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United States

CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in United States.

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UNITED STATES
CARTELS

1. What is the relevant legislative framework?

The United States federal antitrust laws provide for both civil and criminal penalties for corporations and individuals. Section 1 of the Sherman Act prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations." 15 U.S.C. § 1. In addition to criminal enforcement of the Sherman Act, private parties (including state and local governments) can bring civil actions for damages due to Sherman Act violations through Section 4 of the Clayton Act. 15 U.S.C. § 15.

A criminal violation of Section 1 of the Sherman Act has four elements: (1) an agreement or concerted action (2) between two or more potential competitors (3) in an unreasonable restraint of trade (4) in or affecting interstate commerce or commerce with foreign nations. To convict a defendant under this provision, the government must prove each of these elements beyond a reasonable doubt.

Certain industries are exempted from the requirements of the Sherman Act by federal statutes, including the Webb-Pomerene Act (export trade); the Capper-Volstead Act (agriculture); McCarran-Ferguson Act (insurance); the Shipping Act and the Merchant Marine Act (ocean cargo); and the Defense Production Act (defense production). Other exempted groups include states and certain state-supervised entities under the Parker Immunity doctrine, joint lobbying or litigation efforts between competitors under the Noerr-Pennington doctrine, and Major League Baseball.

2. To establish an infringement, does there need to have been an effect on the market?

Judicial precedent divides potential violations of the Sherman Act into two categories: conduct that is unlawful per se, and conduct that is subject to the rule of reason. Conduct that is unlawful per se may be prosecuted without proof of an effect on the market. Conduct that is unlawful per se includes certain horizontal restraints such as price-fixing; bid-rigging; and geographic, market, and customer allocation. The Department of Justice ("DOJ") has recently signalled that it also views "no-poach" and other anti-competitive labour market agreements as per se unlawful. Conduct subject to the rule of reason includes other agreements between competitors, such as information exchanges and joint ventures. This category of conduct requires showing that the anticompetitive effect on the market is unreasonable compared to its procompetitive effect. Due to the difficulty of proving this beyond a reasonable doubt, the DOJ typically prosecutes only per se violations criminally.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The Foreign Trade Antitrust Improvements Act (FTAIA) clarifies the application of the US antitrust laws to conduct that occurs outside the jurisdiction. 15 U.S.C. § 6a. Under the FTAIA, the government may only prosecute foreign conduct that has a "direct, substantial and reasonably foreseeable" effect on US commerce. However, the meaning of "direct, substantial, and reasonably foreseeable" is not well-settled law. The law is also unsettled as to whether the FTAIA applies with the same force to both criminal and civil actions, although some courts have recently treated criminal cases similarly to civil actions with regard to the FTAIA. The DOJ's Antitrust Division (the "Division") is increasingly aggressive in recent years in pursuing investigations and prosecutions of cartel behaviour outside the United States.

4. Which authorities can investigate cartels?

The DOJ's Antitrust Division and the Federal Trade Commission ("FTC") can investigate cartel cases. However, the FTC may only challenge Sherman Act

violations civilly, while the Division may enforce the federal antitrust laws through both civil suits and criminal prosecution. As a result, the FTC ordinarily refers evidence of criminal cartel conduct to the Division for enforcement, as the Department has exclusive jurisdiction over criminal cartel enforcement. The FTC can investigate and challenge per se illegal conduct that falls short of a criminal violation. A United States Attorney's Office may also investigate and prosecute civil and criminal antitrust violations after receiving approval of the Assistant Attorney General of the Division.

In addition to federal antitrust enforcement, some states have statutes providing their attorneys general authority to investigate and prosecute cartel cases. State attorneys general may also sue civilly to recover treble damages for violations of federal antitrust law.

5. What are the key steps in a cartel investigation?

After learning of a potential antitrust violation through public reports, industry whistle-blowers, or other sources, the Division may open a criminal antitrust investigation as a preliminary inquiry. The Division considers the following when presented with a request to open a preliminary inquiry: (1) whether there is reason to believe that an antitrust violation may have been committed; (2) what amount of commerce is affected; (3) if the investigation will duplicate or interfere with other efforts of the Division, the FTC, a United States Attorney, or a state attorney general; and (4) whether allocating resources to the matter fits within the needs and priorities of the Division.

After any preliminary investigation, the Division ordinarily convenes a grand jury. Through the grand jury, the Division can gather relevant documentary and testimonial evidence, which it may ultimately present to the grand jury. The grand jury then determines whether to issue an indictment charging the defendant and initiating formal criminal proceedings. In addition to an indictment, the Division can also file a criminal complaint or information against a defendant.

The criminal statute of limitations for a Sherman Act antitrust offense is five years. 18 U.S.C. § 3282(a). Thus, the DOJ must bring charges within five years of the date of the offense. The civil statute of limitations for a Sherman Act antitrust offense is four years.

6. What are the key investigative powers that are available to the relevant authorities?

In a criminal cartel case, the DOJ can utilise the grand jury in its investigation. The grand jury may issue subpoenas for documentary (*subpoena duces tecum*) or testimonial (*subpoena testificandum*) evidence. A witness who refuses to testify in response to a grand jury subpoena may be held in contempt and be subjected to fines and imprisonment. The government can also bring obstruction of justice charges against individuals who refuse to testify or who attempt to impede enforcement efforts by destroying evidence or providing false information to the government. The Division has pursued a number of obstruction cases in recent years, suggesting increased enforcement on this issue.

The DOJ may also conduct unannounced searches of businesses and residences in order to seize information and documents (including by retaining the original copies). During the search itself, the DOJ may secure and seal the premises. The US Constitution requires that the DOJ obtain a search warrant from an independent authority before conducting a search or seizure. To obtain a search warrant, the Division must submit an affidavit stating facts that show probable cause that a crime has been committed, that evidence of the crime exists, and that the relevant evidence is on the premises to be searched. There are some exceptions to the warrant requirement, such as when a party being searched voluntarily hands over the evidence. The Division can also conduct surprise visits to individuals that are not represented by counsel without a search warrant.

The DOJ may also conduct informal witness interviews with individuals not represented by counsel. These interviews often occur at the company's premises or at the employee's home.

In a civil case, parties (potentially including, as noted, the FTC or DOJ) may request the production of specific documents or information and request written or oral testimony of individuals. If the party is the DOJ or FTC, this may be accomplished through a civil investigative demand ("CID"), which is compulsory. CIDs may not be used to conduct searches of business premises or residential premises nor seizures of property found at those premises.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The Division is obligated to ensure that its personnel do not access privileged documents, including those that may have been seized during a search. Parties may claim attorney-client privilege or privilege based on the work product doctrine.

The attorney-client privilege protects confidential communications between a client and an attorney for the purpose of obtaining legal advice. This includes communications between in-house counsel and company employees. However, not all communications with in-house legal counsel are privileged, such as when an attorney is copied on a message. Rather, the communication must contain or seek legal advice. The work product doctrine protects materials prepared in anticipation of litigation by counsel or by the client at counsel's request.

In most cases, communications with foreign attorneys are privileged if the advice relates to US law or a US proceeding.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The Antitrust Division Leniency Policy allows the first individual or company to self-report its involvement in an antitrust cartel to avoid prosecution if it "cooperates with the [DOJ]'s investigation and prosecutions, and meets other conditions."

The Corporate Leniency Policy traditionally offers two types of leniency. Both require that applicants confess fully to their participation in any conspiracy, take steps to end the participation, and commit to full cooperation with the DOJ in subsequent investigations and enforcement actions. Type A leniency requires additionally that the company have voluntarily come forward before the DOJ became aware of any illegal conduct, and in exchange, it confers automatic amnesty on the organisation and cooperating employees. Type B leniency permits applications for amnesty after the DOJ has learned of the illegal conduct and is granted only if the DOJ lacks evidence to successfully convict the applicant and determines that the leniency would otherwise not be unfair. Under Type B leniency, immunity from prosecution for employees is not automatic but will be considered. Since 2019, the DOJ also considers a company's corporate compliance programme when considering whether to grant Type B leniency.

Since April 2022, the Division's leniency policy includes a new condition: the leniency applicant must, "upon its discovery of the illegal activity, promptly report[] it to the Antitrust Division." The promptness of reporting is measured from the "the earliest date on which an authoritative representative of the applicant for legal matters—the board of directors, its counsel (either inside or outside), or a compliance officer—was first informed of the conduct at issue." Additionally, the new guidance also requires applicants to develop restitution plans earlier in the leniency process. In order to receive a conditional leniency letter, applicants must present "concrete, reasonably achievable plans" about how they will make restitution at the outset of the investigation, rather than developing such a plan as the investigation proceeds. (As under the prior leniency guidelines, in order to receive a final leniency letter, applicants must actually pay restitution.) The antitrust community is still watching to see how this new requirement will play out in practice.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Leniency is only available to the first party to qualify. However, judges may consider a company's cooperation as a mitigating factor for sentencing, and the DOJ may credit later-cooperating parties in its investigations or plea bargaining, which may result in a reduced sentence or fine. "Leniency plus," which is explained in question 3.6, may also allow for reduced sentencing based on a party's leniency status in a different market.

10. Are markers available and, if so, in what circumstances?

The DOJ operates a marker system where a company can claim a place in line for leniency. To obtain a marker, an applicant must: (1) report that they have uncovered some information or evidence indicating that the applicant has engaged in a criminal antitrust violation and disclose the general nature of the conduct discovered; (2) identify the industry, product, or service involved in terms that are specific enough to allow the Antitrust Division to determine whether leniency is still available and to protect the marker for the applicant; and (3) identify the client. The marker allows the company a finite period of time—typically, 30 or 45 calendar days—to conduct a preliminary internal investigation into the nature of its role in the conspiracy. As discussed in question 3.1, the timeliness of reporting is now a factor under the revised guidelines.

Because the leniency programme is only available on a

"first in" basis, the marker system can play a critical role in determining which amnesty applications will be granted. Only one organisation or individual can receive leniency per conspiracy, and the DOJ reports that "organisations have lost the race for leniency by a matter of hours and faced significant fines" as well as prosecution of their senior executives as a result.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Cooperation obligations are laid out in a conditional leniency agreement which may be revoked based on the leniency applicant's noncompliance at any time prior to the conclusion of the investigation. A leniency applicant must fully cooperate with the government investigation and subsequent enforcement actions, which may include providing testimony at trials of co-conspirators. For a cooperating company, cooperation typically also includes requirements to produce executives for interviews and grand jury testimony. Cooperation obligations typically also include the production of documents to the DOJ regardless of the location of the documents. For leniency applicants with foreign operations, they may also be required to translate documents, which can be burdensome.

Leniency recipients typically have no confidentiality requirements, but the DOJ has certain obligations and discloses the contents of a leniency application only with the consent of the applicant. However, the information may be discoverable in both civil litigation against the leniency applicant and in criminal proceedings against other parties, although the DOJ typically intervenes to stay discovery in related civil cases during the pendency of its investigation.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Current employees who cooperate with the DOJ's investigation are automatically included in Type A leniency, and they are eligible for leniency in a Type B application. Employees who do not fully cooperate are typically, and explicitly, excluded from the conditional leniency letter. The Division is under no obligation to extend leniency to former directors, officers, or employees, although parties may negotiate to have these individuals explicitly included in the immunity. The Division's policy is typically to include former directors, officers, and employees in the immunity when they "provide substantial, noncumulative cooperation against remaining potential targets" or when their cooperation is necessary for their former employer's leniency application to be sufficient.

No current or former directors, officers, or employees of an organisation that has already applied for leniency may be considered for individual leniency. Individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for non-prosecution protection under their employer's leniency.

13. Is there an 'amnesty plus' programme?

The DOJ provides additional rewards for certain cooperating companies. Under the "leniency plus" programme, a cooperating company in one investigation may receive special benefits for reporting information about an additional antitrust violation occurring in a different industry. Leniency plus status also means that the company will not be fined in connection with the second conspiracy, and cooperating employees, officers, or directors will not be prosecuted by the DOJ for that offense. The Division may also reduce the sanctions it seeks for the first offense.

Conversely, a company that cooperates with an investigation may be subject to the "penalty plus" policy if the DOJ discovers that the company has failed to disclose information about separate antitrust activity. Under this policy, the company foregoes credit under leniency plus and the DOJ will generally seek a more severe punishment for the additional conduct.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

Criminal charges may be resolved by plea agreements and deferred prosecution agreements.

The DOJ often engages in plea bargaining. In a typical plea agreement, a company or individual defendant pleads guilty to the antitrust violation and agrees to full cooperation with the DOJ's investigation and subsequent enforcement actions. In return, the DOJ may recommend a "downward departure" during sentencing to impose a punishment less severe than the minimum of the range given by the Sentencing Guidelines. While a district court has the discretion to reject the plea agreement, the DOJ's recommendation, or the Sentencing Guidelines, it will routinely select a sentence in line with DOJ's recommendation when there is a plea agreement

and often defers to the agreement reached by the parties so long as it believes it is fair and reasonable.

The DOJ may also resolve criminal charges with a deferred prosecution agreement. A DPA typically provides that the DOJ will bring charges against the defendant but decline to move forward on those charges as long as the defendant meets the requirements laid out in the DPA. As with a plea agreement, these requirements typically include full cooperation with the DOJ's investigation. Recent years have seen an increase in the Division's use of DPAs. The Division justified this increase with regard to participants in federal programmes in particular by identifying an interest in avoiding debarring the companies from participation in federal programmes, which could be detrimental to important markets.

15. What are the key pros and cons for a party that is considering entering into settlement?

Parties should weigh the benefits of avoiding a costly trial and achieving certainty regarding the sentence against the costs of a guilty plea that may be admissible as prima facie evidence in related civil suits.

At the same time, however, admissions in a US proceeding potentially may be used against a party in foreign jurisdictions. As a result, increasingly, parties should consider their exposure in all relevant jurisdictions in determining whether to enter into a settlement or defend against the government's case.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

US authorities engage in extensive international cooperation. Enforcement actions such as raids are often coordinated internationally, and the US has mutual legal assistance treaties (MLATs) in place with other countries that provide for information sharing, assistance with service of documents, and other forms of cooperation. Cooperation is limited by the US authorities' obligation to safeguard information, which can extend to the requirement for a court order to permit sharing of information gathered through a grand jury subpoena.

In addition to cooperation, the DOJ also considers when to proceed with a US enforcement action when a foreign enforcement action is already proceeding. In such circumstances, the DOJ considers four questions: (1) Is there a single, overarching international conspiracy?; (2) Is the harm to US business and consumers similar to the harm caused abroad?; (3) Does the sanction imposed abroad take into account the harm caused to US businesses and consumers?; and (4) Will the sentence imposed abroad satisfy the deterrent interests of the United States?

In addition to international cooperation, federal authorities may cooperate with state-level authorities in pursuing parallel investigations and enforcement actions related to the same conduct.

17. What are the potential civil and criminal sanctions if cartel activity is established?

For corporations, Sherman Act violations carry a maximum fine of either $100 million or a fine calculated under the "double the gain, double the loss" rule, which calls for calculating a fine based on twice the gross amount the antitrust co-conspirators gained through the violation or twice the gross amount that the victims lost through the violation, whichever is greater. These alternative fines may exceed the $100 million ceiling provided for in the Sherman Act, although the government must prove the amount of gain or loss in these cases beyond a reasonable doubt.

For individuals, the Sherman Act provides for criminal penalties of up to $1 million and 10 years' imprisonment. DOJ may alternatively seek to impose fines based on the "double the gain, double the loss" rule on individuals as well. According to the DOJ, individual criminal sanctions, including prison sentences, are the "single most effective deterrent to antitrust offenses." The Division thus prioritises "holding culpable executives and employees accountable, particularly high-level corporate officers responsible for corporate misconduct."

As discussed above with regard to plea agreements, however, the DOJ may recommend reduced sentences for both corporate and individual defendants who cooperate significantly with the government's investigative efforts.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

Courts typically base antitrust fines on the guidance in the United States Sentencing Guidelines. The formula

begins with a base fine of 20% of the total volume of commerce affected by the conduct. As a note, the definition of "volume of commerce affected" is unsettled, which results in significant discretion and flexibility in determining the base fine.

The court next assigns a "culpability score" to a corporate defendant. This reflects the circumstances in the particular case and includes factors such as the company's criminal history, the role that high-level personnel played in the conspiracy, the company's efforts to develop an effective compliance programme, and the extent of the company's cooperation. The culpability score corresponds to a table of minimum and maximum multipliers, which are multiplied by the base fine to determine a range of possible fines. This range is considered advisory, and the final fine set by the court may upwardly or downwardly depart from the suggested range. The DOJ typically recommends a sanction within the Guidelines range, absent significant cooperation or other special circumstances.

The DOJ may recommend a downward departure from the Guidelines range due to a defendant's significant cooperation. This may apply to defendants who cooperate immediately following the leniency applicant (e.g., the second to report), although this has become less frequent in recent years. The DOJ's recommendation for sentencing is only advisory, however, and courts retain broad discretion in determining the final fine.

Sentencing may involve penalties beyond a fine. The Division may also recommend a probationary period, potentially involving a court-appointed monitor, particularly if it can argue that a company's compliance programme is ineffective or that the company continues to employ the culpable employees.

In addition to fines and probation, defendants may be ordered to pay restitution to victims of the conspiracy. Companion criminal statutes, such as those regarding mail or wire fraud, may also provide for further prosecution of defendants with federal contracts, and any company may also risk debarment from future participation in government contracting.

Like penalties for corporate defendants, fines against individuals are based on the volume of affected commerce, with typical individual fines falling between one and five percent of this figure. The Guidelines provide that individual fines should in all cases exceed a $20,000 minimum, although individual sanctions are not multiplied by a culpability score. The volume of affected commerce also guides the court's analysis for imprisonment of individuals.

In practice, the highest fines recently set for corporate defendants have been based on twice the gain or loss resulting from the conduct. As an example, AU Optronics was sentenced in 2013 (following a 2012 trial) to a $500 million criminal fine based on its participation in a conspiracy to fix prices for LCD panels.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Generally, US courts respect corporate formalities, with the result that the parent company is not presumed liable for the conduct of its subsidiary. However, the actions of the subsidiary may be imputed to the parent in certain situations. The government must indict the parent and the subsidiary and prove at trial that the subsidiary is the "alter ego" of the parent or is the agent of the parent. To impose liability on a parent company for the actions of its subsidiary as an "alter ego," the DOJ must prove that (1) there is such unity of interest and ownership that separate personalities of entities no longer exist; and (2) the failure to disregard their separate identities would result in fraud or injustice.

To impose liability under the agency theory, the DOJ must show that the (1) parent company intended for the subsidiary to act on its behalf; (2) the subsidiary agreed to act as the parent company's agency; and (3) the parent company exercised total control over the subsidiary.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Both private actions and class actions are available for infringement of the cartel rules.

Private plaintiffs may sue for violations of the Sherman Act in federal court for treble monetary damages and injunctive relief. Section 4 of the Clayton Act allows a private person to bring a civil suit for any injury that results from an antitrust violation. Private plaintiffs may include individuals, entities such as a corporation, a US state either on behalf of itself or on behalf of its residents, and foreign governments.

As in other areas of law, private parties may bring antitrust claims as a class, but they must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. A putative class must meet the standard numerosity, commonality, typicality, and adequacy of representation requirements under Rule 23(a). To recover monetary damages under Rule 23(b)(3), class

plaintiffs must also prove: (1) that common questions of law and fact will predominate over any individual questions; and (2) that a class action is superior to other methods for adjudicating the dispute.

21. What type of damages can be recovered by claimants and how are they quantified?

Private litigants under Section 4 of the Clayton Act may recover three times the amount of the damages as well as costs and attorney fees, except against certain defined defendants, most notably a leniency applicant or co-operator in a preceding DOJ investigation. The leniency candidate, assuming it satisfies its obligations, is only subject to single damages instead of treble damages in subsequent civil actions. Section 16 of the Clayton Act also allows private suits for injunctive relief. In contrast to Section 4, a party bringing suit under Section 16 does not have to show actual injury to receive an injunction but only that a threat of injury exists.

22. On what grounds can a decision of the relevant authority be appealed?

Appeals may be taken from adverse rulings and final judgments.

In a criminal proceeding, the defendant may appeal a guilty verdict or the sentence imposed after a guilty verdict. The government may only appeal the sentence imposed after a guilty verdict; it may not appeal a defendant's acquittal.

In a civil proceeding, plaintiffs and defendants have the right to appeal certain adverse rulings that are not final judgments, called interlocutory orders. Federal statute establishes the procedures for taking an interlocutory appeal, which involves seeking permission from both the district court and the Court of Appeals. 28 U.S.C. § 1292. Both parties can take appeals as of right from final judgments of the district court.

23. What is the process for filing an appeal?

The appeal process in antitrust cases is the same as in other federal civil and criminal proceedings.

In a criminal proceeding, a defendant has a right to appeal the verdict if found guilty at trial and may initiate an appeal by filing a notice of appeal within 14 days of the entry of judgment or the filing of the government's notice of appeal. However, if the defendant is acquitted at trial, the government may not appeal the acquittal or try the defendant again because of the US Constitution's bar against double jeopardy. However, the government may appeal the court's sentencing decision within 30 days. If a defendant pleads guilty pursuant to a plea agreement, the defendant typically is considered to have waived the right to appeal for any reason other than ineffective assistance of counsel or prosecutorial misconduct.

In a civil proceeding, either party may appeal a district court's judgment as of right to the relevant Court of Appeals within 30 days (60 days for the United States, if it is a party). At the appellate level, a losing party may file a petition for a writ of certiorari to ask the US Supreme Court to review the case, but the Court rarely grants writs of certiorari and only does so when at least four justices agree to hear the case.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

Labour Market Cases. As discussed below in subsection (ii), the DOJ has increasingly focused on conduct in labour markets, taking the view that wage-fixing and no-poach agreements were varieties of price-fixing and market allocation. In 2022, the DOJ litigated its first two labour market trials. In the Eastern District of Texas, the Division had charged the owner of a healthcare staffing agency with conspiring to lower wages for certain healthcare employees. Similarly, in the District of Colorado the Division had criminally charged a dialysis provider with conspiring with a competitor not to solicit each other's employees. In both cases, the courts had previously rejected motions to dismiss, agreeing with the DOJ that the at-issue agreements could be per se violations of the Sherman Act. On consecutive days, the Division lost in both trials when the juries acquitted the defendants of all antitrust charges.

Those losses have not deterred the Division from pursuing this theory. In October 2022, it announced that a health care staffing agency had pled guilty to conspiring with a competitor to enter no-poach and wage-fixing agreements. The court sentenced the company to pay a criminal fine of $62,000 and restitution of $72,000 to nurses harmed by the conspiracy. In addition; three separate labour market prosecutions are slated for trial in 2023: one regarding a non-solicitation agreement in the dialysis industry in the Northern District of Texas, one regarding no-poach and wage-fixing agreements in the home health care industry in the District of Maine, and one regarding a no-

poach conspiracy in the aerospace engineering industry in the District of Connecticut.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

Overlap with Section 2 Enforcement. In early 2022, the Antitrust Division announced that the DOJ would consider bringing criminal cases for monopolization under Section 2 of the Sherman Act after declining to enforce this Section criminally for decades. In October 2022, the DOJ announced its first guilty plea under Section 2 from an individual who pleaded guilty to attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming. The defendant's sentencing has been scheduled for March 29, 2023. The DOJ brought more criminal charges in December 2022, when it charged 12 individuals with conspiracy to monopolize the transmigrante forwarding industry in a Texas border region.

Notably, and of relevance to this chapter, the Division's Section 2 enforcement actions so far all involve cases that could also have been—or, in fact, were—prosecuted as cartel conduct under Section 1. Although the October 2022 guilty plea only involved one count under Section 2, the facts revolved around an agreement with a competitor to allocate regional markets. The December 2022 charges include price fixing in violation of Section 1 in addition to the monopolization charge.

Procurement Collusion Strike Force. Since forming the Procurement Collusion Strike Force [PCSF] in 2019, the Division has devoted significant resources to the PCSF's mission to deter and prosecute procurement-related fraud, particularly bid-rigging, price-fixing, and market allocation involving government procurement. Most recently, the PCSF has been working to expand its national presence. On November 15, 2022, the DOJ announced that the PCSF would take on four new national law enforcement partners, the Inspector Generals of the Environmental Protection Agency and of the Departments of Transportation, Energy, and Interior. The DOJ explained that these additions were specifically targeted at protecting funds distributed through recent federal infrastructure legislation. With this addition, the PCSF includes 34 agencies and offices.

While the PCSF is not exclusively cartel-related, its activity over the past year has focused heavily on bid-rigging related to government procurement. In the first months of 2023 alone, the PCFS secured guilty pleas from a military contractor for rigging bids on contracts to refurbish and maintain equipment for military installations in Texas and from New York Metropolitan Transport Authority employees for conspiring to rig bids on vehicle auctions. With the recent additions described above, PCSF activity going forward is expected to increasingly target bid-rigging and other procurement issues related to federally-funded infrastructure projects as well.

Labour Market Activity. In 2018, the Trump Administration announced that it would begin to criminally prosecute employers who engaged in labour market collusion. Since then, the Biden Administration has continued to move that policy forward, and the Division has consistently pursued a policy of charging non-solicitation (or "no-poach") agreements and other labour market behaviour such as wage-fixing as per se violations of antitrust law rather than under the rule of reason.

As noted above in subsection (i), the DOJ has continued pursuing this enforcement theory, and other antitrust enforcers have followed the Division's lead. In December 2022, for example, the New York Attorney General announced a settlement with a title insurance underwriter that required the underwriter pay a $2.5 million fine for entering into illegal no-poach agreements with competitors and to agree not to engage in such agreements in the future. And on January 5, 2023, the FTC proposed a new rule to blanketly ban non-compete clauses as an unfair method of competition. The proposed rule is based on the FTC's preliminary finding that noncompetes stifle competition and therefore violate Section 5 of the Federal Trade Commission Act. Relying on the same provision, the FTC has also recently sued—for the first time in its history—to require three separate companies to cancel noncompete restrictions imposed on their workers. Similarly, multiple bills have been introduced in the U.S. House and Senate in the first months of 2023 that would severely restrict non-compete agreements. Although the proposed rule and bills do not target cartel conduct, they underscore the government's evolving sensitivity to agreements that restrict competition in the labour market.

Information Sharing. In February 2023, the Division signalled that it plans to increase antitrust scrutiny of competing companies' pricing and other information sharing practices. Principal deputy assistant attorney general Doha Mekki gave a speech announcing that the Division would withdraw policy statements that provided for safety zones in which participants in the healthcare industry could share information that met certain conditions, such as being sufficiently backward-looking and anonymized. Citing changes in technology that allow

reverse engineering even backward-looking and anonymized information, she said the Division will now intensify its scrutiny of information sharing—both in the healthcare industry and elsewhere—as a method of enabling price and wage fixing. Notably, the FTC has not confirmed whether it will also withdraw these healthcare industry policy statements and for now, they remain posted to its public website.

This is not the first indication by the Division of interest in information sharing. Previously, in July 2022, the DOJ entered a settlement with three poultry companies who agreed to pay $84.8 million to resolve the DOJ's civil allegations that they had violated the Sherman Act by conspiring to improperly exchange data to allow them to suppress employee wages.

Interlocking Directorates. The Division has also taken steps to increase enforcement of Section 8 of the Clayton Act, which directors and officers from serving simultaneously on the boards of competitors (subject to limited exceptions). On October 19, 2022, Assistant Attorney General Jonathan Kanter announced the Division's view that Section 8 was being underenforced. That same day, the Division announced seven resignations by interlocked directors in connection with Section 8 concerns. This trend has continued into 2023. In February 2023, Kanter stated that the DOJ had "17 active investigations into illegal board overlaps." Most recently, on March 9, 2023, the DOJ announced five more resignations, as well as a company declining to exercise board appointment rights, in response to the Division's Section 8 enforcement efforts.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

Overall, we expect the Division to continue its approach to antitrust enforcement:

- Antitrust enforcers have increasingly focused on labour market activity such as wage-fixing and no-poach agreements, as detailed in subsections (i) and (ii). We expect this to continue and even strengthen as the DOJ builds up positive precedent for its theory that this conduct can constitute a per se Sherman Act violation.
- As noted above in subsection (ii), although the DOJ has continued taking steps to criminally enforce monopolisation conduct under Section 2, those prosecutions have heavily overlapped with cartel conduct. That trend likely reflects the difficulty of proving a standalone Section 2 violation, which we believe makes it likely to continue.

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