

The International Comparative Legal Guide to:

Cartels & Leniency 2010

A practical insight to cross-border Cartels & Leniency



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is statutory (Sherman Act §1). Federal law, along with most state statutes, provides for both criminal and civil sanctions, and applies to both individuals and corporations.

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 1 of the Sherman Act prohibits: “Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Criminal prosecutions under the statute are focused on “hard core” antitrust violations, e.g., price-fixing, bid rigging, and market allocation.

1.3 Who enforces the cartel prohibition?

The Antitrust Division of the United States Department of Justice (“Division”) is the principal government enforcer of the criminal aspects of the law. The Assistant Attorney General (nominated by the President and confirmed by the Senate) leads the Division, delegating supervision of criminal enforcement matters to the career Deputy Assistant Attorney General and his subordinate, the Director of Criminal Enforcement. Investigations are conducted through the Division’s National Criminal Enforcement Section in Washington, D.C. and seven regional field offices. The Division’s criminal trial attorneys work with a range of law enforcement professionals, including agents from the Federal Bureau of Investigation, state law enforcement officers, U.S. Attorneys’ offices, and foreign authorities in international cases.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Antitrust Division Manual (<http://www.usdoj.gov/atr/public/divisionmanual/index.htm>) describes prosecutorial procedures. A number of sources, including business or consumer complaints, press reports, corporate insiders seeking immunity, private litigation, and periodic industry analyses, may provide information that prompts an investigation. Ordinarily, an investigation will be authorised when an indication exists of a clear and deliberate

violation, the amount of commerce affected is substantial, and the investigation would not be duplicative of another one being conducted by the Division or other agencies.

Once the Director of Criminal Enforcement has approved the opening of an investigation, the case is cleared with the Federal Trade Commission (FTC), and then a grand jury is usually convened. The Division may gather evidence through voluntary requests, corporate informants, and compulsory process (search warrants, subpoenas). Grand jury proceedings are confidential, and access while the jury is in session is limited to the jurors, the government’s attorneys, essential court staff, and witnesses. The Division will usually issue a “target letter” to the individual or corporation under investigation, advising the recipient of the investigation, and offering an opportunity to testify or meet with Division attorneys. At the end of this process, the Division will seek an indictment from the grand jury, which will be granted upon a showing of “probable cause” that a crime has occurred.

After the indictment has been approved by the jury and presented to the court, a judge will usually issue a summons, requiring the defendant’s appearance at an arraignment, where he will be advised of the charges and enter a plea. Many cases settle during plea bargaining, at which time the judge will review the plea for conformance with due process, then order a presentence investigation report by the court’s probation office. Counsel will have the opportunity to file briefs supporting or opposing the report, and at a final sentencing hearing the judge will determine the sentence, abiding by any federal statutory maximum or minimum sentence provisions, and referring to the advisory federal Sentencing Guidelines.

1.5 Are there any sector-specific offences or exemptions?

Yes. There are two types of exemptions to the antitrust mandate of free competition: (a) court-made exemptions based on considerations of constitutional rights and federalism; and (b) legislative exemptions based on Congress’s protection of certain industries or activities.

Significant among the former are the following:

- Any regulated business that must file its prices for approval by a regulatory agency is eligible for immunity under the “filed rate” doctrine, under the theory that the agency (not a price-fixing conspiracy) is the final entity determining price.
- Likewise, the “state action” doctrine applies when the conduct of an individual or business is undertaken pursuant to the “active supervision” of a state regulator or law that has “clearly articulated” its approval of the restraint. For the same reason, actual state governments and agencies are also immune from the antitrust laws.

- The *Noerr-Pennington* doctrine provides a constitutional defence to charges of conspiracy, when the underlying actions are protected under the First Amendment rights of freedom of speech and petitioning the government, e.g., lobbying activities and court and agency filings.
- Finally, various international immunities protect foreign sovereigns with limited exceptions, or individuals or businesses who claim their unlawful conduct was either commanded by or was actually the act of a foreign state.

In addition, there are statutory exemptions applicable to labour unions, international shipping, communications, energy, agricultural cooperatives, insurance, and sports leagues. These exemptions may be narrowly focused by industry or by a specific type of immunity conferred. For example, under the Export Trading Company Act, a person may obtain a Certificate from the U.S. Department of Commerce conferring immunity for criminal actions, so long as it is established that its exports will not adversely affect competition in the U.S. Alternatively, wholesale immunities apply to agricultural associations under the Capper-Volstead Act, state-regulated insurance companies under the McCarran-Ferguson Act, and ocean shipping under the Shipping Act. Finally, because the Sherman Act only regulates activity concerning “trade or commerce,” non-commercial restraints (such as certain collegiate athletic association rules) are not subject to prosecution.

1.6 Is cartel conduct outside the United States covered by the prohibition?

Yes, if it affects United States commerce. Under the Foreign Trade Antitrust Improvements Act of 1982 and principles of international comity, foreign cartel conduct is not prohibited by the U.S. antitrust laws if it does not result in a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce (15 U.S.C. §6a). That said, some of the most egregious and harmful cartels are international in scope, flowing across jurisdictions and industries. Indeed, the Division states that international cartels account for over 40% of its grand jury investigations (Scott D. Hammond, Dep’y Ass’t Att’y Gen., Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program, at 17 (Mar. 26, 2008) (www.usdoj.gov/atr/public/speeches/232716.pdf)).

While prison terms for foreign nationals were once rare, they are increasingly common, with the Division seeking sentences of at least 6 months and sometimes 12 months or more. During the 1990s, foreign executives would often negotiate “no jail” deals with the Division; however, as a matter of policy, the Division now insists on incarceration for foreign nationals as well as U.S. citizens. Thus, in 2008 alone, the Division secured jail sentences for foreign nationals averaging 18 months.

The Division zealously implements border watches to ensure that any visiting business officials can be detained and questioned, served with a subpoena, or arrested and prosecuted. Grand jury subpoenas can reach U.S. citizens residing abroad, but not foreign nationals. International coordination among enforcers facilitates cooperation on simultaneous dawn raids, service of subpoenas, and evidence exchange. The Division has antitrust cooperation agreements with counterparts in Australia, Canada, the European Union, Germany, Brazil, Israel, Japan, and Mexico. Nevertheless, for those foreign nationals who decline to submit to U.S. jurisdiction, the Division has yet to secure the physical extradition of a defendant on criminal antitrust charges (one extradition proceeding of note is the case of Ian Norris in the United Kingdom, which is ongoing).

Finally, along with the rise of international prosecutions have come questions about the appropriate methodology used to determine “volume of affected commerce” (and, derivatively, fines) under the Sentencing Guidelines. For example, officials have considered whether sales occurring entirely outside the U.S. for the shipment of cargo into the U.S. should be included, and whether sales of components occurring entirely outside the U.S. should be included when products into which components are incorporated are subsequently sold into the U.S. Though the Division has committed that it will consider only domestic commerce affected by a conspiracy (Scott D. Hammond, Charting New Waters in International Cartel Prosecutions, at 14 n.28 (Mar. 2, 2006) (<http://www.justice.gov/atr/public/speeches/214861.pdf>)), how it will determine what is “domestic” in any given case is unclear. In the context of restitution, however, the Division has stated that leniency applicants are “not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused” by the conduct reported (Scott D. Hammond, Recent Developments Relating to the Antitrust Division’s Corporate Leniency Programme, at 5 (Mar. 5, 2009) (<http://www.usdoj.gov/atr/public/speeches/244840.pdf>)).

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power**	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	No	Yes*
Carry out an unannounced search of residential premises	No	Yes*
■ Right to ‘image’ computer hard drives using forensic IT tools	No	Yes*
■ Right to retain original documents	No	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

** In non-criminal matters, the Division uses civil investigative demands, the scope of which is outlined in the Antitrust Civil Process Act, 15 U.S.C. §1312. In criminal matters, it must rely on grand jury subpoenas, which can only be issued in a criminal investigation when a grand jury has been empanelled, but do not require the prior approval of the grand jury. Antitrust Div. Manual, Ch. III.E.1.b.; Antitrust Div. Grand Jury Manual, Ch. 3 Part 1 B.1.b (<http://www.justice.gov/atr/public/guidelines/206696.htm>). Searches and seizures require prior court authorisation based on probable cause.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

Because cartel conduct is regulated as a criminal offense, constitutional law imposes boundaries on the government's investigations. Thus, if the Division wants to conduct an involuntary search of business premises, or seize records or electronic documents, it must apply to have a search warrant issued by a federal judge, identifying what it expects to find. Pursuant to the "exclusionary rule" (unique to U.S. jurisprudence) if the government conducts an illegal search, it will be prohibited from using against the defendant in trial not only any evidence it obtained illegally but also any derivative evidence discovered solely because of evidence found in the unlawful search.

Likewise, the Fifth Amendment prohibits the Division from compelling individuals to incriminate themselves. The Division can, however, issue a subpoena compelling an individual to testify before a grand jury through a grant of "use" immunity, protecting the witness from later prosecution based on his or her testimony (18 U.S.C. §6002). It should be noted that the protection against self-incrimination does not apply to companies or to the compulsory production of non-testimonial evidence.

2.3 Are there general surveillance powers (e.g. bugging)?

Yes. With court authorisation upon a showing of probable cause to believe a crime may be detected, the Division can conduct covert surveillance through either "wiring" cooperating witnesses, or applying for a court order allowing it to videotape, tap phones, or otherwise intercept oral or electronic communications. Mere surveillance of individuals in public, or seizure of evidence placed in public without any reasonable expectation of privacy (e.g., sidewalk trash disposal), does not require court authorisation or a showing of probable cause.

2.4 Are there any other significant powers of investigation?

Yes. As a practical matter, the Division's leniency programme encourages a "race" to the government for conspirators wishing to avoid onerous criminal jail time and fines by disclosing valuable evidence before anyone else comes forward. This cooperation often provides the government extremely valuable evidence.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Federal law enforcement officers (e.g., FBI agents) are the persons authorised to carry out or execute search warrants, but Division lawyers will often join enforcement officials for unannounced searches. On the eve of the issuance of a grand jury subpoena or search warrant, Division lawyers may conduct unannounced "drop in" visits to interview witnesses and targets in their homes or offices.

Constitutional due process protections prohibit the government from interviewing suspects in police custody who have not been informed of their right to remain silent and their right to an attorney. If the suspect requests an attorney, all questioning must cease until the attorney's arrival. Any statements made without the proper notification of rights or in response to police questions after an attorney has been requested will not be admissible in court -- though this protection does not apply to drop-in interviews because the interviewees are not in "custody."

2.6 Is in-house legal advice protected by the rules of privilege?

Yes. Unlike some other jurisdictions, the U.S. recognises attorney-client privilege for confidential communications involving in-house counsel for the purpose of obtaining legal advice. While granted equal recognition in principle, in practice, claims of privilege involving in-house counsel communications may be scrutinised more closely by courts or challenged more often by plaintiffs in light of the fact that in-house counsel often occupy dual roles as business and legal advisors. Communications in the former capacity are not protected.

In addition, attorney-client privilege protection may attach to joint defence communications among parties under investigation since there is a widely recognised "common legal interest" exception to the general rule that disclosure to third parties constitutes a waiver of the privilege. The Division's leniency programme may effectively obviate this protection for colluding defendants, in the incentive it creates for defection. But the Division's leniency programme does not require the production of privileged documents, nor does it consider the disclosure of privileged information in furtherance of a leniency application as a waiver (Scott D. Hammond and Belinda A. Barnett, U.S. Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Leniency FAQ), at 16-17 (Nov. 18, 2008) (<http://www.usdoj.gov/atr/public/criminal/239583.pdf>)).

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Although government lawyers do not necessarily have to be licensed in the state in which they practice, they are subject to the court and local bar rules in any state in which a criminal investigation or trial is pending and in which they are acting as attorneys (28 U.S.C. §530B). Under such rules, government prosecutors are generally prohibited from directly contacting parties under investigation who have legal representation without their counsel present.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Yes. The Division focuses intently on potential obstruction, perjury, false statements, and similar crimes aimed at the integrity of the investigation process. The Division recognises that because "[c]artelists are frequently adept at concealment, which can include actively obstructing a prosecutor's investigation . . . punishment imposed for impeding a cartel investigation should be on par with punishment for the original offense." (Thomas O. Barnett, Ass't Atty Gen., Antitrust Div., Criminal Enforcement of Antitrust Laws: The U.S. Model, at 6 (Sept. 14, 2006) (<http://www.justice.gov/atr/public/speeches/218336.pdf>)).

Moreover, when cartel conduct is facilitated by other illegal conduct, the Division will often bring related offenses, such as mail and wire fraud, money laundering, and tax offenses, along with antitrust charges. These non-cartel offenses have, in fact, more than tripled in the past three years, rising to 28 charges in 2008, of which the Division secured convictions in 22. They are likely to continue to rise in 2009, following implementation in March of the Division's Economic Recovery Initiative, which has in six months already resulted in 250 training sessions for over 13,000 government auditors to assist in identifying bribery and fraud in addition to Sherman Act violations suggested by "red flags of

collusion.” (Scott D. Hammond, *Follow the Money: An Update on Stimulus Spending, Transparency and Fraud Prevention* (Sept. 10, 2009) (<http://www.justice.gov/atr/public/testimony/250274.pdf>).

In similar fashion, when a leniency applicant has obtained immunity on antitrust charges, the Division will forego pressing related non-antitrust charges that facilitated the cartel conduct. It will not, however, necessarily forego unrelated criminal charges such as tax fraud, that are of concern to other enforcers in other Divisions of the DOJ.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

For each count, a corporation may be fined either:

- up to US\$100 million; or
- twice the gain from the illegal conduct or twice the loss to the victims (15 U.S.C. §1; 18 U.S.C. §3571(d)).

For large cases of international scale, the Division usually seeks the latter. For example, in 2008, it secured a fine against LG Display Co. for its participation in the LCD flat panel cartel for US\$400 million.

A company convicted of cartel conduct may also be debarred from participation in federal contracts under the Federal Acquisition Regulations.

3.2 What are the sanctions for individuals?

For individuals, the law authorises:

- fines up to US\$1 million; and
- prison sentences up to 10 years.

The Division may elect an alternative fine of twice the gain or twice the loss, but rarely does so as the focus for individuals is securing jail time. While in 2008 it secured only US\$1,485,000 in fines against individuals (compared to US\$695,000,000 against corporations), it obtained 14,331 total days of incarceration with an average sentence of 25 months.

3.3 What are the applicable limitation periods?

The law bars criminal prosecutions for cartel participation “five years . . . after such [an] offense shall have been committed.” (18 U.S.C. §3282(a).) The period runs until formal charges are filed in an indictment or information; it does not stop merely because the Division has opened a grand jury investigation. In international investigations, the Division may seek a court order tolling the period if it submits an official request to a foreign authority for assistance in gathering evidence abroad. The Division may also request a target of investigation to agree to toll the statute of limitations during plea negotiations.

The statute of limitations does not begin to run from the beginning of a conspiracy, but rather from the date on which the purpose of the conspiracy has been achieved or the conspiracy has been abandoned. In other words, the clock does not start until the last overt act has been committed; thus, proof of an overt act taken in furtherance of the conspiracy during the five years preceding indictment will defeat a limitations defence. Finally, in criminal cases, “fraudulent concealment” of the conspiracy will not stop the clock from running.

Mere cessation of illegal conduct may not suffice to demonstrate

“withdrawal” from a conspiracy. Rather, proof of withdrawal generally requires showing that the defendant has communicated his withdrawal in a manner reasonably calculated to inform his co-conspirators or has otherwise taken some clear and unambiguous action to disassociate himself from the conspiracy.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

A company can pay the legal fees of an employee. Corporate law in the U.S. is largely a matter of state regulation and private agreement. The authority of a company to authorise advance payments or payment in full may be limited by the corporate charter, applicable by-laws, and individual employee contracts, and is subject to governing state law on indemnification. Companies will often advance the legal costs of employees under investigation or provide representation to them. In the case of conviction, federal law prohibits a company from paying the criminal fines of its employees unless expressly permitted to do so under state law (18 U.S.C. § 3572).

Potential conflicts of interest between a company and its executives must be borne in mind by corporate counsel. For example, a corporation cannot obtain immunity under the Division leniency programme without ensuring the cooperation of its employees with an investigation. Such cooperation requires identifying at least some personnel directly involved in illegal conduct. In one recent case outside the antitrust context, a company retained a law firm as outside counsel for an internal investigation. In the course of that investigation, the firm interviewed an executive, allegedly failed to make clear to the executive the absence of any attorney-client relationship between them, and subsequently disclosed information obtained from the interview. The government brought charges against the executive, who moved to suppress the evidence. A federal trial judge threw out the evidence, and recommended bar disciplinary proceedings against the attorneys who had interviewed the executive and later disclosed the confidential communications (*United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. Apr. 1, 2009), rev’d and remanded, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)). While the appeals court subsequently reversed based on the executive’s knowledge that the investigation’s findings would be reported to the company’s auditors, the trial judge’s decision remains a powerful reminder of the importance of clarifying the attorney-client relationship early and definitively.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. The leniency policy in its modern form was adopted in 1993 (<http://www.justice.gov/atr/public/guidelines/0091.pdf>). In 2008, the Division issued substantial clarifications and public guidance to make its leniency programme more transparent (<http://www.usdoj.gov/atr/public/criminal/leniency.htm>).

The policy provides procedures by which a corporation can receive amnesty for confessing its role and fully cooperating with the Division. A corporation is eligible for Type A leniency if it comes forward before an investigation has started and: (1) the Division has not received information about the reported illegal activity from any other source; (2) the company took prompt and effective action to end its participation in the criminal activity upon its discovery; (3) the company reports the conduct with candour and provides full, continuing and complete cooperation throughout the investigation;

(4) the confession is a corporate act, not the isolated confession of a few individuals; (5) where possible, the corporation makes restitution to injured parties; and (6) the company has not coerced others into participating in the conduct, and was not the leader in or originator of the conspiracy.

If the Division already has evidence of a violation (whether or not an investigation has commenced), a company can apply for amnesty under Type B, which, in addition to the remedial corporate behaviour mandated under Type A, requires that the Division not already have evidence likely to result in a conviction against the company, that the company be the first to come forward and qualify for leniency, and that the grant of leniency not be unfair to others (i.e., that the applicant is not the conspiracy's single organiser or single ringleader) (Leniency FAQ at 15-16).

Key features of the policy are: (1) only one company can qualify for leniency for each criminal conspiracy; (2) a company must admit criminal wrongdoing to obtain a conditional leniency letter; (3) the Division considers a company to have "discovered" illegal activity whenever either the board of directors or in-house or outside counsel became aware of the activity; and (4) leniency is not guaranteed for former employees, but the corporation's directors, officers and employees can receive "tag along" immunity under a corporate application when they admit their involvement and cooperate fully.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), provides further incentives for cooperation. Under ACPERA, if a company also cooperates with plaintiffs in civil actions for damages against other members of the cartel, the company will be liable to victims of the conspiracy only for compensatory "single" (not triple) damages, and will be liable for such damages only with respect to its own sales as opposed to joint and several liability for treble damages based on sales for the entire conspiracy.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. To obtain a marker, counsel must report the discovery of information suggesting the company has engaged in criminal conduct; disclose the general nature of that conduct; identify the industry, product, or service involved; and identify the company. The Division has stated that the evidentiary standard for obtaining a marker is low in order to encourage companies to come forward at the first sign of a violation, even if they do not have confirmation. The length of time during which a marker will be provided is finite and based on the scale of investigation required -- usually approximately 30 days.

An anonymous marker is also available in limited circumstances for a very short term (two or three days), when counsel wants to secure the client's place in line but needs time to verify additional information before providing the client's name.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. Applications and proffers of evidence may be -- and routinely are -- made orally. Conditional acceptance into the leniency programme is reduced to writing in the form of a conditional leniency letter.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The Division holds the identity of leniency applicants in strictest confidence. Information provided by applicants is also confidential and will not be disclosed (even to foreign authorities) without a court order or, as is more often the case, consent by the applicant (Leniency FAQ at 27).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The cooperation requirement ends once the Division's investigation is complete or closed, any pending prosecutions of co-defendants are concluded, and the corporation has discharged all of its relevant duties, such as making restitution. The applicant will be notified of the completion of its cooperation requirements by receipt of a final leniency letter, formally notifying the applicant in writing that it has been granted unconditional leniency.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes. If an applicant is too late to qualify for amnesty for an already disclosed conspiracy in one market, it may qualify for "amnesty plus" leniency by disclosing a related conspiracy in another market. If it qualifies for leniency in the second market, the Division will recommend to the sentencing court that the company receive a substantial discount (59 percent in one case) (Scott D. Hammond, *Measuring the Value of Second-In-Cooperation in Corporate Plea Negotiations*, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2006) (www.usdog.gov/atr/public/speeches/215514.htm)) in its fine for the conspiracy in the first market. The size of the discount will depend on the strength of the evidence provided by the cooperating company in the second market, the potential significance of the violation reported, in terms such as volume of commerce, scope, and number of co-conspirators, and the likelihood the Division would have discovered the second market conspiracy on its own. As an additional incentive, the Division also has a "penalty plus" policy, in which it will encourage a sentencing court to consider the failure to report a separate antitrust offense that is later discovered and successfully prosecuted as an aggravating factor in sentencing.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. While individuals may be covered under a corporate leniency application, a separate procedure covers individuals who apply on their own initiative. Such individuals are eligible so long as the Division has not received information from another source; the report is candid and complete; the individual cooperates; and the individual did not coerce another party to join the conspiracy or act as an originator or leader thereof. An individual ineligible under this policy may be considered for statutory or informal immunity on a case-by-case basis.

Additionally, where anticompetitive conduct involves government contracts, whistleblowers may obtain a monetary reward under the False Claims Act for reporting fraudulent activity. Currently, whistleblowers can receive a "bounty" of as much as 25 percent on any recovery made by the federal government for any false claim reported.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

Yes. Before charges are filed, a target may “appeal” Division Staff’s decision to the office of the Criminal Enforcement DAAG. When that is unsuccessful, most cases result in a settlement via plea agreement. Typically, as a result of negotiations (which are privileged), the defendant will agree to plead guilty and cooperate with the Division. The U.S. Sentencing Guidelines note these concessions by the defendant, and will adjust incarceration or fine magnitude. The Division will also agree to make a recommendation within an offense range lower than what the defendant would receive had she taken the case to trial and lost. The court’s probation office will consider the defendant’s cooperation when making its recommendation to the judge. Ultimately, the judge, guided by the Sentencing Guidelines, will determine the sentence. Defendants should be aware that any sentence of jail time will likely be served in full, because of the absence of parole in federal criminal law.

7 Appeal Process

7.1 What is the appeal process?

In federal matters, a defendant may (as of right) appeal from a conviction in the district trial court to the applicable circuit court of appeals. A defendant unsatisfied with that result may then petition the U.S. Supreme Court to hear his or her case, but appeal is only allowed when at least four of the nine justices consent to take the matter. Such appeals are very rarely granted.

The subject of an appeal is also circumscribed. Courts will only overturn a guilty verdict if the evidence is legally insufficient to support conviction. Usually, appeals are taken on procedural issues concerning the introduction of evidence or testimony, the instruction of the jury, and other technical matters, but even here the likelihood of a reversal is low as appellate courts apply a “harmless error” standard in many situations that will allow a verdict or sentence to stand even if the trial judge’s decision was in error as a matter of law.

7.2 Does the appeal process allow for the cross-examination of witnesses?

No. The cross-examination of witnesses is a constitutionally protected right of every defendant at the trial stage, but, at the appellate stage, argument and presentation are on the briefing papers and the “record” from proceedings below.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Section 4 of the Clayton Act provides direct purchasers of cartelised products the right to sue for three times the plaintiff’s actual loss, attorneys’ fees, and pre- and post-judgment interest. Moreover, other factors make follow-on civil actions common:

- Each defendant is jointly and severally liable with the others, with no right of contribution.

- State Attorneys General have *parens patriae* authority to litigate on behalf of their residents.
- Plaintiffs can use certain final judgments entered against a defendant in a government criminal or civil antitrust proceeding as prima facie evidence of a violation (15 U.S.C. §16(a) (providing that a judgment against a defendant in a government antitrust action may be used against the defendant in a subsequent private antitrust action when the judgment is final, is not a consent judgment entered before any testimony was taken, and concerns matters directly litigated and decided in the government action)).

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. Rule 23 of the Federal Rules of Civil Procedure provides that to certify a class the representative must prove:

- numerosity (that joinder of all unnamed plaintiffs is impracticable);
- commonality (that common issues of fact and law predominate);
- typicality (that the claims or defences of the representative are typical of the claims of the unnamed plaintiffs); and
- adequacy (that the representative’s counsel is competent to litigate the claims fully).

Additionally, there must be a proper class representative identified for each claim of damages, meaning, in practice, that plaintiff’s counsel must find consumers who purchased a product from each defendant during the period of the conspiracy and (for indirect purchaser claims) in each state that allows indirect purchaser claims.

Class actions are not uncommon, and are usually divided into federal direct purchasers and state-law indirect purchasers.

8.3 What are the applicable limitation periods?

For federal civil cases, the limitations period is four years. This period is tolled during and for one year following the pendency of a government antitrust suit involving the same alleged violation. The period is also tolled when the violation is fraudulently concealed by the conspirators. Additionally, when a class suit is filed and a court later declines to certify the class, the absent class plaintiffs receive the benefit of tolling from the date the complaint was filed to the date the court denied certification. For state claims, the periods vary, but are usually not much longer or shorter than the federal period.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

Successful plaintiffs can recover their reasonable attorneys’ fees, litigation costs, and pre- and post-judgment interest. Additionally, civil plaintiffs need only prove their case by a preponderance of the evidence (showing that the violation was more likely than not), while the government must prove criminal charges beyond a reasonable doubt.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

Yes. Civil damages claims for cartel conduct are the norm. For national or multinational companies with high turnover, damages can be quite high, as small overcharges are aggregated across millions of sales and then inflated by trebling.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

AAG Varney has stated that vigorous cartel enforcement is more necessary than ever in hard times, as businesses face the temptation to collude to protect margins. The Antitrust Division has implemented a Recovery Initiative to assist federal agencies receiving funds under the American Recovery and Reinvestment Act (totalling over US\$700 billion in federal “stimulus” spending) to detect collusion and fraud. A Citizen Complaint Center has been created to accept reports of such conduct. And the Division has published on its website “Red Flags of Collusion” providing guidance as to what types of conduct and markets are ripe for collusion. These actions complement and expand the Procurement Fraud Task Force initiatives of the previous administration.

On the legislative front, ACPERA’s provisions providing for detrebling of civil damages for corporations obtaining leniency were extended for one year in June 2009, ensuring that the Division’s leniency programme remains highly attractive and effective. Additionally, as of the writing of this article, Congress is considering partial repeal of the federal antitrust immunity for health and medical malpractice insurers, which would subject these insurers to federal criminal and civil enforcement in addition to state-law cartel prohibitions already in place.

9.2 Please mention any other issues of particular interest in the U.S. not covered by the above.

The year 2008 was a noteworthy year for the Division. It filed 54 cases against 59 individuals and 25 companies, the highest year-end case total in almost a decade. At year’s end, it had 137 pending grand jury investigations, a number not seen since 1992. Fines secured exceeded US\$700 million, the second-highest amount in one fiscal year. Jail time averaged 25 months. Total average fines collected from cartel defendants continue to rise, having more than doubled over the past five years and showing no signs of abating. As of mid FY2009, fines already exceed US\$1 billion. Through 2009 and beyond, an upward ratchet in fines and jail time is likely as defendants continue to be exposed to the heightened penalty provisions of ACPERA.

The prospect of jail for cartelists has also increased. In January 2009, the Division secured a 48-month jail sentence in its investigation into collusion in shipping freight services between the continental United States and Puerto Rico. The sentence represents the longest jail term for a single antitrust offense ever. In 2008, the Division announced that three U.K. “marine hose” cartel defendants had been sentenced according to unprecedented plea agreements contemplating cooperation with and incarceration in a foreign jurisdiction. In 2009, the Division also continued its successful prosecution of the international “air cargo” cartel, securing plea agreements and US\$214 million in fines from three airlines. In total, 15 airlines and four executives have pleaded guilty in the ongoing investigation, resulting in fines of more than US\$1.6 billion and jail time for three individuals.

Additionally in 2009, Australia revised its law to impose jail terms of up to 10 years for cartel conspirators, Japan increased its maximum prison term from three to five years, and Russia instituted a maximum prison term of six years for repeat violators of antitrust law (not only cartel conduct). This increasing criminalisation of cartel conduct across jurisdictions will likely hinder the ability of foreign nationals to escape prosecution.

Facing recessionary pressures, many corporations will understandably be extremely cognizant of costs, including expenses associated with legal issues and exposure. However, given the sound institutional infrastructure behind cartel enforcement, the increased anti-fraud and collusion training and monitoring associated with the Division’s Recovery Initiative, the political support and agency leadership driving these programmes forward, and the daunting civil and criminal liability for corporations and executives, antitrust compliance should be a top priority for any company doing business in, or selling into, the United States.

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