GLOBAL LEGAL INSIGHTS

Cartels

Enforcement, Appeals & Damages Actions

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USA

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Overview of the law and enforcement regime relating to cartels

Section 1 of the Sherman Act is the principal substantive statute governing cartel activity. 15 U.S.C. § 1. Section 1 prohibits "[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". *Id.* A Section 1 violation has three elements: (1) an agreement; (2) that unreasonably restrains competition; and (3) affects interstate commerce.

As to the first element, an "agreement" need not be formal or in writing. There must, however, be a "conscious commitment to a common scheme designed to achieve an unlawful objective" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Independent or unilateral conduct does not violate Section 1. *Id.* at 761. Thus, it is not illegal for a company to observe market prices and follow them or to learn a competitor's price from a customer or other third party and decide, unilaterally, to follow it.

In determining whether certain conduct "unreasonably restrains competition" for the purposes of the second element, courts analyse the challenged conduct as either a "*per se*" (automatic) violation or otherwise under the "rule of reason". Conduct commonly considered cartel activity, such as agreements between competitors on price, output, market division or agreements to rig bids, constitute "*per se*" violations of Section 1 and are conclusively presumed to be illegal without inquiry into the precise harm caused or the business rationale for the conduct.

The DOJ is tasked with criminal enforcement of the Sherman Act. The DOJ can also bring civil actions to enforce Section 1. While the statutory language appears to create criminal liability for a broad range of conduct, the DOJ's stated policy is to pursue only cartel activity criminally. U.S. Dep't of Justice, Antitrust Division Manual III-20.

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

In addition to federal law, most states have their own antitrust laws. State antitrust laws are enforced by state attorneys general. Private parties also can sue for cartel activity under state laws.

Several industries have been granted limited exemptions to the conduct proscribed by Section 1. These include certain labour, agriculture, energy, insurance, financial, health-care, communications and professional sports markets. For example, the McCarran Ferguson Act exempts state regulated insurance businesses so long as the underlying conduct does not involve an agreement to "boycott, coerce, or intimidate". 15. U.S.C. § 1013(b). Certain conduct, not specific to any one industry, also is exempt from antitrust scrutiny. The Noerr-Pennington doctrine, a judicially created exemption based on the First Amendment, provides immunity from antitrust liability to companies for conduct that attempts to influence the government, such as lobbying, joint petitioning and litigation. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). States also enjoy antitrust immunity. *Parker v. Brown*, 317 U.S. 341 (1943). State immunity extends to actions taken pursuant to state regulation where there is a clear articulation of state policy and the policy is actively supervised by the state. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980).

Non-antitrust specific exemptions such as the political question doctrine and the act of state doctrine also may apply to cartel activity. The political question doctrine bars courts from adjudicating cases involving policy choices or value determinations that are more appropriately resolved by the legislative or executive branches. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, the Fifth Circuit Court of Appeals upheld a lower court's decision that it lacked jurisdiction over cartel claims against entities owned or controlled by OPEC member states. 632 F.3d 938 (5th Cir. 2011). The court determined that state decisions as to crude oil production levels involved foreign sovereign conduct. The court held that to rule on the case it would be required to second-guess executive branch decisions involving foreign policy, energy security and the proper level of engagement with oil-producing countries, and therefore presented non-justiciable political questions. The Fifth Circuit also held that the action was barred by the act of state doctrine, under which "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory".

Overview of cartel enforcement activity during the last 12 months

The past year has been significant for US anti-cartel enforcement. In FY 2012, the DOJ obtained approximately $1.32bn from criminal antitrust offenders, including an estimated $1.1bn in criminal fines, a significant increase from the $524m in criminal fines collected in 2011. The 2012 total also consists of approximately $220m in restitution, penalties, and disgorgement paid to state and federal agencies.

Individual culpability remains a core part of US antitrust enforcement. The average individual prison sentence in 2012 was approximately 28 months, again a significant increase from 2011's average prison sentence of 17 months. By the end of June 2012, the total prison time imposed on antitrust defendants had already surpassed the FY 2011 total by more than 25%.

The Antitrust Division has prevailed in a series of high-profile jury trials this year. While the Division has had mixed success in securing jury verdicts in prior years, that trend appears to be changing in light of the DOJ's victories in three recent jury trials, the most significant of which is discussed below.

In a case widely viewed as an essential test of the DOJ's ability to obtain convictions against members of international cartels, the DOJ prevailed after an eight-week trial against AU Optronics, a Taiwan-based liquid crystal display (LCD) producer, its US subsidiary and two executives (albeit five executives were charged) for their role in a five-year conspiracy to fix the prices of thin-film transistor LCD panels sold worldwide. US raids in the LCD investigation began in 2006 after the DOJ accepted Samsung Electronics into its leniency program in exchange for informing the government about a conspiracy to fix prices of TFT-LCDs used in computer monitors and notebooks, televisions, mobile phones, and other electronic devices. Prior to AU Optronics' trial and sentencing, the DOJ had obtained 7 corporate plea deals from its LCD investigation with fines totaling $892m (ranging from $30m to $400m). The DOJ also had obtained 10 individual plea deals ranging from 6-14 months. Notably, in the AU Optronics' trial, the DOJ sought to use the "alternative fine statute" in 18 U.S.C. § 3571 to obtain a fine above the Sherman Act statutory maximum. Under the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the DOJ was required to prove gain/loss to the jury beyond a reasonable doubt. The jury agreed with the DOJ's economic testimony and found gross gains to the conspirators of at least $500m, subjecting AU to a potential fine of $1bn. AU Optronics was recently sentenced to a $500m fine, matching the largest fine ever imposed in a US antitrust case. The company and its American subsidiary also were placed on probation for three years, required to adopt an antitrust compliance program and to appoint an independent corporate compliance monitor. The two executives found guilty were sentenced to 3-year prison terms and fined $200,000.

In 2012, the DOJ continued its investigation into the automotive parts industry. While the initial raids in 2009 were limited to wire harness producers in the United States, Japan and Europe, the investigation has become the broadest investigation in Antitrust Division history. The investigation has expanded to include raids and subpoenas of producers of seatbelts, air bags, steering wheels, windshield wipers, radiators, ball bearings and refrigerants. While the investigation is far from complete, substantial corporate and individual fines have already been imposed. For example, Yazaki

Corp., an automotive electrical component supplier, agreed to pay a $470m criminal fine, the third largest criminal fine ever obtained for a Sherman Act antitrust violation. Individual penalties have been similarly strict with executives receiving sentences of up to 2 years in prison.

This past year, the DOJ continued two notable investigations into the financial markets. First, the DOJ's investigation of major financial institutions accused of conspiring to manipulate the bidding process for municipal bond markets has produced corporate restitution, disgorgement and monetary penalties of over $740m stemming from several non-prosecution agreements. This total includes $137m in restitution paid by Bank of America despite having received amnesty. The DOJ also has charged 20 executives in connection with the investigation. Of the 20 executives, 19 have been convicted or pleaded guilty and trial is pending on the sole remaining individual.

The DOJ also continued its investigation of bank collusion to manipulate the London Interbank Offered Rate (LIBOR) and Euro Interbank Offered Rate (EURIBOR). UBS disclosed that it has received conditional amnesty from the DOJ. Fines are likely to be significant as in June 2012, Barclays agreed to pay $160m to DOJ's fraud division, $200m to the U.S. Commodity Futures Trading Commission, and $92m to the U.K. Financial Services Authority.

Moreover, the DOJ's investigation into the air cargo industry continued throughout 2012. The investigation began in 2006 with coordinated raids after Lufthansa received conditional amnesty from the DOJ for disclosing its role in the international cargo conspiracy. The DOJ has obtained more than $1.8bn in corporate fines against 19 companies, including $300m fines against both Korean Air Lines and British Airways. The DOJ has also obtained plea deals with 6 executives with prison sentences ranging from 6-13 months. Fifteen other executives, primarily foreign nationals, have been indicted. In July 2012, Florida West, a small Florida air-cargo operator in precarious financial condition, was permitted by a federal district court judge over the DOJ's objection to enter a rare "no-contest" plea. While the federal judge cited "extremely unique" circumstances and "cloak and dagger-like facts" in its opinion permitting the no-contest plea, it is unclear to what extent the no-contest plea by Florida West will open the door for similar treatment in future cases.

Investigations into the freight forwarding industry also progressed in 2012 with a Japanese freight-forwarder pleading guilty and agreeing to pay a $2.3m criminal fine for its role in a conspiracy to fix fees in connection with freight forwarding services for air cargo shipments from Japan to the United States. Including the described plea, 14 companies have either pleaded guilty or agreed to plead guilty and to pay more than $100m in criminal fines in connection with this investigation.

Key issues in relation to enforcement policy

Cartel cases, both civil and criminal, are adjudicated in federal court and defendants have the right to a trial by jury. In a criminal case, the government has to prove guilt beyond reasonable doubt. In a civil case, plaintiffs need to prove liability by a preponderance of the evidence.

The DOJ normally reserves criminal prosecution for "cartel activity" such as price fixing, bid rigging, and market allocations. The DOJ is unlikely to pursue a case criminally if the case involves unsettled law, novel issues of law or fact, past prosecutorial decisions that may have reasonably caused confusion as to the legality of the conduct, or "clear evidence that the subjects of the investigation were either unaware of, or did not appreciate, the consequences of their actions". Antitrust Division Manual at III-20. Conduct not pursued criminally may be pursued civilly.

In practice, the vast majority of criminal cases are resolved by a plea bargain agreement or by the DOJ's decision to discontinue the investigation prior to seeking an indictment. Similarly, civil cases often are settled or resolved by pre-trial motion practice.

Key issues in relation to investigation and decision-making procedures

Most criminal cartel investigations are triggered by information learned through an amnesty applicant. Investigations are also often triggered by tips from customers, competitors, or employees. Additionally, as demonstrated by the automotive parts investigation, the DOJ may learn of anticompetitive conduct through investigations or litigation in other industries. The DOJ's "amnesty plus" program, pursuant

to which a cartel participant in one market discloses a cartel in another market, is a driving force of new investigations.

After opening a criminal investigation, the DOJ issues grand jury subpoenas or executes search warrants directed to industry participants. At this point, the existence of the investigation usually becomes public. The DOJ proceeds with criminal investigations through the grand jury process. The grand jury is tasked with examining felony cases and returning indictments. In practice, the grand jury is a tool for prosecutors to investigate potential criminal antitrust offences. A grand jury almost always defers to a prosecutor's decision to seek indictment. The grand jury has broad powers to subpoena documents and witnesses; witnesses may be served with subpoenas anywhere in the United States commanding them to provide testimony under oath. Fed. R. Crim. P. 17(e). Witnesses subpoenaed to testify before the grand jury have the right to refuse to testify under the Fifth Amendment if their testimony would be potentially incriminating. The DOJ may relieve such incrimination risk and thus procure the testimony by granting the testifying witness immunity from prosecution.

An indictment is merely a formal charge by the government of an antitrust violation after a grand jury finding that there is sufficient evidence to have a trial. Indicted companies and individuals have the right to trial by jury and the government must prove its case beyond a reasonable doubt.

In addition to the powers of the grand jury, the DOJ uses search warrants, wiretaps, border searches and interviews to gather evidence and further its investigations. A federal judge may execute a search warrant upon a finding of probable cause, thus enabling law enforcement officers to enter private premises to search for and seize evidence. The DOJ also uses phone or wiretaps to monitor and record conversations among suspected co-conspirators. Federal law permits the use of phone or wiretaps to gather evidence of a violation of the Sherman Act upon a showing of probable cause to a federal judge. 18 U.S.C. § 2516(r).

In a global cartel case, the DOJ typically places key executives of foreign-based companies on "border watch". Once the request is made, immigration and border control officials comply automatically as no showing of guilt or knowledge about an alleged cartel is required. Border watches are used to detect the executive's entry into the United States. The person then can be subjected to an unannounced "drop-in" interview by a DOJ attorney or FBI agent.

In civil antitrust cases, the DOJ begins its investigation by issuing a civil investigative demand (CID). CIDs can seek documents, interrogatory responses or sworn testimony. The DOJ has the power to serve a CID on any individual or corporation it has reason to believe is in possession, custody, or control of relevant materials, or has any information relevant to a civil antitrust investigation. 15 U.S.C. § 1312.

Leniency/amnesty regime

The DOJ administers a formal amnesty program called the "leniency program" that provides for complete immunity from criminal prosecution. The leniency program and "amnesty plus" program are significant detection tools and have played a role in virtually every recent major cartel investigation, including the auto parts investigation, municipal bonds investigation, LIBOR investigation, LCD investigation, air cargo investigation, and freight forwarding investigation. The program also can result in de-trebling of damages in parallel civil cases if the amnesty applicant satisfies the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") by, among other things, providing "satisfactory cooperation" to plaintiffs in the civil action.

A corporation that comes forward to report illegal activity prior to a government investigation qualifies for "Type A" leniency if it satisfies six conditions: (1) at the time the corporation comes forward, the Division has not received information about the activity from any other source; (2) upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity; (3) the corporation reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation; (4) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (5) where possible, the corporation makes restitution to injured parties; and (6) if the corporation did not coerce another party to participate in the activity

and clearly was not the leader in, or the originator of, the activity. Antitrust Division's Corporate Leniency Policy, *available at* http://www.justice.gov/atr/public/guidelines/0091.htm.

If the corporation does not meet all six conditions, it may still qualify for "Type B" leniency. If a company comes forward after the DOJ has received information about the illegal antitrust activity, it may qualify for leniency if: (1) the corporation is the first to come forward and qualify for leniency with respect to the activity; (2) at the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction; (3) upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity; (4) the corporation reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation; (5) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (6) where possible, the corporation makes restitution to injured parties; and (7) the Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward. *Id.*

If a corporation qualifies for Type A leniency, all current directors, officers and employees of the corporation who admit their involvement in the criminal antitrust violation as part of the corporate confession will also receive leniency if they admit their wrongdoing with candour and completeness and continue to assist the Division throughout the investigation. *Id.* If the corporation qualifies for Type B leniency, the Corporate Leniency Policy states that individuals who come forward with the corporation will still be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually. In practice, however, the DOJ ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants. Although the DOJ has no obligation to grant leniency to former employees under the Corporate Leniency Policy, the Division has authority to agree not to prosecute former employees who come forward to cooperate, and often reaches such agreements.

When a company uncovers evidence suggesting that it has engaged in a criminal antitrust violation, time is of the essence; it must act quickly to get a "marker" that establishes its place as the first in line at the DOJ for purposes of receiving amnesty.

Although generally amnesty is not available for the second company to report illegal activity, early cooperation often is noted by the DOJ in plea agreements as a mitigating factor.

Moreover, the second company may receive more lenient treatment under the "amnesty plus" program by disclosing the existence of a second cartel. A party that is the first to report the second cartel receives both full amnesty for the second cartel and more lenient treatment in the first cartel. The DOJ's policy is to pursue a fine or jail sentence at or above the upper end of the Sentencing Guidelines range if a company is aware of a second cartel but chooses not to report it.

An individual who approaches the DOJ on his or her own behalf to report illegal antitrust activity may also qualify for leniency. Antitrust Division's Leniency Policy for Individuals, *available at* http://www.justice.gov/atr/public/guidelines/0092.htm. An individual leniency applicant is required to admit to his or her participation in the antitrust violation and must not have approached the DOJ previously as part of a corporate leniency application based on the same conduct. Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if three conditions are met: (1) at the time the individual comes forward, the Division has not received information about the activity being reported from any other source; (2) the individual reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation; and (3) the individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity. *Id.*

If an individual does not qualify for leniency under the corporate or individual leniency policies, the individual still may be considered for statutory or informal immunity from criminal prosecution, but such immunity is discretionary.

There is no formal process for challenging the DOJ's decision to grant amnesty.

Administrative settlement of cases

Plea bargaining plays a significant role in the DOJ's enforcement of the antitrust laws. In fact, the vast majority of criminal antitrust cases are resolved by plea agreements. All of the most significant anti-cartel enforcement actions in the past year, as discussed above, have involved plea bargains.

A guilty plea by a defendant constitutes an admission of guilt by the charged defendant. The government and the defendant negotiate the terms of the resolution including recommended fines and jail time. Any plea agreement must be approved by a federal court. Fed. R. Crim. P. 11(c)(3). In most cases, however, federal judges defer to the DOJ and approve antitrust plea bargains. The guilty plea, like a finding of guilt by a jury, is *prima facie* evidence of a violation of the antitrust laws in a parallel civil case.

Third party complaints

While DOJ investigations are frequently triggered by tips from customers, competitors, disgruntled employees or other third parties, the DOJ is under no obligation to pursue a formal investigation based solely on such tips. The more common process by which third parties contest cartel activity is through the filing of a private lawsuit. Therefore, in addition to actions brought by the DOJ, defendants may be exposed to private damage claims and class actions. Mere announcement of a grand jury investigation often triggers scores of class action lawsuits. For example, in connection with the DOJ's LIBOR/EURIBOR investigation discussed above, several banks already are facing US class actions from investors that purchased securities tied to LIBOR.

An injured private party, typically a purchaser of an allegedly price-fixed product, may bring a civil suit to redress violations of the antitrust laws. While only direct purchasers may sue for damages under the Sherman Act, many state statutes allow indirect purchaser damages actions. Typically, private antitrust lawsuits are pursued as class actions. This means that one purchaser plaintiff can sue on behalf of all purchasers of the allegedly price-fixed product, thus greatly increasing potential exposure. A plaintiff must make certain showings before a case may proceed on a class action basis. Although, for many years, courts were willing to grant class action status to antitrust plaintiffs based on very minimal showings, more recently courts have scrutinised class action applications carefully. Defeating a motion for class certification can be tantamount to outright victory for a defendant.

Damages in private actions are typically measured by calculating the actual damages or "overcharge" resulting from the cartel and then trebling that sum. A defendant's liability is joint and several. A plaintiff, therefore, may collect three times the entire damage caused by the cartel from one or more defendants as it wishes. Successful plaintiffs are also entitled to recover attorneys' fees.

Civil penalties and sanctions

The Antitrust Division has continued to vigorously litigate its ongoing challenges to contractual restrictions that it maintains illegally distort competitive forces in the markets for health insurance and consumer credit cards, and has obtained prompt settlements remedying competitive harm in other instances.

For example, litigation is ongoing in the DOJ's civil suit against Blue Cross Blue Shield of Michigan. The lawsuit, originally filed in October 2010, alleges that provisions of Blue Cross's agreements with hospitals, known as most favoured nation clauses, have the effect of raising hospital prices, preventing other insurers from entering the marketplace and discouraging discounts. The case is set for trial in 2013.

Litigation also is ongoing in the DOJ's October 2010 civil suit against American Express, and has been joined by several states. The complaint challenges rules by American Express, Visa, and MasterCard preventing merchants from offering consumer discounts, rewards, and information about the costs related to use of their credit cards. The complaint alleges that such rules raise costs for merchants and, ultimately, result in consumers paying more for their purchases. In July 2011, a federal judge approved a settlement between the DOJ and Visa and MasterCard under which the companies agreed

to lift the restrictions on merchants. Litigation against American Express is ongoing.

On February 15, 2012, the Division obtained a civil settlement from Gunnison Energy Corporation (GEC), SG Interests I Ltd., and SG Interests VII Ltd. (SGI) requiring the companies to pay $550,000 for agreeing not to compete when bidding for natural gas leases auctioned by the U.S. Department of the Interior's Bureau of Land Management. The settlement is currently under Tunney Act review.

Right of appeal against civil liability and penalties

Losing parties in civil cases have a right to appeal. Appeal is taken to the circuit court with jurisdiction over the trial court. Appeals in the federal system after the initial appeal to the circuit court, i.e., appeals to the Supreme Court, are discretionary. Supreme Court review is rare, however, and reserved for particularly important issues or for issues where there is conflict among lower courts.

Criminal sanctions

The DOJ normally reserves criminal prosecution for "hard-core cartel activity" that constitute "*per se*" violations of the antitrust laws such as price fixing, bid rigging, and market allocations. Under the Sherman Act, a corporation faces a maximum fine of $100m per offence, and individuals face a maximum sentence of 10 years in prison and a $1m fine.

Under the Alternative Sentencing Act, a defendant may be sentenced above the statutory maximum if the defendant derives a pecuniary gain from the offence or others experience pecuniary loss. 18 U.S.C. § 3571(d). Under such circumstances, the defendant may be fined up to twice the gross gain or twice the gross loss, "unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process". If the government seeks a fine in excess of the Sherman Act statutory maximum, it must prove the gain or loss to a jury beyond a reasonable doubt.

Within the boundaries set by the Sherman Act and the Alternative Sentencing Act, courts consider the US Sentencing Guidelines to determine the specific penalty to be imposed on the defendant. Under *United States v. Booker*, 543 U.S. 220 (2005), sentencing judges are no longer required to impose sentences within the guidelines range, but rather should consider the guidelines in connection with a wider range of sentencing factors set forth in the federal sentencing statute.

Convicted criminal defendants have a right to appeal. The constitutional prohibition of double jeopardy prevents the DOJ from appealing a criminal acquittal. As with civil cases, appeal is taken to the circuit court with jurisdiction over the trial court.

Cross-border issues

The US antitrust laws extend to conduct that takes place outside the United States when there is a sufficient nexus to the United States. The Foreign Trade Antitrust Improvements Act (the "FTAIA") governs the extraterritorial application of the antitrust laws. 15 U.S.C. § 6a.

On its face, the Sherman Act applies to trade or commerce among foreign nations. However, the FTAIA limits the extraterritorial reach of the antitrust laws. Under the FTAIA, the Sherman Act will not apply to conduct involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect – (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States" 15 U.S.C. § 6a; *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004) ("The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets.").

The Supreme Court in *Hartford Fire Insurance Co. v. California*, held that the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States" 509 U.S. 764, 796 (1993). The focus of the inquiry often falls on whether the "direct,

substantial, and reasonably foreseeable" test has been satisfied. Courts look at factors such as the location of the parties, where title to the goods passes, the chain of distribution that takes place before the goods enter the United States, and the effect on US prices. *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009); *In re Graphite Electrodes Antitrust Litig*, No. 10-MDL-1244, 2007 WL 137684 (E.D. Pa. Jan. 16, 2007); *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 755852 (D.D.C. June 7, 2001). *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997) confirmed that the same rules of extraterritoriality apply to criminal cases.

Developments in private enforcement of antitrust laws

Civil redress is a core feature of US law, and follow-on class action lawsuits are triggered in virtually every cartel case. All of the DOJ investigations described above currently have follow-on class actions pending.

Damages exposure in follow-on class actions can be significant. For example, in the follow-on class action to the air cargo investigation, there have been $485m in civil settlements to date, including $89.5m in settlement from British Airways alone. Similarly, in the follow-on class actions to the LCD investigation, there has been more than $1bn in civil settlements to date, and significant opt-out suits remain.

Amnesty recipients also face significant exposure to civil damages despite the provisions of ACPERA limiting liability to actual, rather than treble, damages. In the LCD class actions, amnesty recipient Samsung paid $322m in settlement of direct and indirect purchaser class actions. In the air cargo class actions, amnesty recipient Lufthansa paid $84m to direct and indirect purchasers in a class action settlement.

Reform proposals

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

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews. The DOJ changed its model conditional and final leniency letters for corporations in 2008, but there is no ongoing or proposed leniency or immunity policy assessment or review.

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James Keyte handles a wide variety of antitrust litigation, transactional and advisory matters across numerous industries.

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In the transactional arena, Mr Keyte has represented numerous clients before the Department of Justice and the Federal Trade Commission. Mr Keyte regularly appears before the antitrust agencies in a variety of investigational contexts.

Mr Keyte also advises numerous clients on compliance with basic antitrust statutes, including issues relating to competitor collaborations, unilateral conduct and distribution.

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While serving as acting assistant attorney general at the DOJ, Ms. Pozen led many high-profile matters and worked extensively with leaders of international antitrust authorities. She also has represented the U.S. on international competition issues on behalf of the Organisation for Economic Co-operation and Development and the International Competition Network.

Ms Pozen was profiled in 2009 as a leading antitrust attorney by *Global Competition Review* in its "Women in Antitrust" issue.

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