtain that cooperation in exchange for a lesser sentence. These agreements are routinely entered into in most cartel investigations. Over the last 20 years, more than 90 percent of the corporate defendants charged with an antitrust offence have entered into plea agreements with the Division.

Under these plea agreements, the Division obtains cooperation in exchange of recommendations of lesser fines or sentences. There are two types of plea agreements with defendants charged with Sherman Act offences: type 'B' agreements and type 'C' agreements. Under FRCP 11(c)(1)(B), the Division recommends, or agrees not to oppose, that a particular sentence or sentencing range is appropriate, or that a particular provision of the Sentencing Guidelines does not apply. While this agreement is not binding upon the court, type 'B' agreements are binding upon the defendants as long as the Division makes a sentencing recommendation consistent with the agreement. Under FRCP 11(c)(1)(C), however, the Division and the defendant jointly agree that a specific sentence or sentencing range is appropriate. If the court accepts the agreement, the sentencing recommendation of the parties is binding upon the court. In the last decade, the Division has succeeded in having courts routinely approve type 'C' agreements.

The DoJ's Principles of Federal Prosecution provide general guidance as to the consideration that the Division will weight in agreeing to enter into a plea agreement. These include the defendant's willingness to cooperate in the investigation or prosecution; the nature and seriousness of the offence or offences charged; the likelihood of obtaining a conviction at trial and the public interest in having the case tried rather than disposed of by a guilty plea.

In order to enter a plea, the defendant must be willing to plead guilty to the charged conduct at arraignment and make a factual admission of guilt. Plea agreements must be in writing.

The Division has developed standard model corporate and individual plea agreements for Sherman Act offences. These models are available at www.usdoj.gov/atr/public/criminal.htm.

The Division routinely 'carves out' certain individuals from corporate plea agreements in the case of culpable employees or employees who refuse to cooperate with the investigation.

When the Division enters into plea agreements that require a foreign national to travel to the US for interviews or testimony in order to cooperate, it routinely agrees not to take any action to arrest, detain or serve the individual with process or prevent the individual from departing.

28 What is the effect of leniency or immunity granted to a corporate defendant on its employees?

As noted in question 21, employees of a corporate defendant that is granted leniency are also granted leniency as long as those employees are not corporate 'ringleaders'.

29 What guarantee of leniency or immunity exists if a party cooperates?

If the Antitrust Division decides to grant a corporation or individual leniency, it sends an 'amnesty letter'. This letter is made conditional on the applicant performing certain obligations over a period of time, such as cooperating with the investigation and making restitution. After all the obligations have been met (typically, after the matter has been concluded), the Division issues a final amnesty letter confirming that the application has been accepted. An accepted amnesty application is binding on the Division.

30 What are the practical steps in dealing with the enforcement agency?

A request for immunity is typically made in person by counsel to Antitrust Division staff. Counsel may act on behalf of both a corporation and its employees as long as there is no conflict of interest between them (see questions 31 and 32). Counsel must make a proffer of the evidence that the corporation or individual seeking amnesty will provide. If the Division is interested, it will invite a corporate representative or an individual to an interview with Division attorneys. Such interviews are conducted with limited immunity.

31 Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

The Antitrust Modernization Commission (AMC) was created pursuant to the AMC Act of 2002 (Pub L No. 107-273, sections 11051-60, 116 Stat 1856). The AMC consists of 12 members, four of which were appointed by the president, four of which were appointed by the leadership of the Senate, and four of which were appointed by the leadership of the House of Representatives (id, section 11,054(a)).

The AMC is charged to examine whether the need exists to modernise the antitrust laws and to identify and study related issues. The AMC presented its findings to the president and Congress in April 2007. With respect to cartels, the AMC recommended that the Sentencing Commission evaluate whether it would be appropriate to revise the US Sentencing guidelines, which assume an average overcharge of ten percent. The AMC recommended that the Sentencing Commission evaluate whether it remains reasonable to assume such an overcharge.

Update and trends

2007 marked the end of the *Stolt-Nielsen* litigation. In this case, the Antitrust Division revoked the amnesty it had signed with Stolt Nielsen and decided to pursue an indictment against it. The Antitrust Division alleged that Stolt Nielsen had continued its anti-competitive behavior for a longer period of time that it had admitted when it sought amnesty. In September 2006, a federal grand jury in Philadelphia issued an indictment against Stolt-Nielsen and two of its subsidiaries for their role in this cartel. In November 2007, Judge Kauffman of the US District Court for the Eastern

District of Pennsylvania dismissed the indictment and ruled that the Antitrust Division had failed to produce any credible evidence that Stolt-Nielsen's participation in the conspiracy continue past the time when it sought leniency. See *United States v Stolt-Nielsen SA*, 2007 US Dist LEXIS 88011 (ED Pa 29 Nov 2007). The Antitrust Division stated in December 2007 that it would not appeal that judgment. This case highlighted the need to conduct an investigation into the fact and the scope of the conduct before contacting the Division to obtain leniency.

Defending a case

- 32** May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Counsel can represent a corporation and its employees as long as there is no conflict of interest between the company and the employees represented by the company's counsel. Typically, prior to conducting preliminary-fact interviews of employees, counsel for the corporation informs each employee that he represents the corporation and not the employee as an individual. Counsel further informs each employee that if he has any concerns about his involvement in the alleged activity he should consider separate representation. Many employees confer with separate counsel and, ultimately, most agree to be represented by corporate counsel.

The Antitrust Division is normally less than enthusiastic about corporate counsel representing multiple parties. Indeed, during grand jury investigations, the Division often raises concerns about conflicts of interest when corporate counsel also represents employees, and may insist on a letter from the employee stating that the employee understands the potential conflict of interest and, nevertheless, wishes to be represented by corporate counsel. Sometimes the Division issues 'Wheat' letters, notifying counsel that, if he or she represents both the corporation and employees and any of those employees are called as government witnesses at trial, the Division will seek to disqualify counsel

from representing the corporation (see *Wheat v United States*, 486 US 153 (1988)).

- 33** May counsel represent multiple corporate defendants?

Given the leniency policy, which may result in a race to be the first to the Antitrust Division's door, representation of multiple corporate defendants almost always creates an immediate conflict of interest between corporate defendants, such that dual representation is not permitted.

- 34** May a corporation pay the legal costs of and penalties imposed on its employees?

If the corporation's charter permits indemnification, and most do, it can agree to indemnify corporate employees for legal fees incurred as a result of separate representation (see, eg, Del Code Ann Tit 8, 145 (1998) (indemnification of officers, directors, employees and agents)). A corporation may not indemnify an individual for fines paid as a result of illegal activity.

Getting the fine down

- 35** What is the optimal way in which to get the fine down?

The best way to obtain lenient treatment and reduce any applicable fine is to be the 'first in' to cooperate, engage in continuing cooperation with the Antitrust Division and accept full responsibility for the activities in question.

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