

## ANTITRUST TRADE AND PRACTICE

# Antitrust Criminal Update: Adventures in Cartel Enforcement

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## Introduction

Department of Justice (DOJ) cartel investigations have historically targeted corporate defendants. The current enforcement landscape, however, is increasingly focused on individual accountability and has evinced the Antitrust Division's willingness to embrace new and undertested approaches of ensuring competitive domestic markets. From a jury's conviction of a cartel in coastal Georgia, to the rising review of third-party algorithms, to a continuing emphasis on labor markets, we look at some of the latest developments in American cartel enforcement.

## The Current State of Cartel Enforcement

Cartel enforcement, especially of corporate defendants, has declined in recent years. Between 2022 and 2023, the number of defendant corporations dropped by nearly 80%, while the rate of individuals charged fell 29%. U.S. Department of Justice, "Criminal Enforcement Trends Charts." The DOJ collected \$267 million in criminal penalties in 2023—a significant



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improvement over its 2022 total of \$2 million, but nevertheless a far cry from the record \$3.6 billion it accrued in 2015. *Id.* Furthermore, the DOJ suffered high-profile defeats in the prosecutions it did pursue. The Division has particularly struggled to obtain criminal convictions from juries—in 2023, jurors acquitted defendants in the no-poaching and wage-fixing cases *United States v. Manahe* and *United States v. Jindal*. The DOJ fared little better with judges last year. In *United States v. Patel*, a Connecticut district court granted the defendant's motion for judgment of acquittal, and in *United States v. Brewbaker*, the Fourth Circuit reversed a lower court's denial of the defendant's motion to dismiss. Both the *Patel* and

*Brewbaker* courts found the DOJ's application of the per se rule overly broad, noting that the rule of reason standard applies unless there is "demonstrative economic evidence" of "manifestly anticompetitive effects." *United States v. Brewbaker* (4th Cir. 2023).

Diminishing enforcement levels could potentially reflect changes to the DOJ's leniency policy. Whistleblowers frequently trigger cartel investigations, and many of the Antitrust Division's prosecutions have depended on leniency applications.

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Companies across the board should scrupulously document their independent decision-making, exercise caution when sharing any data with competitors and thirdparty intermediaries, and consider institutionalizing antitrust review of algorithm usage and information sharing practices.

In 2022, the DOJ made the application process more stringent, adding a requirement that applicants "promptly report" illegal activities to the Division upon discovery of such conduct. Press release, U.S. Department of Justice, "Antitrust Division Updates its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions" (Apr. 4, 2022). The new condition introduces an element of uncertainty to the process, and leniency applications have declined since the DOJ announced these changes. However, these trends are consistent with a worldwide downward trajectory in leniency applications, so the exact effect of the revised policy is unclear.

Last October, the DOJ introduced a safe harbor policy in the mergers and acquisitions

context which could incentivize whistleblowing. Under the policy, acquiring companies that uncover misconduct during due diligence can potentially earn a presumption of prosecution declination by self-reporting such conduct. In announcing the policy, Deputy Attorney General Lisa O. Monaco explained, "Our goal is simple: Good companies—those that invest in strong compliance programs—will not be penalized for lawfully acquiring companies when they do their due diligence and discover and self-disclose misconduct." Speech, U.S. Department of Justice, "Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection With Mergers and Acquisitions" (Oct. 4, 2023). The safe harbor—which the DOJ began implementing in March of this year—has special requirements for antitrust offenses. Companies disclosing antitrust violations must not only meet the requirements of the antitrust leniency policy, but must also report the misconduct prior to closing and agree to suspend review under the Hart-Scott Rodino Act or otherwise refrain from closing until granted a conditional leniency letter or the leniency marker expires.

Despite its string of recent losses, the DOJ won a significant victory on July 12, when a federal jury in Georgia convicted brothers George and John Melton of conspiring to fix prices, rig bids, and allocate markets. Press release, U.S. Department of Justice, "Jury Convicts Two Executives in Longstanding Antitrust Conspiracy to Fix Prices, Rig Bids, and Allocate Markets for Concrete" (Jul. 12, 2024). In its 2020 indictment, the DOJ alleged that the Melton brothers—managers at rival ready-mix concrete stores in the greater Savannah area—violated Section 1 of the

Sherman Act by coordinating price increases, allocating jobs, and submitting collusive and noncompetitive bids to customers. Indictment, *United States v. Evans Concrete*, No. CR 420-081 (S.D. Ga. Sep. 2, 2020). A plea agreement brokered with James Pedrick, an employee who acted as a conduit for the exchange of pricing-related information, was essential to the successful prosecution. Recommended probation by the DOJ for his “full, complete, and truthful cooperation,” Pedrick offered key testimony regarding the misconduct. Plea agreement, *United States v. Evans Concrete*, No. CR 420-081 (S.D. Ga. Aug. 8, 2023). While the conduct at issue ostensibly implicated a highly local market, in his post-verdict statements Assistant Attorney General Jonathan Kanter described concrete as “essential to our nation’s infrastructure,” demonstrating that no matter is too small for cartel enforcement. Press release, U.S. Department of Justice, “Jury Convicts Two Executives in Longstanding Antitrust Conspiracy to Fix Prices, Rig Bids, and Allocate Markets for Concrete” (Jul. 12, 2024).

### **The Future of Cartel Enforcement: Trends and Takeaways**

As regulators explore novel and creative ways of applying antitrust law, the scope of cartel enforcement is likely to expand in such diverse areas as labor markets, algorithmic and artificial intelligence (AI) pricing, and information exchanges.

**Labor and employment.** Regulators continue to address labor issues with antitrust law. See, e.g., U.S. Department of Justice, “2023 Merger Guidelines” (Dec. 18, 2023) (indicating that competition in labor markets is relevant to antitrust review of mergers). Accordingly, cartel enforcement has become an attractive conduit

for prosecuting wage-fixing arrangements and no-poaching agreements. Despite previous losses in similar prosecution attempts, the DOJ recently demonstrated its persistence in pursuing such theories of harm with *United States v. Lopez*, indicting a health care executive for allegedly colluding with competitors to fix wages of nurses in the Las Vegas area. Press release, U.S. Department of Justice, “Health Care Staffing Executive Indicted for Fixing Wages of Nurses” (Mar. 16, 2023). In discussing the indictment, Kanter declared that “the Antitrust Division will be vigilant in protecting workers.” *Id.* As with pricing information, companies should be cautious when sharing information related to compensation and benefits with competitors, especially through third-party intermediaries that collect and distribute wage and other employment data. In collaborative activities like joint ventures and transactions, labor restrictions should be closely tailored to, and justified by, legitimate business reasons.

**AI and Algorithmic pricing.** AI and algorithmic pricing appears to be an emerging area of cartel enforcement, as regulators express concern that third-party pricing algorithms could enable anticompetitive and collusive conduct among competitors. On July 23, the DOJ released a joint statement with the Federal Trade Commission, the United Kingdom’s Competitions and Markets Authority, and the European Commission, characterizing the rapid evolution of generative AI as a “technological inflection point.” Press release, “Leaders of Justice Department, Federal Trade Commission, European Commission and U.K. Competition and Markets Authority Issue Joint Statement on AI Competition” (Jul. 23, 2024). The statement highlights the risks of

AI-related “connections” between firms which could be used to “steer market outcomes in their favor at the expense of the public.” *Id.* Though the DOJ has yet to bring a Section 1 case against AI products, including algorithmic pricing, it has launched a price-fixing probe and filed statements of interest in class action challenges of such algorithms. Companies should exercise caution in using third-party pricing algorithms as this area of law continues to develop.

**Information exchanges.** Information exchanges are another area of increasing regulatory scrutiny. In 1978, *United States v. Gypsum* made clear that information exchanges alone are not criminal antitrust violations, though they can be challenged civilly under a rule of reason analysis and are frequently cited as circumstantial evidence of price-fixing in criminal conspiracy cases. But as information sharing via third-party intermediaries becomes commonplace, distinguishing between permissive exchanges and illegal collusion proves increasingly difficult. Further complicating the analysis is the DOJ’s 2023 decision to revoke its longstanding safe harbor policy, which traditionally protected exchanges through third-party aggregations. In reversing the policy, the DOJ observed that exchanges facilitated by intermediaries can have the same

anticompetitive effects as direct information-sharing. Consistent with its scrutiny of intermediaries, the DOJ recently sued Agri Stats, a data analytics company which published weekly and monthly reports on sales prices, worker compensation, and output rates in the meat processing industry. Press release, U.S. Department of Justice, “Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors” (Sep. 28, 2023). The DOJ describes the industry reports as “troves of competitively sensitive information” which are withheld from the public but disseminated to the overwhelming majority of meat processors, creating an “asymmetry” that exacerbates competitive harm to consumers. *Id.*

### Conclusion

While many of the DOJ’s recent cartel prosecutions have faltered, the July verdict in *Evans Concrete* could signal a shift in the DOJ’s fortunes. Accordingly, companies across the board should scrupulously document their independent decision-making, exercise caution when sharing any data with competitors and third-party intermediaries, and consider institutionalizing anti-trust review of algorithm usage and information sharing practices.