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Cartel Regulation

in 46 jurisdictions worldwide

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CONTENTS

Global Overview

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Cartel enforcement continues to evolve worldwide, characterised by increased fines and criminal enforcement, new settlement procedures, strengthening of leniency programmes and more guidance on collective actions.

Increased fines and criminal enforcement

Every year brings increased criminalisation – including against individuals – and more frequent and severe criminal and administrative penalties. For example, a new bill expected to be enacted into law in 2013 or 2014 in New Zealand would include a specific prohibition on 'cartel provisions', which would introduce a criminal offence with a maximum jail term of seven years for individuals convicted of cartel conduct. Recent amendments to the UK Competition Act provide that, effective 1 April 2014, the prosecution will no longer be required to prove that an individual acted 'dishonestly', and instead will only have to prove intent to enter an agreement and intent as to the agreement's effect. The amendments, however, also provide new defences related to the transparency of the allegedly illegal arrangement. In a unique development in Norway, as of 1 January 2014, only individuals (and no longer corporations) can be prosecuted under the Competition Act.

Fines and prison terms in many countries continue to rise in frequency and level. The US authorities obtained the largest amount of fines in a single year in fiscal year 2012, amounting to US$1.14 billion. The Turkish Competition Board imposed the highest fine in its enforcement history, fining 12 banks a total of 1.12 billion lira, which not only quadruples the previous highest fine ever imposed by the Board, but also exceeds the sum of all fines imposed in Turkish antitrust cases to date. The decision also imposed the highest administrative fine ever levied on a single company in Turkey, amounting to 213 million lira. The fine amounts to 1.5 per cent of the company's annual gross revenue for 2011. Ukrainian authorities are imposing larger fines more frequently. Authorities recently announced the preliminary conclusion of the cartel investigation in the food retail sector, where the cartel participants will face record-breaking fines – 20 billion hryvnia. The minister for economic affairs in the Netherlands intends to increase the maximum fine levels from €450,000 or 1 per cent of turnover to €900,000 or 2 per cent of turnover for procedural violations. The Malaysian Competition Commission issued a proposed decision this year to impose its first financial penalty of 10 million ringgit on two airline companies for an alleged market-sharing agreement. New Zealand authorities imposed the largest cartel penalty in the jurisdiction as part of a settlement, amounting to NZ$7.5 million. The European Court of Justice this year confirmed in *DuPont* and *Dow* that parent companies may be held liable not only for infringements by their wholly-owned subsidiaries, but also for infringements committed by joint venture subsidiaries. Finally, the Lithuanian National Audit Office issued a press release in January 2011 stating that fines on companies were too small. In 2012, the Competition Council of Lithuania apparently followed this advice and imposed significant fines, including the record-high fine of 57 million litas imposed on banks and a cash-handling services operator. The fine was subsequently reduced to 28 million litas on appeal , but it is expected that the Competition Council will impose high fines in the future.

Despite the trend toward ever-increasing fines, there have been other notable examples of fine reductions and companies or individuals being exonerated. For example, the Singapore Competition Appeals Board recently ruled that the Competition Commission of Singapore should not have considered the involvement of directors and senior management as an aggravating factor justifying an increase in the fine in the *Modelling Services* case. Additionally, the Appeals Board determined that a discount should be given where the relevant industry is 'high turnover, low margin', and thus reduced the fine. In 2011, the Fair Trade Law of Taiwan was amended to permit administrative fines up to 10 per cent of the total sales of an enterprise. On 13 March 2013, the Fair Trade Commission of Taiwan levied a record-high administrative fine of NT$6.32 billion against nine independent power producers. The decision was subsequently overturned on appeal and remanded. Finally, the US DoJ brought a cartel price fixing case against AU Optronics, a maker of LCD panels, and several of its executives. In a jury trial against the company and five executives of the corporation, two executives were found guilty, two others were acquitted and the jury deadlocked as to the fifth, resulting in a hung jury. The DoJ retried the fifth executive, and a second jury found him guilty. In the autumn of 2013, the DoJ brought another AU Optronics executive to trial on the same price fixing charges; he was acquitted by the jury.

International cooperation

Increased international cooperation may lead to greater deference to enforcement actions in other jurisdictions. In 2010, the Dutch Competition Authority imposed fines on Dutch, Belgian and German flour producers. After collaboration with other European authorities, the Dutch authorities recently adjusted the fine imposed on one of the producers, as the combined total of fines imposed by the French, German, and Dutch authorities would have led to the company's bankruptcy. Finally, it is believed that the European Commission refrained from including indirect sales of cars manufactured in Japan and exported to the European Economic Area in its calculation when determining the penalty in the *Automotive Wire Harnesses* case, and instead took into consideration the fact that the Fair Trade Commission of Japan had already imposed sanctions with respect to those cars.

Leniency programmes

While one may question the incentives created by leniency programmes and whether hard-core antitrust violators should be given a free pass from prosecution for being the first to incriminate the other members of the cartel, leniency systems continue to be widely adopted. In the Czech Republic, the leniency programme previously operated by the Office for the Protection of Competition on an

informal basis was incorporated into the Competition Act. Many jurisdictions continue to bolster their leniency programmes. A new Russian law provides for the automatic release from criminal liability of an individual acting on behalf of the first leniency applicant. In Slovakia, changes to the leniency programme following its initial adoption in 2009 have enabled employees and officers of successful leniency applicants to benefit from an automatic exemption from criminal enforcement. In Poland, proposed amendments to the Competition Act would allow individuals, in addition to companies, to apply for leniency, and would allow the Office for the Protection of Competition and Consumers to direct a leniency applicant to continue its participation in the cartel for the purposes of securing evidence and enhancing its ability to conduct an effective search.

The scope of attorney–client privilege in leniency discussions is a thorny issue that continues to evolve. While privilege waivers were often sought by the US DoJ in the past, recent judicial decisions in the United States frown upon the practice. This is now codified in DoJ policy. The UK Office of Fair Trading (OFT) published revised leniency guidance in July 2013. The OFT had considered requiring leniency applicants to waive legal professional privilege over certain documents relevant to their application. While the revised guidance clarifies that waiver is not mandatory, the OFT specifies that it would usually instruct external independent counsel to review any materials for which privilege is claimed. The South African Supreme Court of Appeal confirmed that documents submitted to the Competition Commission by a leniency applicant are subject to legal privilege unless the Commission makes reference to the documents in a complaint referral to the Competition Tribunal.

Settlements

The number of settlements is rising, with new provisions for settlement procedures having been introduced in a number of countries. The EU Commission concluded its seventh settlement in the *Automotive Wire Harnesses* case and continues to encourage parties to settle where possible. The Norwegian Competition Authority will have authority as of 1 January 2014 to conclude a matter via settlement before carrying out an exhaustive assessment, as long as it makes an assessment of the company's conduct and the suitability and necessity of the proposed measures to remedy the competition law breaches in question. Another example can be found in the new Belgian Competition Act, which provides for a new procedure through which a company may settle. The fine may be reduced by 10 per cent if the company acknowledges liability. In the Czech Republic, a fine reduction of 20 per cent for settlements was introduced. In Portugal, the Competition Authority applied for the first time the settlement provisions of the new Competition Act in the context of a cartel in polyurethane foam, granting reductions to the companies' fines based on the settlement procedure as well as on grounds of leniency. The South African Competition Commission for the first time utilised a 'fast track' settlement process related to the prosecution of a widespread cartel in the construction industry. The UK's Consumer Rights Bill of 2013 provides for a new expeditious settlement procedure of opt out cases for which collective proceedings orders have been issued. However, settlement is not always a panacea. In the United States, fines paid in plea bargains for companies routinely run over US$100 million. In New Zealand, 2011 and 2012 saw several penalty proceedings arising from settlement agreements, one of which constitutes the largest penalty for cartel enforcement in New Zealand.

Collective redress/class actions

While the merits of the US system of civil class actions, involving treble damages, joint and several liability and often duplicative and overlapping recoveries for private plaintiffs, are debatable, recent trends demonstrate an increased recognition of collective redress. In France, a draft law has been introduced to allow groups of consumers to claim damages from companies convicted by the French Competition Authority of competition law infringements. In Finland, the Helsinki District Court ruled that class actions for damages for breaches of competition law could be brought under Finnish law. The Court reached the conclusion despite the fact that the 2007 Act on Class Actions – which introduced class actions to Finland – explicitly excludes damages for breaches of competition law from the scope of such actions. The ruling is subject to appeal, however, which is not expected until late 2014. The UK Consumer Rights Bill 2013 introduces a new opt-out collective action regime that, if adopted, is expected to lead to an increase in the number of competition cases heard by the UK courts. The South African Supreme Court of Appeal recognised the availability of opt-out class actions for private damages and set out a procedure through which plaintiffs may seek class certification. The Court also recognised opt-in class actions when the interests of justice so require. The EU Commission published a non-binding recommendation setting out common principles of collective redress with the objective of bringing coherence to the different systems of collective redress in the EU. In the United States, where class actions are routinely used in private civil cartel actions, the Supreme Court will address whether a state attorney-general action brought in the name of the state seeking restitution on behalf of its citizens is properly heard in federal or state court under the Class Action Fairness Act. The case arises in the context of one of the many civil cases against LCD manufacturers that followed criminal enforcement by the US DoJ. Congress enacted CAFA in 2005 with the purpose of ensuring that large class actions of national importance are adjudicated in federal court. This decision will have major implications for businesses that operate across state and national borders because defendants generally perceive state courts as presenting more risk than federal court as they believe that local plaintiffs enjoy a 'home court advantage' and that state courts tend to be less sophisticated in complex cases.

* * *

As recent trends illustrate, the defence of cartel actions continues to be an evolving, complex endeavour.

* *The authors recognise the significant contribution of Lauren Giudice and Marika Harjula of the firm. White & Case represents a party in the LCD case discussed herein.*

United States

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation?

Section 1 of the Sherman Act (15 USC section 1) is the principal substantive statute. In addition, section 5 of the FTC Act prohibits 'unfair methods of competition' and is used to sanction conduct that may fall short of a Sherman Act violation, such as invitations to collude or cases where the pernicious effects of collusion are less clear.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The US Department of Justice, Antitrust Division (DoJ) investigates and prosecutes cartels criminally and civilly. The Federal Trade Commission (FTC) also enforces the Sherman Act and the FTC Act in civil actions. Private parties may bring civil actions for monetary and injunctive relief. In addition to federal law, states have antitrust laws that usually mirror the Sherman Act, which are enforced by state attorneys general. The FTC has its own adjudicative arm, but also brings some cases in federal court; the DoJ brings cases in federal court.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There have been no recent changes or proposed changes to the Sherman Act since 2004, when the statutory fines were increased (see question 15) and provisions allowing single damages for amnesty applicants were enacted (see question 22).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Sherman Act prohibits agreements 'in restraint of trade'. While the language of section 1 is sweeping on its face, judicial decisions have narrowed its scope.

Cartel activity (ie, agreements between competitors on prices, output, or to allocate customers or territories or rig bids) are considered per se (automatic) violations of section 1 and are presumed to have an anti-competitive effect on the market. Agreements do not need to be formal or in writing, but there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective'. *Monsanto Co v Spray-Rite Serv Corp*, 465 US 752, 768 (1984).

Unilateral conduct is not a cartel offence. Thus, it is not illegal for a company to observe market prices and follow them or to learn a competitor's price from a customer or other third party and decide, unilaterally, to follow it. Moreover, contacts with competitors (whether in a business or social setting), even if they involve discussions of competitively sensitive matters, are not in themselves illegal, although discussions are risky as they could be used to infer that the parties reached an agreement.

While the language of the Sherman Act appears to create criminal liability for a broad range of conduct, the DoJ's stated policy is to pursue only cartel activity criminally (DoJ, Antitrust Division Manual (Antitrust Division Manual) III-12).

Private parties (typically customers) can also sue for cartel activity. If successful, they are awarded three times actual damages, costs and attorneys' fees and, in some cases, injunctive relief.

An attempt or solicitation to collude does not violate the Sherman Act, although in some cases the DoJ has sought to prosecute attempts as criminal mail or wire fraud. The FTC has also challenged attempts to collude in civil cases under the FTC Act.

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions?

A number of industries have limited exemptions provided by law. These include certain labour, agriculture, energy, insurance, financial, health-care, communications and professional sports markets. For example, the McCarran-Ferguson Act exempts state law-regulated insurance business so long as the underlying conduct does not involve an agreement to 'boycott, coerce, or intimidate' (15 USC section 1013).

The judiciary has also created exemptions to the antitrust laws. The Noerr-Pennington doctrine, based on the First Amendment to the US Constitution, provides immunity from antitrust liability to companies for certain conduct that attempts to influence the government, such as lobbying, joint petitioning and litigation. *Cal Motor Transp Co v Trucking Unlimited*, 404 US 508, 513-15 (1972), *United Mine Workers v Pennington*, 381 US 657, 661-62 (1965), *Eastern RR Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127, 135-36 (1961). States enjoy antitrust immunity. *Parker v Brown*, 317 US 341, 350-51 (1943). This concept has been extended to actions taken pursuant to state regulation where there is a clear articulation of state policy and active supervision by the state. *Cal Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*, 445 US 97, 104 (1980).

The political question doctrine bars courts from adjudicating cases involving policy decisions that are more appropriately resolved by the legislative or executive branches. *Japan Whaling Ass'n v Am Cetacean Soc'y*, 478 US 221, 230 (1986). The Fifth Circuit Court of Appeals recently upheld a lower court's decision to decline jurisdiction over cartel claims against entities owned or controlled by OPEC

member states. *Spectrum Stores, Inc v Citgo Petroleum Corp*, 632 F.3d 938, 943 (5th Cir. 2011). The court classified the conduct at issue (ie, state decisions in respect of crude oil production levels) as involving foreign sovereign conduct. The court held that for it to rule on the case would, in effect, require it to second guess executive branch decisions involving foreign policy, energy security and the proper level of engagement with oil-producing countries. The court held that the action was similarly barred by the act of state doctrine, under which 'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'. *Underhill v Hernandez*, 168 US 250, 252 (1897).

6 Application of the law

Does the law apply to individuals or corporations or both?

Both. The DoJ typically brings criminal actions against both companies and executives. Civil cases are generally brought against companies only.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes, but there must be a sufficient nexus to the United States. The Foreign Trade Antitrust Improvements Act (the FTAIA) (15 USC section 6a) governs the extraterritorial application of the antitrust laws.

On its face, the Sherman Act applies to 'trade or commerce' among foreign nations. However, the FTAIA limits the extraterritorial reach of the Sherman Act. Under the FTAIA, the Sherman Act will not apply to antitrust conduct occurring outside of the United States unless that conduct is import commerce or has a direct, substantial and reasonably foreseeable effect on domestic commerce, and such effect proximately caused the plaintiff's foreign injury (15 USC section 6a; see also *F Hoffmann-LaRoche, Ltd v Empagran SA*, 542 US 155, 159 (2004)).

The import commerce exception is generally viewed narrowly to apply to only direct imports by the defendants. *Hartford Fire Insurance Co v California* held that the Sherman Act applies to foreign conduct that was intended to have, and did in fact have, substantial effects on domestic or import commerce (509 US 764, 796 (1993)). *United States v Nippon Paper Industries, Co*, 109 F.3d 1, 9 (1st Cir. 1997), confirmed that the *Hartford Fire* test applies in criminal cases. Where the conduct in question involves overseas sales, the battle lines are usually over whether the second prong of the test (ie, direct, substantial and reasonably foreseeable) is met. Courts look at factors such as the location of the parties, where title to the goods passes, the chain of distribution that takes place before the goods enter the United States and effects on US prices. See, for example, *Sun Microsystems Inc v Hynix Semiconductor Inc*, 608 F. Supp. 2d 1166, 1189-90 (N.D. Cal. 2009); *In re Graphite Electrodes Antitrust Litig*, Nos. 10-MD-1244, 00-5414, 2007 WL 137684, at *4 (E.D. Pa. 16 January 2007); *In re Vitamins Antitrust Litig*, No. 99-197, 2001 WL 755852, at *2 (D.D.C. 7 June 2001).

The law is evolving, however, and two decisions of different circuit courts highlight inconsistencies in the interpretation of the term 'direct' for purposes of the FTAIA. For example, the Seventh Circuit held that plaintiffs sufficiently pleaded a 'direct' effect on US commerce where plaintiffs alleged that a cartel established benchmark prices in other markets and then applied those prices to its US sales. Specifically, 'foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to US customers'. *Minn-Chem, Inc v Agrium Inc,* 683 F.3d 845, 860 (7th Cir. 2012) (en banc). Given somewhat similar circumstances, the Ninth Circuit held differently. *United States v LSL Biotechnologies*, 379 F.3d 672, 681-83 (9th Cir. 2004), held that any potentially anti-competitive effect of a restrictive clause's ban on distributing certain seeds to Mexico, and the resulting fruit to the US, was not 'direct' because it did not follow as an immediate consequence of the defendant's activity but instead depended on uncertain intervening events. A district court in New York followed the Ninth Circuit's analysis of 'direct effects', *Lotes Co v Hon Hai Precision Industry Co*, No. 12 Civ. 7465, 2013 WL 2099227 (S.D.N.Y 14 May 2013), rejecting the Seventh Circuit's analysis that overseas anti-competitive conduct need only have a 'reasonably proximate causal nexus' to anti-competitive effects in the United States, and finding that ripple effects on markets in the United States were insufficient to establish jurisdiction under the Sherman Act.

Investigation

8 Steps in an investigation

What are the typical steps in an investigation?

Today, most criminal investigations are triggered by information learned through an amnesty applicant (see questions 22–25). However, the DoJ also relies on tips from customers, competitors, disgruntled employees and its own observations of unusual market behaviour. The DoJ can also learn of anti-competitive activity through investigations or litigation in other industries, press reports or inter-agency referrals. The Amnesty Plus programme (see question 25) – pursuant to which a cartel participant in one market discloses a cartel in another market – is another prime source of new investigations.

After opening a criminal investigation, the DoJ will typically issue grand jury subpoenas or execute search warrants directed to industry companies and individuals. At this point, the existence of the investigation usually becomes public.

The DoJ proceeds with criminal investigations through the grand jury process and utilises other tools of criminal enforcement (see question 9). The grand jury is a group of laypersons charged with investigating felonies (crimes punishable by more than one year in prison) and returning indictments. In practice, the grand jury is a tool for prosecutors to investigate potential criminal antitrust offences. A grand jury almost always defers to a prosecutor's decision to seek indictment. The grand jury has broad powers to subpoena documents and witnesses; witnesses may be served with subpoenas anywhere in the United States, commanding them to provide testimony under oath (Fed. R. Crim. P. 17(e)). Witnesses subpoenaed to testify before the grand jury have the right to refuse to testify under the Fifth Amendment to the US Constitution if their testimony would be potentially incriminating. The DoJ can force testimony by granting immunity, thus relieving the incrimination risk.

An indictment is not a conclusion that a crime has been committed, but merely a finding that there is enough evidence to have a trial. Indicted companies and individuals have the right to trial by jury. At some point in the investigation, individuals or corporations may be identified as 'targets' by the DoJ. A 'target' is a person or company 'as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant' (DoJ, United States Attorneys' Manual section 9-11.151). Targets are given certain rights, such as an opportunity to meet with the DoJ before indictment and the right (rarely invoked) to testify before the grand jury.

In civil antitrust cases, the DoJ will typically begin an investigation by issuing a civil investigative demand (CID). CIDs can seek documents, interrogatory responses or sworn testimony. The DoJ has the power to serve a CID on any individual or corporation it has reason to believe has custody or control over relevant materials,

or has any information relating to a civil antitrust investigation (15 USC section 1312). CIDs sometimes lead to civil litigation by the DoJ in federal court.

There are no strict time frames on criminal or civil investigations, and thus investigations may continue for an open-ended period of time, although the statute of limitations may serve as a deadline for the conclusion of an investigation.

9 Investigative powers of the authorities

What investigative powers do the authorities have?

In addition to the powers of the grand jury (see question 8), the DoJ uses search warrants, wiretaps, border searches and interviews.

A search warrant enables law enforcement officers to enter private premises to search for and seize evidence. Only a federal judge or a magistrate may execute a search warrant, upon a finding of probable cause. In antitrust cases, search warrants are used to gather documents (hard copy and electronic) that may evidence illegal conduct. In a global cartel case, the DoJ typically places key executives of foreign-based companies on 'border watch'. The request is made to immigration and border control officials, who comply automatically; no showing of guilt or knowledge about an alleged cartel is required. Border watches are used to detect the executive's entry into the United States. The person can then be subjected to a drop-in interview (usually conducted by a DoJ attorney and an agent from the Federal Bureau of Investigation. These interviews are often done unannounced at the executive's workplace or hotel. While these interviews are technically voluntary, there may be pressure on the executive to cooperate. Travel risks for overseas executives must be considered carefully by the company with counsel.

Authorities have broad investigative powers at international borders. For example, border control recently seized the personal computer, thumb drive, camera and mobile phone of an individual who helped fund-raise for the legal defence of a former armed service member who provided government files to WikiLeaks (see Susan Stellin, 'The Border Is a Back Door for U.S. Device Searches', *The New York Times*, 9 September 2013. The case was settled prior to litigation. It is possible that authorities could exercise this same power to search effects, such as hard disk drives, at international borders on suspicions of antitrust violations. The DoJ also uses phone or wiretaps to monitor and record conversations among suspected co-conspirators. Federal law permits the use of phone or wiretaps to gather evidence of a violation of the Sherman Act upon a showing of probable cause to a federal judge (18 USC section 2516(1)(r)).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Coordinated investigations conducted by the DoJ, European Commission and other authorities are common. For example, the authorities may coordinate searches, service of subpoenas and drop-in interviews. The ability to collect evidence from multiple jurisdictions is important in international cartel cases, and international agencies not only coordinate on obtaining evidence, but also general theories of the case. However, they cannot share evidence in the case, except pursuant to a formal mutual legal assistance treaty (MLAT), diplomatic requests (such as letters rogatory) or consent of the parties.

MLATs are treaties and, therefore, supersede earlier promulgated domestic laws to the extent they are inconsistent (Vienna Convention on the Law of Treaties, article 27). The United States has entered into MLATs with approximately 80 jurisdictions (Antitrust Division Manual at VII-32). MLATs often contain binding provisions requiring assistance in response to a formal request, although in certain situations the obligation to cooperate is discretionary.

The United States has also entered into a number of antitrust cooperation agreements (ACAs). These are 'softer' agreements that do not generally create binding obligations and are not investigatory tools for particular cases. ACAs have been entered into between the United States and Australia, Brazil, Canada, Chile, China, the European Union, Germany, India, Israel, Japan, Mexico and Russia.

The DoJ and FTC also belong to the International Competition Network, and the Antitrust Division, FTC and Department of State represent the United States in the Competition Committee of the Organisation for Economic Co-operation and Development (Antitrust Division Manual at VII-33-VII-34).

In practice, while the DoJ touts its extensive cooperation with other jurisdictions and the attendant benefits, there are impediments to cooperation and each jurisdiction has its own priorities. For example, the use of MLATs to gather evidence may be cumbersome and resisted by the state receiving the request. Dual criminality requirements and discretionary provisions may make MLATs toothless in antitrust cases where the counterparty does not criminalise antitrust offences.

11 Interplay between jurisdictions

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

Multi-jurisdictional cases can lead to troubling conflicts that raise serious sovereignty and comity concerns.

For example, the DoJ has begun seeking foreign-origin documents that were produced in a parallel civil case. The DoJ's stated policy is that grand jury subpoenas do not reach beyond the borders of the United States, and the DoJ does not seek foreign-located evidence through grand jury subpoenas out of comity concerns. The DoJ's standard practice is to request the parties to produce such documents voluntarily. In the DoJ investigation into the liquid crystal display (LCD) industry, the DoJ issued a grand jury subpoena seeking the entire civil discovery record, including foreign-origin documents brought into the United States, solely for production in the civil cases. The documents had been produced under a protective order that prohibited any recipient of the documents from using them other than in connection with the civil litigation. Foregoing the usual channels for obtaining foreign-based discovery (such as MLATs, treaties and letters rogatory), the DoJ subpoenaed the documents, arguing that its grand jury subpoena trumped the civil protective order. The Ninth Circuit Court of Appeals agreed with the DoJ, holding that grand jury subpoenas automatically trump civil protective orders (*In re Grand Jury Subpoenas*, 627 F.3d 1143, 1144 (9th Cir. 2010) (citing *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995))). The Fourth and Eleventh Circuits apply a similar rule. *In re Grand Jury Subpoena*, 646 F.3d 159, 166 (4th Cir. 2011); *In re Grand Jury Proceedings*, 995 F.2d 1013, 1018 (11th Cir. 1993). These courts stand in sharp contrast to the rule of other circuits, notably the Second Circuit, which holds that 'absent a showing of improvidence in the grant of a protective order or some extraordinary circumstance or compelling need, a protective order is enforceable against any third party, including the government' (*In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991)). Other circuit courts – notably the First and Third Circuits – have reached intermediate approaches. Thus, whether a grand jury can obtain such documents will depend on the location of the grand jury.

Civil plaintiffs may also attempt to obtain documents regarding foreign regulatory proceedings, including confidential amnesty submissions. In this context, the court must balance the plaintiffs' need for materials that may go to the heart of their claims – and

which may not be readily available from other sources – with the regulator's interests in safeguarding ongoing investigations and promoting cooperation by treating such materials as confidential. The issue here is one of international comity: should US courts override the wishes of foreign regulators and order the production of materials that such regulators obtained with the understanding that they would remain confidential? The case law remains divided on this issue, with some courts compelling production and other courts deferring to foreign regulators.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated?

Ultimately, cartel cases (both civil and criminal) are adjudicated in court. Civil and criminal defendants have the right to trial by jury. In practice, the vast majority of criminal cases are resolved by a plea bargain agreement (see question 29) or by the DoJ's decision to discontinue the investigation prior to seeking an indictment. Civil cases are often settled or resolved by a pretrial motion to dismiss the case or for summary judgment after discovery.

13 Appeal process

What is the appeal process?

Convicted criminal defendants and losing parties in civil cases have a right to appeal. The constitutional prohibition of double jeopardy prevents the DoJ from appealing a criminal acquittal. Appeal is taken to the circuit court with jurisdiction over the trial court. Appellate review is generally focused on questions of law; however, courts of appeals may overturn factual findings should they be found to be clearly erroneous. See, eg, *In re ATM Fee Antitrust Litig*, 686 F.3d 741, 747 (9th Cir. 2012). Questions of law, on the other hand, are reviewed de novo. Id at 748. The Federal Rules of Appellate Procedure provide that a party has 30 days in suits between private parties from entry of judgment or order appealed from to file a notice of appeal. Fed. R. App. P. 4. Defendants in criminal cases have 14 days from the later of entry of judgment or appealable order or the filing of the government's notice of appeal. Id. Appeals in the federal system above the initial appeal (ie, to the Supreme Court) are discretionary. Supreme Court review is rare and reserved for important issues or where there is conflict or confusion among the lower courts.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In a criminal case, the government must prove guilt beyond a reasonable doubt. In a civil case, plaintiffs must prove liability only by a preponderance (ie, greater weight) of the evidence.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Under the Sherman Act, for conduct post-dating 22 June 2004, a corporation faces a maximum fine of US$100 million per offence. This means that a single antitrust offence (eg, one phone call) can be punishable by a US$100 million fine. Moreover, the statutory maximum can be exceeded under the Alternative Sentencing Act (18 USC section 3571), which provides that if any person derives pecuniary gain from the offence (or others experience pecuniary loss), the defendant may be fined up to twice the gross gain or twice the gross loss, 'unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process'.

A recent district court decision held that if the government seeks a fine in excess of the Sherman Act cap, it must prove the gain or loss to a jury beyond a reasonable doubt (Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 USC section 3571(d) at 6, *United States v AU Optronics Corp*, No. C 09-00110 SI (N.D. Cal. 18 July 2011)). In the *AU Optronics* case, the DoJ proved gain or loss beyond a reasonable doubt, established by the special jury verdict form that specifically asked whether AUO and the other participants in the conspiracy derived a combined gross gain from the conspiracy of US$500 million or more. However, the DoJ's burden to prove gain or loss over US$100 million is a demanding standard that may be difficult for the DoJ to satisfy in many cases. This standard should be considered in the decision of whether to plead guilty or go to trial.

In arguing for a US$1 billion fine, the DoJ pointed to the inherent anti-competitive effect of the cartel and the company's 'history and characteristics', arguing that 'the company has been engaged in felonious conduct from its inception'. Judge Illston of the Northern District of California took a more measured approach, sentencing the company to a US$500 million fine. Reasoning that 'we need to assure that businesses producing useful products with services to provide to the community and the world not be penalized to the point where they are no longer able to do that', Judge Illston found that the fine requested by the government was 'simply substantially excessive to the needs of this matter'. The US$500 million fine imposed does not dwarf the US$400 million awarded against LG Display in the same case, a company that pleaded guilty, provided substantial assistance to the government and whose executives agreed to serve prison terms. In fact, the fine of US$500 million matches the largest fine ever imposed for antitrust violations against Hoffmann-La Roche, which was also a negotiated plea bargain.

Under the Sherman Act, individuals face a maximum of 10 years in prison and a US$1 million fine. In 2012, the DoJ obtained its first trial conviction against foreign nationals in a criminal antitrust case. Two executives of AU Optronics were found guilty after a jury trial, while two others were acquitted. The jury deadlocked as to the fifth, resulting in a hung jury. Judge Illston demonstrated her reluctance to 'throw the book' at company executives. The executives were each sentenced to three years in prison. Despite having exercised their right to go to trial and put the government to its burden of proof, the defendants were issued sentences more commensurate with those imposed pursuant to guilty pleas, albeit on the more severe end of the spectrum. The fifth executive was subsequently retried, found guilty and sentenced to serve two years in prison. One more AU Optronics executive was tried and acquitted in October 2013.

The DoJ obtained the largest amount of criminal fines in a single year in fiscal year 2012, amounting to US$1.14 billion. Individuals are increasingly sentenced to prison terms. The DoJ reported that for fiscal year 2012, 78 per cent of the individuals sentenced were sentenced to prison time. Duration of prison sentences has increased as well, and the DoJ reported that the average prison term in fiscal year 2012 was almost 25 months, in stark contrast to the eight-month average in the 1990s. In 2009, a former executive of a shipping company was sentenced to serve four years in prison, pursuant to a plea agreement, the longest term ever imposed for a single antitrust violation. The DoJ recently requested in a sentencing memorandum a prison term of 87 months, which would be the longest prison sentence for an antitrust violation imposed in the United States. See United States' Sentencing Mem. at 2, *United States v Peake*, No. 03:11-cr-00512 (D.P.R. 10 September 2013). The individual was convicted of price fixing by a jury in January 2013. The sentencing is scheduled to occur on 29 October 2013.

The DoJ's power to force foreign nationals to plead guilty stems in part from an obscure memorandum of understanding between

the DoJ's Antitrust Division and its Immigration and Naturalization Service (now called US Immigration and Customs Enforcement, an investigative arm of the US Department of Homeland Security) (Memorandum of Understanding Between the Antitrust Division, US DoJ, and the Immigration and Naturalization Service, US DoJ, 15 March 1996, available at www.justice.gov/atr/public/criminal/9951.htm). The memorandum states that violations of the Sherman Act will be considered 'crimes involving moral turpitude', which may subject aliens with no immigration status to deportation, exclusion, or both from the US for a minimum of 15 years. The DoJ often agrees to waive the immigration consequences if the alien pleads guilty, a manoeuvre that has proven instrumental in securing plea agreements in many investigations. The designation of antitrust offences as 'crimes involving moral turpitude' – a category normally reserved for crimes not created by statute, and which involve 'inherently base, vile, or depraved' conduct (*Fernandez-Ruiz v Gonzales*, 468 F.3d 1159, 1165, 1169 (9th Cir. 2006) (internal citations omitted)) – is dubious and has never been tested in court.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The DoJ can bring a civil action for equitable injunctive relief (15 USC section 4). Agencies may seek novel types of injunctive remedies, as demonstrated in the recent decision, *United States v Apple, Inc*, 12-cv-2826, 12-cv-3394, 2013 WL 4774755 (S.D.N.Y. 5 September 2013). The court in the *Apple* case held that Apple had conspired with five publishers to raise the price of e-books. In its final order entering an injunction, the court ordered Apple to renegotiate its distribution agreements with the five publishers and employ an external antitrust compliance monitor for two years. Id. The DoJ and several state attorneys general had originally asked that the external monitor serve for a period of 10 years, and that the court additionally regulate Apple's conduct with respect to goods other than e-books (eg, music, other audio, films, television shows, or apps). See Pls.' Mem. of Law In Support of Proposed Injunction, Ex. 1 at 6, 16, *United States v Apple*, 12-cv-2826, 12-cv-3394 (S.D.N.Y. 2 August 2013).

The DoJ has no authority to seek civil fines, but could sue as a purchaser of price-fixed goods, although such suits are rare (15 USC section 15a). Most civil actions brought by the DoJ are resolved by consent decrees in which the defendant agrees to cease conduct or take other remedial measures.

The FTC is limited to 'equitable' remedies, which typically consist of injunctive relief and disgorgement. The most significant civil exposure comes from private suits (see question 20).

In addition, persons or companies convicted of price fixing may be debarred from federal government contracts (see question 18). Convicted US citizens may lose the right to vote. Foreign executives convicted of price fixing are routinely denied travel into the United States (unless agreed otherwise in a plea agreement) (see question 15).

17 Sentencing guidelines

Do sentencing principles or guidelines exist? Are they binding on the adjudicator?

Yes. Two parts of the Federal Sentencing Guidelines are relevant to corporate antitrust fines: section 2R1.1 governs antitrust offences, and chapter 8 contains guidelines for organisations (USSG section 8A1.1 et seq). The Sentencing Guidelines attempt to narrow the discretion of federal judges in sentencing antitrust offenders by dictating a sentencing range within which the sentence should fall, absent significant aggravating or mitigating circumstances. The guidelines apply to individuals and organisations.

In 2005, the Supreme Court held that sentencing guidelines were not binding on federal judges. *United States v Booker*, 543 US 220, 226 (2005). In 2011, however, the Supreme Court held that the district court must still give 'respectful consideration' to the Sentencing Guidelines. *Pepper v United States*, 131 S. Ct. 1229, 1241 (2011).

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements?

Yes, contractors may be suspended or debarred under the Federal Acquisition Regulation, which directs agencies to 'solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only'. 48 CFR section 9.402(a). Should the debarring official determine it be 'in the Government's interest', the debarring official may debar a contractor for a conviction or civil judgment for a violation of federal or state antitrust laws relating to the submission of offers. Id section 9.406-1, -2. Debarment is discretionary, as 'the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision'. Id section 9.406-1(a). Debarment is to last for 'a period commensurate with the seriousness of the cause(s)', but usually should not exceed three years. Id section 9.406-4.

Additionally, before a contractor is found to have violated the antitrust laws, it may be suspended from government contracts if the contractor is suspected of or indicted for a violation of state or federal antitrust laws. Id section 9.407-2(a)-(b). Suspension lasts for the duration of the investigation and any ensuing legal proceedings, unless legal proceedings have not been initiated after 18 months. Id section 9.407-4.

Contractors must be notified and given an opportunity to be heard before being debarred, unless debarment is based on a prior conviction; however, contractors may be suspended upon notice of suspension before being given an opportunity to be heard. Id sections 9.406-3, 9.407-3. Conduct by a contractor's officers, directors, shareholders, partners, employees, other associated individuals or joint venture partners may be imputed to the contractor, and vice versa. Id sections 9.406-5, 9.407-5.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The DoJ normally reserves criminal prosecution for price fixing, bid rigging, and market allocations. The DoJ is unlikely to prosecute if the case involves unsettled law; 'novel issues of law or fact'; past prosecutorial decisions that may have reasonably caused confusion as to the legality of the conduct; or 'clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action' (Antitrust Division Manual at III-12). Conduct not pursued criminally may be pursued civilly (see question 8).

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Yes, and there is a very active plaintiffs' bar in the United States. Almost all criminal investigations that become public lead to parallel private civil suits. While brought on behalf of purchasers, the cases are instituted and driven by plaintiffs' lawyers, who generally work on a contingency fee basis. Some cases are brought even where there is no government investigation.

An injured private party may bring a civil suit to redress violations of the antitrust laws. Plaintiffs typically are purchasers of the allegedly price-fixed product or products. While only direct purchasers may sue under the Sherman Act, many state statutes allow indirect purchaser suits. Private actions can be brought in addition to any criminal inquiry or proceeding initiated by the DoJ. Antitrust plaintiffs' counsel in the United States constantly monitor news sources for announcements regarding criminal antitrust investigations and usually commence lawsuits shortly after such announcements. Typically, such private antitrust lawsuits are pursued on a class action basis; under this procedure, a single plaintiff can sue on behalf of all similarly situated plaintiffs (see question 21).

Damages in private actions typically are measured by the 'overcharge' resulting from the cartel. Actual damages are automatically trebled. Liability is joint and several, which means that a plaintiff may collect three times the entire damage caused by the cartel, from one or more defendants, as it wishes. Successful plaintiffs are entitled to recover attorneys' fees and costs.

Multiple lawsuits alleging the same misconduct are usually commenced by different plaintiffs in federal and state courts around the country. Typically, such cases are consolidated in one court, at least for pre-trial proceedings. A guilty plea in the criminal case will bind a defendant as to liability in the related private lawsuits, although these defendants can (and often do) litigate damages.

21 Class actions

Are class actions possible? What is the process for such cases?

Private civil actions are usually brought on a class basis. This means that one or several purchaser plaintiffs can sue on behalf of all purchasers of the allegedly price-fixed product in the United States during the period of the conspiracy, thus greatly increasing potential exposure. A plaintiff must make certain showings before a case may proceed on a class action basis. Specifically, the proposed class must be so numerous that joinder of all of its members would be impractical; there must be common questions of law or fact to the class; the claims or defences of the representative parties must be typical of the claims or defences of the class; and the representative parties must be capable of fairly and adequately protecting the interests of the class. FRCP 23(a). Additionally, the court must make a finding that prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudications or adjudications with respect to an individual class member that would be dispositive of the interests of other members not parties to the individual adjudications; final injunctive or declaratory relief would be appropriate respecting the class as a whole; or questions of law or fact common to class members predominate over any questions affecting only individual members, and thus a class action would be superior to other methods of adjudication. Id 23(b).

For many years, courts were willing to grant class action status to antitrust plaintiffs based on very minimal showings. More recently, courts have begun to scrutinise class action applications with greater care. Defeating class certification can be tantamount to an outright victory. Members of the class may opt out of the class, a right sometimes invoked by large purchasers who are then free to pursue individual actions against the alleged conspirators. Thus, in addition to one or more class action cases, a company accused of fixing prices often faces several opt-out actions.

Cooperating parties

22 Leniency/immunity

Is there a leniency/immunity programme?

The DoJ administers a formal amnesty programme (technically called the leniency programme), which provides for complete immunity from criminal prosecution. The programme can also result in the de-trebling of damages and no joint and several liability in parallel civil cases, if the amnesty applicant satisfies the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) Pub. L. No. 108-237, 118 Stat. 661 (22 June 2004), including providing satisfactory cooperation to plaintiffs in the civil action.

23 Elements of the leniency/immunity programme

What are the basic elements of the leniency/immunity programme?

A corporation that comes forward to report illegal activity prior to a government investigation qualifies for leniency if it meets the following conditions: the corporation is the first in to cooperate, was not the ringleader, took prompt and effective action to terminate its role in the illegal activity, reports the illegal activity with candour and continues to cooperate with the DoJ's investigation, makes restitution where possible, confesses as a truly corporate act (as opposed to isolated confessions of individual directors and officers) and the DoJ determines that granting leniency would not be unfair to others (Antitrust Division's Leniency Program, available at www.justice.gov/atr/public/criminal/leniency.html).

A corporation that comes forward after a government investigation has begun can still qualify for leniency if it meets the above conditions, and if the DoJ does not have evidence against the corporation that will likely warrant a sustainable conviction and determines that it would not be unfair to other parties to grant leniency (Id).

Leniency is also available for individuals. To receive leniency, an individual must report the activity before the investigation has begun, be the first to report the illegal activity, report the illegal activity with candour and completeness and continue to cooperate with the DoJ, and must not have been the ringleader. If an individual does not meet these conditions, the DoJ will consider him or her for statutory or informal immunity from criminal prosecution, which is discretionary and generally more limited.

24 First in

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

It is a precondition for receiving amnesty.

25 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Amnesty is not available, but the second company in could be considered for more lenient treatment by the DoJ. Early cooperation is often noted by the DoJ in plea agreements as a factor mitigating sentences.

The Amnesty Plus programme provides for more lenient treatment in one cartel investigation if a party discloses the existence of a second cartel. Under the Amnesty Plus programme, a party that is the first to report the second cartel will be rewarded with both full amnesty for the second cartel, and more lenient treatment in the first cartel. The DoJ's policy is to pursue a fine or jail sentence at or above the upper end of the Sentencing Guidelines range if a company is aware of a second cartel but chooses not to report it (known as Penalty Plus).

26 Approaching the authorities

Are there deadlines for applying for immunity or leniency, or for perfecting a marker?

If a company uncovers evidence suggesting that it has engaged in a

criminal violation and wants amnesty, time is of the essence; it must act quickly to get a marker that establishes its place as the first in line at the DoJ. Only the first in will receive a marker and thus be eligible for amnesty.

Other cases are a judgement call and will depend on the strength of the evidence, whether the company wishes to defend itself and whether counsel believes there is benefit to be gained from early cooperation. The earlier an entity enters into a plea agreement, the more credit the entity will receive when the DoJ seeks penalties. If amnesty is not available, and particularly if evidence of per se conduct is ambiguous, it may be advisable to prepare a strong defence rather than to enter a plea agreement. Absent a plea agreement, the government may find it difficult to prove criminal liability and fines beyond the statutory maximum beyond a reasonable doubt (see question 15). In addition, a plea agreement is deemed an admission of liability in civil cases. Thus, the decision to cooperate should be considered carefully with counsel.

27 Cooperation

What is the nature and level of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Successful amnesty applicants must report the illegal activity with candour and continue to cooperate with the DoJ's investigation. Under ACPERA, a leniency applicant may qualify for detrebling of damages in civil cases if the applicant cooperates with plaintiffs (see questions 22 and 23). Subsequent cooperating parties would normally be required to take direction from the DoJ as to what is required for cooperation (eg, producing documents or witness interviews). The parameters are not strictly defined, but are instead the subject of negotiation with the DoJ. Should the party plead guilty, cooperation obligations will typically be included in the plea agreement.

28 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

The DoJ is obligated to keep confidential the fact of amnesty and any negotiations with amnesty applicants. This also applies to negotiations with subsequent cooperating parties. If a subsequent cooperating party agrees to plead guilty, however, the plea agreement, which often contains cooperation provisions, is made public. Additionally, underlying documents of an applicant or subsequent cooperating party that are created or maintained in the regular course of business may be discoverable in civil cases.

29 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The DoJ can enter into plea bargains, but they must be approved by the court (Fed. R. Crim. P. 11(c)(3)). In most cases, federal judges defer to the DoJ and approve antitrust plea bargains.

30 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

All current officers and directors are protected by amnesty. In general, former employees are protected for their time working at the company, although this protection may be subject to negotiation between the DoJ and company counsel or the individual's separate counsel. In a typical plea bargain, the DoJ will insist that a small number of executives be carved out of the agreement, meaning they are not protected and are still subject to prosecution. However, the DoJ does not automatically pursue all carved out executives.

31 Dealing with the enforcement agency

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

Where amnesty is sought, it is essential to move quickly to obtain a marker. Next, the corporation must conduct a thorough internal investigation to assess whether illegal conduct took place. Thereafter, attorneys for the company must make a proffer of evidence to the DoJ. If the DoJ is satisfied that illegal conduct has taken place and the other conditions of amnesty are met, it will grant conditional amnesty. At that point, it is critical that the company complies strictly with the conditions in its amnesty letter agreement.

Attorneys and witnesses should always be truthful in dealings with the DoJ. In addition, witnesses appearing before the grand jury are subject to the risk of perjury for untruthful statements. It is critical to avoid destroying relevant documents or otherwise obstructing justice. Obstruction carries stiffer penalties than price fixing, and the DoJ may pursue an obstruction or perjury investigation in parallel with the underlying price-fixing investigation. The most recent model amnesty letter states that an amnesty applicant can be prosecuted for making false statements or obstructing justice when it fails to truthfully respond to DoJ inquiries.

32 Ongoing policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No. The DoJ changed its model conditional and final leniency letters for corporations and individuals in 2008, but there is no ongoing or proposed leniency or immunity policy assessment or review.

Defending a case

33 Representation

May counsel represent employees under investigation and 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?

This issue generally arises only in criminal cases, because individuals are not normally sued or the targets of civil investigations. Counsel can represent the company and individuals if there is no conflict or potential conflict of interest. If there is a potential conflict, the individuals may need separate counsel. A potential conflict may arise when an individual is identified as a subject or a target of the investigation. In that situation, the individual may want to blame others in the company, and the company may want to blame the individual or characterise him or her as a rogue employee. However, employees identified as subjects or targets do not always have conflicting interests with the company.

As a practical matter, it is sometimes advisable to retain separate counsel for anyone who appears before the grand jury, even someone not a subject or target of the investigation or who has immunity. The company and its counsel must weigh the pros and cons of separate counsel carefully in each situation. On the one hand is added cost, loss of control over the employee when separate counsel is retained and the risk that the separately represented employee could decide to cooperate with the government and incriminate the company. On the other hand, separate counsel should be retained where there is an immediate apparent conflict or where a future conflict appears

Update and trends

The Supreme Court recently accepted a case in which it will decide whether a state attorney general action brought in the name of the state seeking restitution on behalf of its citizens may be removed from state court to federal court under the Class Action Fairness Act (CAFA). *Mississippi, ex rel Jim Hood v AU Optronics Corp et al*, No. 12-1036. Congress enacted CAFA in 2005 with the purpose of ensuring that large class actions of national importance are adjudicated in federal court. Under CAFA, class actions may be filed in or removed to federal court when the case meets CAFA's definition of a class action, defined as 'a civil action filed under [a] rule […] authorizing an action to be brought by 1 or more representative persons as a class action'; the matter in controversy exceeds US$5 million; there are more than 100 class members; and the case meets CAFA's minimal diversity rule. The last requirement for minimal diversity is satisfied when the citizenship of at least one plaintiff or class member is diverse from any defendant. 28 USC section 1332(d). Until CAFA, federal courts' diversity jurisdiction required complete diversity, where each plaintiff must be diverse from each defendant. Congress included certain exceptions to CAFA jurisdiction that exclude local controversies and cases where a state is a defendant.

In CAFA, Congress also created federal jurisdiction over mass actions, which are defined as civil actions 'in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact'. Congress again included several exceptions to CAFA's mass action jurisdiction for cases involving local controversies and ones brought on behalf of the general public (as opposed to individual claimants). Congress did not, however, expressly exclude state actions that otherwise meet the requirements of a class action or mass action.

In *Hood v AU Optronics Corp*, the Mississippi attorney general filed an action in state court under state law on behalf of the state and its citizens, and the defendants removed the case to federal court under CAFA. The Mississippi attorney general's action is one of many similar actions against the same defendants based on the same alleged global price-fixing conspiracy in the thin-film transistor LCD industry. The question presented for the Supreme Court in *Hood* is whether the case is a mass action under CAFA that may proceed in federal court.

The Court of Appeals for the Fifth Circuit held that the case is a mass action that may proceed in federal court. *Hood v AU Optronics Corp et al*, 701 F.3d 796 (5th Cir. 2012). However, other courts of appeals have disagreed with the Fifth Circuit's decision, finding that nearly identical actions against some of the same defendants asserting the same or similar allegations of price fixing in the LCD industry are not mass actions, and have remanded those cases to state court. *AU Optronics v South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012); *LG Display Co v Madigan*, 665 F.3d 768, 773 (7th Cir. 2011); *accord Nevada v Bank of Am Corp*, 672 F.3d 661, 672 (9th Cir. 2012). The Supreme Court granted certiorari in *Hood*, and its decision will resolve the circuit split.

In *Hood*, the Mississippi attorney general is arguing that Congress never intended CAFA's mass action provision to apply to state actions, and that principles of state sovereignty and federalism weigh in favour of construing CAFA narrowly to keep state enforcement actions in their own courts when brought under state law. The attorney general further argues that mass actions were intended to apply to actions in which there are more than 100 named plaintiffs, and because the state is the only named plaintiff in *Hood*, the case does not meet CAFA's 100 or more persons requirement for mass actions. Moreover, the attorney general argues that, in any event, the general public exception to mass actions applies.

The defendants are arguing that diversity jurisdiction has always been decided based on the citizenship of the real parties in interest, and that the text of CAFA applies in the same way to state actions as it does to non-state actions. Because individual purchasers of LCD products are the real parties in interest for the state's restitution claims, the defendants argue that *Hood* satisfies CAFA's 100 or more persons requirement. Moreover, because the restitution claims are brought on behalf of individual purchasers rather than the general public, the defendants argue that the general public exception does not apply.

The *Hood* case has major implications for both large and small businesses that operate across state lines. Defendants generally perceive that state court presents more risk than federal court because they believe it is more difficult to prevail on pre-trial motions in state court; state court exercises less control over juries, expert witnesses and the evidence admitted at trial than federal court; and appellate court review tends to be more meaningful in federal court than in state court. Similarly, state attorneys general tend to perceive a much larger 'home court advantage' in state court than in federal court, and try to keep their cases against out-of-state businesses in state court.

The Supreme Court will hear oral arguments in *Hood* on 6 November 2013.

likely. The DoJ will often demand separate counsel for certain executives and claim that there is a conflict of interest. This demand is often a tactical move to separate individuals from company counsel. The DoJ might then seek to pressure the individual separately to cooperate and incriminate the company. Counsel for the company must also consider whether the DoJ will make a motion at a later date to disqualify company counsel, a risk in certain situations. While DoJ statements about conflicts need to be taken seriously, they are not conclusive.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

A counsel may represent multiple corporate defendants in a civil case, although there needs to be a fairly clear unity of interest. In a criminal case, representation of multiple corporate defendants may violate the defendant's right to effective assistance of counsel under the Sixth Amendment to the Constitution.

35 Payment of legal costs

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

A corporation may indemnify or advance employees money for legal fees provided that the corporation's by-laws provide for such indemnification. Most company by-laws provide for indemnification. A corporation may not indemnify an employee for future criminal activity. However, courts have upheld indemnification for criminal activity that occurred before the parties entered into the indemnification agreement. See, for example, *Brown v Gallagher*, 902 N.E. 2d 1037, 1040 (Ohio Ct. App. 2008).

36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions?

The DoJ's respect for enforcement actions in other jurisdictions is based on the principles identified by the International Competition Policy Advisory Committee Final Report, issued in 2000. The DoJ follows the principles that competition agencies must be mindful of the impact of their actions in other jurisdictions, respect the ideas of others, build trust between the enforcement and business communities, and encourage an ongoing dialogue between enforcement agencies, businesses, consumers, practitioners and academics (Antitrust Division's International Program, 10-11, available at www.justice.gov/atr/public/international/program.pdf).

To understand how these principles are applied in practice, the DoJ's focus must be recognised. In criminal cases, the DoJ analyses the effects that the alleged cartel had in the US. As such, the focus is less oriented toward other jurisdictions. In addition, the constitutional prohibition on double jeopardy would not be applicable, as it

governs being tried twice for the same offence by the same sovereign (see U.S. Const. amend. V; *Bartkus v Illinois*, 359 U.S. 121, 128-32 (1959)). Nonetheless, a recent example of the DoJ respecting international comity can be found in the plea agreements of three current and former executives of Dunlap Oil & Marine Ltd. The executives were sentenced to serve 24, 20 and 30 months in prison respectively for participating in a conspiracy to rig bids, fix prices and allocate market shares in violation of the Sherman Act. The executives were also criminally charged with cartel offences in the UK, and subsequently sentenced to service 24, 20 and 30 months in prison. The plea agreements with the DoJ effectively provided for concurrent sentences in the US and the UK, providing that the DoJ would recommend that the US sentences could be reduced by one day for each day of imprisonment imposed in the UK. Because the sentences in the UK and US overlapped in duration, the defendants were not required to serve prison sentences in the US. See the DoJ press release 'British Marine Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy' (1 December 2008), available at www.justice.gov/opa/pr/2008/December/08-at-1055.html; and Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, US DOJ, 'Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program' (26 March 2008), available at www.justice.gov/atr/public/speeches/232716.htm.

37 Getting the fine down

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

This depends on the case. Early cooperation can help, but can sometimes be ill-advised. Therefore, it is better to prepare a strong defence.

* *The author recognises the significant contribution of Lauren Giudice of the firm. White & Case represents parties in the LCD, OPEC and Minn-Chem cases discussed herein.*

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