

Cartels

Enforcement, Appeals & Damages Actions

Third Edition

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USA

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Introduction

The United States remains a leader in cartel enforcement, in part given its long tradition of prosecuting cartel conduct both criminally and civilly. Indeed, “the United States remains the only jurisdiction that has extensive experience utilizing . . . incarceration, [criminal fines,] and private damages litigation” to prosecute cartel activity – *DOJ Policy Speech* (Mar 1, 2012).

The agency primarily responsible for cartel enforcement, the Antitrust Division of the Department of Justice (DOJ), employs an arsenal of tools for detecting and investigating cartel conduct. Perhaps the most notable tool is the DOJ’s Leniency Program, which gives full immunity to the first company or individual to report the cartel and cooperate with the DOJ. Indeed, over 90% of the DOJ’s cartel fines in recent years have stemmed from its Leniency Program. In addition to DOJ enforcement, the majority of U.S. states can bring enforcement actions against suspected cartel members, and there is an active plaintiffs’ bar in the United States that can bring private enforcement actions – a bar motivated by the possibility of recovering treble damages.

The following chapter provides an overview of cartel enforcement in the United States. Specifically, this chapter: (i) summarises the legal framework prohibiting cartels; (ii) explains the various means of cartel enforcement used by the DOJ and other agencies; (iii) comments on certain changes in policies and practices affecting cartel enforcement in recent years; (iv) describes significant enforcement activity in the last year; and (v) addresses various other issues affecting cartel enforcement in the United States.

Legal framework prohibiting cartels

A. Legal framework (Sherman Act, Section 1)

Section 1 of the Sherman Act (18 U.S.C. § 1) is the primary statute used to prosecute cartels in the United States. Section 1 states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” While Section 1 applies to a broad range of agreements in restraint of trade, only “hard-core” cartel activity is pursued criminally in the United States – i.e., price fixing, bid rigging, and market or customer allocation agreements. Other agreements in restraint of trade are typically pursued civilly.

A violation of Section 1 requires proof of: (1) an agreement between two or more competitors, (2) that unreasonably restrains trade, and (3) that affects interstate commerce or commerce with foreign nations. A Section 1 violation is a general intent crime, meaning that the DOJ need only prove that the company knowingly joined the agreement. In other words, Section

1 does not require proof of specific intent to commit a violation or cause harm. A criminal Section 1 prosecution requires proof beyond a reasonable doubt – the highest standard of proof in the U.S. legal system.

(i) *Agreement*

The first element requires the existence of an agreement or understanding. An agreement does not need to be formal or written. An agreement can be informal and established orally, by a wink or nod, and even by silence. No overt acts need be proved, nor is an express agreement necessary. The DOJ can prove an agreement either by direct evidence (e.g., testimony of a participant) or circumstantial evidence (e.g., a pattern of business conduct). It should be noted that parallel conduct of companies by itself would not meet this first element of the offence, as long as the parallel conduct is truly independent or unilateral. For example, it is not illegal for a company to observe market prices and then follow them.

This first element requires an agreement between two or more independent companies or individuals. A fundamental proposition of the antitrust laws in the United States is that entities under common control, such as wholly-owned subsidiaries of the same parent company, cannot violate Section 1, because companies under common control do not compete against one another. There have been many cases where defendants have argued that certain business relationships between companies should amount to “common control”, such as trade associations and joint collaborations (e.g., joint venture relations). Courts have typically found that these other business relationships are not sufficient to finding that the companies cannot violate Section 1; thus the participants in these relationships are still subject to possible criminal liability if they participate in cartel conduct.

(ii) *Unreasonable restraint of trade*

The second element of a Section 1 violation requires an “unreasonable restraint of trade”. Courts analyse whether conduct “unreasonably restrains competition” under the “*per se*” or “rule of reason” standard. The rule of reason standard asks whether the alleged conduct’s anticompetitive effects outweigh its procompetitive effects. The *per se* standard presumes the conduct to be unlawful by definition, as the conduct lacks any redeeming competitive purpose; the *per se* standard therefore deems conduct unlawful “without elaborate inquiry as to the precise harm they have caused or the business excuse for their use” – *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Hard-core cartel offences – i.e., price fixing, bid rigging, and market and customer allocations – are clear *per se* antitrust violations and have been described by the Supreme Court as “the supreme evil of antitrust” – *Verizon v. Trinko*, 540 U.S. 395, 408 (2004). Thus, for criminal cartel offences, the DOJ does not need to prove that the cartel conduct unreasonably affected competition, as this harm is presumed. Indeed, the DOJ does not need to prove that the conduct even had an adverse effect, as the agreement itself is the violation.

(iii) *Commerce*

The final element of a Section 1 violation requires proof that the conduct involves interstate commerce or trade with foreign nations. Most commercial activity occurring within the United States will have an interstate effect. When the conduct involves commercial activity with foreign nations (foreign commerce), the conduct must have the requisite “domestic” effect. The standard for determining whether the conduct has this requisite effect is articulated by the Foreign Trade Antitrust Improvements Act (FTAIA), which was meant “to clarify, perhaps to limit” the

extraterritorial application of U.S. antitrust law – *F. Hoffmann-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 169 (2004). In order to meet the domestic effects requirement, the conduct must: (1) have “a ‘direct, substantial, and reasonably foreseeable effect’ on American domestic, import, or (certain) export commerce”; and (2) [have] “an effect of a kind that antitrust law considers harmful, *i.e.*, the ‘effect’ must ‘giv[e] rise to a [Sherman Act] claim’” – *Empagran I*, 542 U.S. 155, 162 (citing 15 U.S.C. § 6a). Recent developments in FTAIA law are discussed in further detail below.

B. Penalties for cartels

The maximum criminal penalties for a Section 1 violation are (i) a \$100m fine per offence for corporations, and (ii) 10 years in prison and a \$1m fine per offence for individuals. Courts may impose fines in excess of the statutory maximum under the Alternative Fines Act (18 U.S.C. § 3571(d)), which provides that the fine may be increased to twice the gross gain from the illegal conduct or twice the gross loss to the victims.

In *United States v. AU Optronics*, the DOJ sought a criminal fine in excess of the statutory maximum under the Alternative Fines Act and obtained a \$500m fine against AU Optronics (AUO) for its involvement in fixing prices of liquid crystal display panels. This is the largest criminal fine imposed by a court for a cartel offence. Prior to this decision, the largest criminal fine obtained by the DOJ involved a plea agreement whereby F. Hoffmann-La Roche agreed to a \$500m criminal fine for its participation in a price fixing and market allocation conspiracy for certain vitamins.

The *AU Optronics* case addressed three important legal issues involving the determination of criminal fines under § 3571(d), two of which were raised and affirmed upon appeal. First, the district court held that the DOJ must prove the amount of the gross gain or loss to the jury beyond a reasonable doubt if it seeks a fine in excess of the statutory maximum. Second, on appeal, the Ninth Circuit rejected the defendants’ argument that “gross gains” should be derived from the defendants’ “own individual conduct”, holding that § 3571(d) “unambiguously permits” the imposition of a fine “based on the gross gains to all the conspirators” – *United States v. Hsiung*, 758 F. 3d 1074, 1095-96 (9th Cir. 2014). Third, the Ninth Circuit rejected the defendants’ argument that joint and several liability should apply, an approach that would have required a reduction from the fine amount of the portion already paid by the defendants’ conspirators.

In criminal prosecutions, the DOJ will use the Federal Sentencing Guidelines to recommend the penalties to impose on corporations and individuals convicted of or pleading guilty to a cartel violation. The Federal Sentencing Guidelines consider a variety of factors for the recommended penalties, including the volume of commerce affected, prior criminal history, role in the offence, and cooperation with law enforcement, among others. Federal courts are no longer required to impose sentences within the ranges provided in the Guidelines – *United States v. Booker*, 543 U.S. 220 (2005). However, courts must still give “respectful consideration” to the Guidelines, *Pepper v. United States*, 131 S. Ct. 1229, 1421 (2011), in connection with a wider range of factors set forth in the federal sentencing statute (18 U.S.C. § 3553).

The Sentencing Guidelines also recommend that courts can impose probation on corporations or require corporations to pay restitution under certain circumstances. The DOJ has seldom sought corporate probation. In September 2014, however, two top officials from the DOJ published policy statements suggesting that court-supervised probation will become more widely used going forward as a means “to ensure an effective compliance program and

to prevent recidivism” – *DOJ Policy Speech* (Sep 10, 2014). As part of probation, the DOJ suggested that it will consider the appointment of external compliance monitors. This recent change in practice is described in more detail below.

Means of cartel enforcement

A. Criminal enforcement by DOJ

(i) *Distinction of criminal v. civil*

The DOJ has exclusive authority to enforce violations of the Sherman Act criminally. Its policy is to only proceed criminally in cases involving hard-core cartel activity – *DOJ Antitrust Division Manual*, III-12. Other conduct is pursued civilly, including conduct evaluated under the rule of reason standard and other antitrust violations that have been historically labelled *per se* by the court. The DOJ’s policy is not to criminally pursue cases, even those appearing to be *per se* violations, “in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action” – *Id.*

(ii) *Initiation of criminal investigation*

There are various means by which the DOJ learns of potential cartel conduct and initiates an investigation, including customer complaints, press reports, private litigation, other DOJ investigations, reports from other federal and state agencies, reports from foreign competition authorities, and screening techniques. The most common way the DOJ learns of potential cartel conduct is clearly from the DOJ’s Leniency Program. The Leniency Program, as explained in more detail below, grants full immunity to a company (or individual) that brings forward information of cartel conduct, admits to a violation, and cooperates with the DOJ’s investigation. The grant of full immunity provides a significant incentive to companies uncovering potentially ill-advised conduct to bring it to the DOJ’s attention. Indeed, the Leniency Program is responsible for almost two-thirds of its current investigations.

When the DOJ receives credible information of a potential violation, it will start the process of initiating a grand jury investigation. To do so, DOJ staff typically prepare an internal memorandum requesting approval from the Director for Criminal Enforcement, the Deputy Assistant Attorney General for Operations, and ultimately the Assistant Attorney General at the DOJ. With this approval, the DOJ will seek to empanel a grand jury with a court; this is done by presenting probable cause of a potential cartel violation. The DOJ will typically seek the grand jury in a federal district where the conduct occurred, defendants are located, or affected sales were made.

(iii) *Tools of criminal enforcement*

With a grand jury investigation open, the DOJ uses a variety of tools to gather evidence about suspected cartel activity. Perhaps the most important is the grand jury subpoena. The grand jury has the power to subpoena documents and witness testimony. As a matter of practice, the DOJ’s grand jury subpoena seeks documents located in the United States. The DOJ also asks subpoena recipients to produce documents located outside the United States on a voluntary basis. A subpoenaed witness may invoke his or her Fifth Amendment right against self-incrimination and refuse to testify; but in many instances, recipients find it in their

interest to cooperate with the DOJ and provide the requested documents and/or testimony. The DOJ also works with other law enforcement (primarily the FBI) to obtain search warrants and conduct electronic surveillance, each of which must be authorised by a judge or magistrate upon a showing of probable cause. The DOJ also gathers evidence from voluntary productions of information, including from leniency applicants and cooperating subjects of an investigation.

(iv) *Leniency program*

The Antitrust Division's Leniency Program (sometimes referred to as the Amnesty Program) is the Antitrust Division's primary tool for criminal antitrust enforcement. Indeed, former Deputy Assistant Attorney General Scott Hammond has noted that the Leniency Program "has been the Division's most effective investigative tool", and "[c]ooperation from leniency applicants has cracked more cartels than all other tools at [the Division's] disposal combined. . . ." – *DOJ Policy Speech* (Oct 18, 2005). The Leniency Program affords immunity from prosecution to a corporation that can meet six criteria: (i) the DOJ has not yet received information about the illegal activity from another source; (ii) the corporation took prompt action to terminate the illegal conduct upon discovery; (iii) the corporation reports the misconduct fully and cooperates completely with the DOJ's investigation; (iv) the misconduct is truly a corporate act (as opposed to individual misconduct by corporate executives); (v) the corporation made restitution to injured parties where possible; and (vi) the corporation did not coerce another party to participate in the illegal activity and/or was not the ringleader of the illegal activity. This type of leniency (immunity) is often referred to as "Type A" leniency.

If a company fails to qualify for Type A leniency, because the DOJ has already received information about the illegal conduct, the company may still be granted leniency under "Type B" of the Leniency Program. The requirements for Type B leniency are as follows: (a) the company satisfies the conditions in (ii) through (v) above for Type A leniency; (b) the company is the first to report the conduct and qualify for leniency; (c) the DOJ does not have enough evidence against the company to result in a sustainable conviction; and (d) the DOJ determines that granting leniency would not be unfair to others, which includes an assessment of how early the company comes forward and whether it was the ringleader of the cartel.

The Leniency Program's requirements create a significant incentive for companies to be the first to report potential violations. The DOJ recognises that creating a race to report motivates companies to cooperate with the DOJ. It has therefore created a marker program by which a company can begin the process of satisfying the leniency requirements without losing its place in line. Obtaining a marker requires counsel to report that they have some credible evidence of a criminal antitrust violation, and identify the industry and client, as well as the general nature of misconduct.

To further motivate participation in the Leniency Program, the Antitrust Division has created "Amnesty Plus" for companies involved in more than one cartel offence. As part of Amnesty Plus, a company under investigation for one cartel offence that discovers another potential cartel offence could receive immunity for the second offence (assuming it qualifies) if it reports the conduct, and may also receive a reduction in fine (or a "credit") for the original offence. Conversely, if the company is aware of the second offence but fails to report it to the Antitrust

Division during the investigation of the original offence, this may constitute an aggravating sentencing factor under the Sentencing Guidelines and result in more severe consequences. There are many nuances to the Leniency Program, and much could be written about application procedures, requirements, and benefits. A corporation should seek advice from counsel in the United States about the Leniency Program should it uncover evidence of a possible cartel violation.

B. Civil enforcement by DOJ and FTC

“Cartel” conduct may also be subject to civil enforcement by the government. Both the DOJ and the Federal Trade Commission (FTC) may bring civil enforcement actions for cartel activity violating Section 1 of the Sherman Act. Typically, if the agency is pursuing a civil investigation, it is because the conduct does not fall under the categories of a “hard-core” cartel violation – i.e., it contains some “redeeming” value or identifiable pro-competitive justification. In such civil actions, the DOJ and FTC will usually seek injunctive relief. However, the antitrust agencies have on occasion sought equitable remedies like restitution, disgorgement of profits, and external compliance monitors. In civil actions, the government (DOJ or FTC) must prove a violation by a preponderance of the evidence – i.e., proof that each element of the plaintiff’s claims against the defendant “more likely than not” occurred. This is a lesser burden of proof than the criminal standard of “beyond a reasonable doubt”.

A recent example of a civil action against what some may describe as “cartel” conduct is *United States v. Apple*. In 2013, the DOJ obtained final judgment against Apple for its participation in a hub-and-spoke agreement with publishers to raise the prices of e-books. The court found that Apple and five of the big six major books sellers reached an agreement to change the pricing model for e-books that included financial penalties upon the publishers “if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers”. As part of the relief, the Court required Apple to modify its agreements, prohibited Apple from serving as an information conduit, and ordered an external compliance monitor.

A second recent example of a civil enforcement action against “cartel-like” conduct is *In the Matter of AmeriGas and Blue Rhino*. In that case, the FTC alleged that Blue Rhino and AmeriGas each decided to implement a price increase by reducing the amount of propane in their exchange tanks without a corresponding reduction in price, which effectively increased the per unit price by 13%. A customer, Walmart, initially rejected each party’s proposal to reduce propane fill levels. The FTC alleged that Blue Rhino and AmeriGas agreed not to accede to Walmart’s resistance to the effective price increase. In October 2014, Blue Rhino and AmeriGas agreed to enter into a consent order, which prohibited each company from agreeing with competitors to modify fill levels or fix the prices of exchange tanks, and from coordinating communications to customers.

C. Criminal and civil enforcement by state agencies

All 50 states and the District of Columbia have some type of antitrust or unfair trade practice statute, most of which are based on and/or interpreted consistently with the federal antitrust laws. Every state, except for Connecticut, Delaware, and Kansas, provide for some form of criminal liability for such violations, except criminal enforcement is not common in most states and sanctions tend to be less severe than under federal law. State attorneys general are responsible for the public enforcement of these laws. And nearly all states permit private civil damage actions, most for treble damages, although some states limit recovery to actual or double damages.

D. Civil enforcement by private plaintiffs

Parties directly injured by cartel violations may sue for treble damages as well as injunctive relief under Sections 4 and 16 of the Clayton Act, respectively (15 U.S.C. §§ 15, 26). The possibility of recovering treble damages provides a significant economic incentive for private parties to file suit. Indeed, it is common for private parties to file suit in the United States following only the announcement of a criminal investigation (sometimes just the announcement of an investigation by an agency outside of the United States will prompt a private suit in the United States). These “follow-on” suits are often filed on behalf of a class, which exponentially increases a company’s potential exposure as well as the burdens and costs of defending the litigation. Thus, private “follow-on” suits remain “a crucial deterrent to potential violators” – *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

While private follow-on suits against cartel conduct are common in the United States, such suits still face significant challenges to success, including strict standards for class certification, a shorter statute of limitations period than in criminal cases (four years in civil versus five years in criminal), and heightened federal pleading standards. The heightened pleading standard stems from the Supreme Court’s decision in *Bell Atlantic v. Twombly*, which requires plaintiffs to allege facts with sufficient specificity “to state a claim to relief that is plausible on its face”.

The DOJ’s criminal enforcement efforts, however, facilitate private parties in follow-on civil damages actions. First, jury convictions and guilty pleas constitute *prima facie* evidence of a cartel violation in a parallel civil case and thus help establish liability. Second, under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), a successful leniency applicant can qualify for a reduction in damages from treble to single, and avoid joint and several liability if it provides “satisfactory cooperation” to the plaintiff. Thus, a cooperating leniency applicant can provide further assistance to plaintiffs in establishing liability for additional conduct (if the scope of the case is expanded) as well as in proving damages.

Recent changes in cartel enforcement policy and practice

In late 2014, the DOJ issued a few policy statements about its cartel enforcement program. At the core of these statements the DOJ reiterated a few key messages about its enforcement program: (1) “[t]here is no more important work” than criminal antitrust enforcement and the DOJ intends to continue to prosecute antitrust violations aggressively; (2) the Leniency Program remains central to the criminal enforcement program; and (3) the DOJ will continue to seek significant fines, jail time, and alternative sentences, including potentially probation and external monitors, against those who engage in unlawful collusion. But the DOJ also noted some significant changes in policy and practice going forward. Each of these changes is addressed below.

A. Prosecution of individuals

It is well known that the DOJ has the authority to prosecute individuals for antitrust violations and often does. Indeed, “[t]he Antitrust Division has long emphasised that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences” – *DOJ Policy Speech* (Feb 25, 2010). It is the DOJ’s charging policy to “prosecute the highest-ranking culpable individuals from each organization against whom the Division is likely to develop an indictable case” – *Antitrust Division Manual* III-94. This fact is always a significant consideration for any company navigating through a DOJ investigation and deciding whether to resolve the investigation

through a plea, as a core benefit of a plea is the government agreeing not to further prosecute the company or its employees.

But the DOJ will nearly always “carve-out” certain employees from this non-prosecution protection. In past practice there were general “rules of thumb” of the number of potential “carve-outs” for companies seeking to enter a plea: the number of individuals subject to prosecution (as potential “carve-outs” in a plea resolution) could be predicted approximately by the order of the company’s cooperation *vis-à-vis* other companies. For example, a “second-in” cooperating company could expect 2-3 carve-outs, a “third-in” could expect 4-5, and so on, depending on the case. The DOJ noted recently that it will make decisions based solely on the factors set for in the Principles of Federal Prosecution, which consider *inter alia* the individual’s role in the cartel, seniority, willingness to admit wrongdoing (self-report), and assistance to the investigation.

This means that the decision to “carve-out” an individual from a corporate plea is not necessarily dependent on the order of the company’s cooperation in the investigation. As a practical matter, it will likely be that a company could place individual employees in a better position from getting “carved-out” of a plea through cooperation (because the company will have opportunities to present findings that may mitigate the DOJ’s interest in an individual by cooperating or that show the individual’s assistance in the investigation), but the DOJ is now taking a firm position that the company’s cooperation will not directly dictate the fate of certain of its individual employees. To be clear, this is not a change in official DOJ policy, as its official policy has been to make a “carve-out” decision based on Principles of Federal Prosecution, but it does suggest the DOJ is changing how it approaches the decision in practice.

B. Bifurcation of cooperation: timing and quality

It may also be well known that companies may mitigate the consequences of a violation by cooperating in the DOJ’s investigation. “Cooperation” typically involves (1) accepting responsibility, including a guilty plea, and (2) substantially assisting the DOJ’s investigation and prosecution by producing information, documents, and other materials as well as witness testimony. In the past, the credit that a company received for cooperating (*e.g.*, discount to the fine) depended on the timing of the cooperation and the quality of cooperation – the two were linked. This meant that a “second-in” company could expect a 20-30% reduction in fines, and a near guarantee that its discount would be greater than discounts given to “later-in-time” cooperators.

The DOJ recently announced that it no longer ties the timing of a company’s cooperation to the quality of the company’s cooperation, recognising that companies that cooperate later in an investigation “can and often do” provide substantial assistance in an investigation by expanding its scope or reporting on an additional conspiracy. In other words, the DOJ’s sentencing recommendations “will be based on the value of the cooperation [the DOJ] receive[s], not simply on the order in which the companies begin to cooperate” – *DOJ Policy Speech* (Sep 10, 2014). Under the “bifurcation” approach, the second-in cooperator is not assured of either. While the new practice appears to benefit companies who may not be quick to plead guilty but provide significant cooperation, the benefits may be negated because the later-in-time cooperator may start at a higher point in the Sentencing Guidelines range.

C. Compliance programs and corporate probation

The DOJ also announced in its recent policy statements that it is now considering a company’s compliance efforts in its recommended sentencing (at least more seriously

than in the past). It remains a bit unclear what this will entail for companies sentenced for a cartel violation either as a result of a plea or conviction, but the policy statements did identify three potential effects. First, the DOJ indicated that it might seek corporate probation “[i]f a company has no pre-existing compliance program or makes no efforts to strengthen a compliance program that has proved ineffective” – *DOJ Policy Speech* (Sept. 9, 2014). In addition, the DOJ may consider the appointment of an external compliance monitor if a company does not show a serious commitment to compliance.

Second, the DOJ indicated that it will have “serious doubts” as to a company’s commitment to compliance if it continues to “employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable” – *DOJ Policy Speech* (Sep 10, 2014). Thus, companies who refuse to remove these culpable individuals subject the company to additional sanctions and oversight. Third, the DOJ indicated that it is considering how to credit companies who demonstrate extraordinary efforts to improve compliance as a result of the investigation. While the DOJ has not finalised its position, “crediting of compliance will require a company to demonstrate that its program or improvements are more than just a facade” – *DOJ Policy Speech* (Sep 9, 2014). This suggests the DOJ may be considering additional discounts as part of the recommended fine.

Two recent enforcement actions suggest that the DOJ is serious about taking a company’s compliance efforts into account in sentencing. First, in *United States v. AU Optronics Corporation*, the defendant had no compliance program at the time of the violation and took few steps to implement one even after it was under investigation. The DOJ commented that after conviction “AUO refused even to acknowledge that its participation in the same agreement was, or should be considered, illegal”, and “continued to employ convicted price fixers and indicted fugitives” – *DOJ Policy Speech* (Sep 10, 2014). As a result the court imposed a three-year term of probation that required AUO to hire an independent monitor to oversee the implementation of an effective compliance program and report quarterly to the U.S. Probation Office. Second, in *United States v. Bridgestone Corporation*, the DOJ alleged that as a result of Bridgestone’s “cavalier” approach to compliance, Bridgestone failed to disclose its participation in cartel conduct involving automotive anti-vibration rubber parts at the time it pleaded guilty for its role in a cartel involving marine hoses. The DOJ treated this failure to disclose as an aggravating factor, resulting in an increase of Bridgestone’s fine by over \$100m and resulted in Bridgestone being placed on three-year probation.

D. Organisation and personnel changes

In the past year, the DOJ also had a few significant changes in its structure and personnel. First, the DOJ completed the closure of several of its branch offices, all of which focused almost exclusively on cartel enforcement. Notably, many of these offices focused on prosecuting local, domestic cartels. There are some who argue that the closure of these offices marks the DOJ’s shift in priority to international cartels. Second, Brent Snyder has settled in as the new Deputy Assistant Attorney General for Criminal Enforcement of the DOJ, replacing Scott Hammond (official replacement occurred in November 2013). Since 2003, Mr. Snyder had worked as a criminal trial attorney for the DOJ’s National Criminal Enforcement Section and San Francisco Field Office. He has been involved in several key cartel investigations, including those involving LCDs, coastal water freight, and air transportation industries. Third, the DOJ opened a second Criminal Enforcement Section in Washington D.C., known as Criminal II. Currently, Criminal II is focused on real estate

auction bid rigging cases, but it is expected to take on other domestic and international criminal enforcement matters in the next year.

Recent activity in cartel enforcement (past 12 months)

A. Enforcement statistics

In fiscal year 2014 (Oct 1, 2013 to Sep 30, 2014), the Antitrust Division secured approximately \$862m in criminal antitrust fines. About 91% of these fines are attributable to the auto parts investigations. In fact, Bridgestone Corporation's fine alone (\$425m) amounted to almost half of these fines. Also, the Antitrust Division obtained an additional \$411m in fines to settle wire fraud charges against two banks involved in LIBOR manipulation schemes pursuant to a joint investigation with the DOJ's Criminal Division. In total, the Antitrust Division secured over \$1.27bn in criminal penalties during the last fiscal year, which is the largest amount ever obtained in a fiscal year.

B. New case law on extraterritorial reach of the Sherman Act (FTAIA)

The DOJ's recent attention on international cartels has netted substantial fines; indeed, the highest in recent years. But this focus on conduct outside of the United States brings significant challenges to prosecution. One significant challenge is proving that the cartel conduct had the requisite effect in the United States. As noted, the FTAIA was intended to "clarify, perhaps to limit" the extraterritorial reach of the Sherman Act. The FTAIA places all conduct involving foreign commerce (other than import commerce) outside the reach of the Sherman Act, unless (i) such conduct "has a direct, substantial, and reasonably foreseeable effect" on domestic, import or certain export commerce, and (ii) "such effect gives rise to a [Sherman Act] claim". One appellate court recently clarified that "[t]he first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it" – *Motorola Mobility v. AU Optronics*, No. 14-8003 (7th Cir. 2014).

In the last year, the DOJ has remained keenly interested in any case that further clarifies or defines the antitrust law's extraterritorial reach. Indeed, even in cases in which the DOJ is not a party, it will file *amicus* briefs with the court to state the DOJ's position on the standards for interpreting the FTAIA. One such case was *Motorola Mobility*. In that case, the appellate court analysed whether a conspiracy to fix the price of certain LCD panels sold to Motorola's foreign subsidiaries met the FTAIA's two-pronged exception (thus bringing it under the Sherman Act's reach). Motorola argued that the conspiratorial conduct did meet the exception, particularly given that the LCD panels were sold to subsidiaries to be incorporated into Motorola cell phones that were then sold to other Motorola entities in the United States for resale in the United States. On rehearing, the appellate court eventually held that the second prong of the exception was not met – i.e., the conspiracy's effect on domestic commerce (if any) did not "give rise to" the foreign subsidiaries' claimed harm. The court stated that the "cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce". The appellate court commented, but refrained from ruling, on whether the first prong of the exception was met – i.e., whether the conspiratorial conduct had a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic or import commerce.

The DOJ was most interested in whether the court would rule on the first prong of the exception, as it is the "direct, substantial, and reasonably foreseeable" requirement in the first prong that the DOJ must meet in prosecuting international cartels. The DOJ filed three *amicus* briefs arguing that the conspiratorial conduct in the *Motorola Mobility* case indeed

met this requirement. The DOJ's position was that "there can be a close, significant, and predictable causal connection between fixing the price of a major component made and sold outside the United States and U.S. commerce in finished products incorporating that component." Accordingly, the DOJ argued that "defendants' price fixing of LCD panels incorporated into cellphones abroad . . . directly affected U.S. commerce in cellphones." The DOJ wanted to ensure that the court did not do anything that would contradict or take away from the same court's ruling just two years earlier in *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012). In that case, the same court adopted DOJ's standard for the "direct" requirement of the first prong of the FTAIA's exception. The court held (as the DOJ argued) that "direct" meant "a reasonably proximate causal nexus". Such a standard allows for an expansion of the Sherman Act's reach, arguably over cartel conduct that may affect sales of components overseas that are then incorporated into products shipped for sale in the United States. The DOJ is expected to continue to advocate that this expansive standard should apply in all of the cases that it brings.

C. First extradition for antitrust charge

In April 2014, the DOJ obtained its first extradition of a foreign national on an antitrust charge. Extradition requires a bilateral extradition treaty, most of which contain dual criminality clauses – i.e., the offence must be criminally punishable under both the requesting and extraditing countries' laws. On June 17, 2014, Romano Piscioti, an Italian national, was arrested while making a connection at Frankfurt Airport on a return trip from Nigeria to Italy. The DOJ had charged Mr. Piscioti of participating in a conspiracy to rig bids, fix prices, and allocate market shares for sales of marine hose. Germany does not criminalise cartel behaviour unless it amounts to bid rigging or fraud. The DOJ was able to extradite Mr. Piscioti under its bilateral extradition treaty because his criminal charges involved bid rigging. Mr. Piscioti pleaded guilty and was sentenced to two years in prison, with credit for the nine months and 16 days he was held in custody in Germany pending his extradition.

The Antitrust Division has successfully extradited two other individuals but not for violations of the Sherman Act: Ian Norris, a UK national, in March 2010, on charges that he obstructed a cartel investigation; and John Bennett, a Canadian national, in November 2014, on charges that he participated in a scheme to pay kickbacks and commit fraud involving an Environmental Protection Agency (EPA) Superfund site in New Jersey.

D. Increased prison sentences

The average prison sentences for individuals committing cartel violations continue to be significant. The average prison sentence for individuals in FY 2014 was 38 months, which is largely the result of one 14-year sentence (discussed below). Disregarding this sentence, the average prison sentence in FY 2014 was 26 months, which represents a slight increase from the prior three-year average of 24 months.

In March 2014, the DOJ secured the longest prison sentence ever imposed for conduct involving a cartel. In that case, Mr. Gordon McDonald, a former project manager for a prime contractor at two EPA Superfund sites in New Jersey, was sentenced to serve *14 years* in prison for engaging in separate bid rigging, kickback, and fraud conspiracies at two Superfund sites; engaging in an international money laundering scheme and major fraud against the U.S.; committing two tax violations; and obstruction of justice. The sentence took into account Mr. McDonald's other convictions, but this is by far the longest prison sentence ever imposed involving an antitrust crime. The longest sentence ever imposed against an individual solely for a criminal antitrust violation occurred in December 2013, when the former president of Sea Star Line was sentenced to serve five years in prison for

conspiring to fix rates and surcharges for freight transported between the continental U.S. and Puerto Rico.

E. Auto parts investigation

The DOJ continues to investigate companies and individuals across the globe for fixing the prices of various auto parts components. This investigation continues to be the largest investigation in the history of the DOJ's cartel enforcement program. To date, the DOJ has brought charges against 49 individuals, secured plea agreements with 32 companies, and imposed more than \$2.4bn in criminal fines in connection with its ongoing investigation into the auto parts industry. Automobile parts implicated to date include airbags, antilock brake systems, anti-vibration rubber, bearings, electronic throttle bodies, instrument panel clusters, lamp ballasts, lighting fixtures, seatbelts, starter motors, steering wheels and wire harnesses, among several others. This demonstrates the DOJ's commitment to carry out Attorney General Eric Holder's promise to "check under every hood and kick every tire". The auto parts investigation also serves as a good example of the DOJ's willingness and ability to coordinate and cooperate with its counterparts throughout the world, including Japan, South Korea, the European Commission, and Canada, among others.

F. LIBOR investigation

In the last year, the DOJ also has been central in the global investigation into the manipulation of the London Interbank Offered Rate (LIBOR) and has imposed over \$1.2bn in criminal penalties against five financial institutions for their roles in the conspiracy. The DOJ's Antitrust Division has worked in tandem with the DOJ's Criminal Division and has cooperated significantly with other regulators during the LIBOR investigation, both within the United States and abroad.

G. Other cases

The DOJ is currently involved in several other high-profile investigations, some of which are closely related to past successful endeavours. In late 2013, the Antitrust Division announced that it is investigating potential manipulation of the foreign exchange markets, which accounts for approximately \$5.3 trillion of daily commerce. Like with LIBOR, the DOJ is working closely with the Criminal Division in the foreign exchange investigation. There have also been reports in 2014 that the DOJ and other cartel enforcement authorities around the world are investigating potential price-fixing in the market for capacitors.

While most of the headlines have been positive for the DOJ's cartel enforcement program, the investigation and prosecution of executives for manipulation, bid rigging, and fraud concerning municipal bonds has led to mixed results. While the DOJ has secured a number of pleas and convictions in the investigation, most recently the Court of Appeals for the Second Circuit reversed the conviction of three executives for fraud, holding that there was not a continuous action to prolong the life of the conspiracy. Furthermore, judges have exercised discretion in sentencing individuals who have pleaded guilty and cooperated with the government's investigation, declining to impose jail time or fines for these defendants.

Finally, the DOJ is broadening criminal cartel enforcement into industries that have traditionally been subject to civil investigation. Recently, two generic pharmaceutical manufacturers disclosed that they received grand jury subpoenas from the Department of Justice pertaining to communication or correspondence with rivals about generic drug sales. These disclosures came four months after the Connecticut Attorney General launched an investigation into price hikes for digoxin, a drug that is used to treat congestive heart failure, according to statements issued at the time by both drug makers.

Other issues in cartel enforcement in the United States

A. Settlement of cases

The DOJ estimates that “[o]ver 90% of the hundreds of defendants charged with criminal cartel offenses during the last 20 years have admitted to the conduct and entered into plea agreements with the Division” – *DOJ Policy Speech* (June 6, 2008). The reason that the vast majority of cases settle (i.e., result in a plea) is because the DOJ typically will recommend a significantly more favourable sentence to the court in exchange for pleading guilty and providing full and continuing cooperation with the cartel investigation. Courts have almost always deferred to the DOJ’s recommendation and approved negotiated agreements in cartel cases.

B. Cross-border issues

According to the DOJ, “[t]he greatest challenge in investigating and prosecuting cross-border cartels is obtaining evidence and information located in other jurisdictions.” In order to overcome this challenge, the DOJ often cooperates with competition authorities in other jurisdictions on conducting searches, taking witness testimony, and collecting documents. The authority for such cooperation is typically provided through mutual legal assistance agreements (MLATs), which allow for the exchange of information in criminal law enforcement matters. The authority can also be derived from antitrust-specific cooperation agreements and memoranda of understanding, which cover the sharing of information, unless restricted by confidentiality rules, and coordination of inspections and investigations. In practice, the DOJ typically overcomes this challenge by offering significant benefits in reduced penalties for cooperation in the investigation, leading companies and individuals residing outside the U.S. border to provide evidence and information voluntarily.

C. Legal reform proposals

In June 2014, the United States Sentencing Commission issued a notice that it is conducting “a study of antitrust offenses, including examination of the fine provisions”, and solicited comments. Some of the comments have included: (i) increasing the presumption of the overcharge resulting from cartel conduct that is used in calculating a recommended sentence in the Sentencing Guidelines; and (ii) increasing penalties for the individuals responsible for cartel conduct, which is consistent with the DOJ’s position that “the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences” – *DOJ Policy Speech* (Feb. 25, 2010). It remains to be seen whether any legal reforms will come from such debate.

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Mark served as Assistant Chief of the National Criminal Enforcement Section from 2004 to 2011. In this role, he oversaw teams of trial attorneys and law enforcement agents who prosecuted numerous cartel cases and related violations, including Foreign Corrupt Practices Act violations, bribery, wire fraud, obstruction of justice, and kickbacks. Mark was lead attorney on many of the section's most prominent enforcement actions, including the Antitrust Division's investigation into air transportation price-fixing – one of its largest ever – which resulted in a record \$1.8bn in fines.

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