

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are partially visible at the bottom and sides of the frame, with their glass surfaces reflecting the sky and clouds. The sky is a pale blue with soft, white, wispy clouds. The sun is visible as a bright, hazy area in the upper right, creating a lens flare effect. The overall composition is dynamic and architectural.

Vinson & Elkins

An Introduction to:

Antitrust Cartel

Winter 2023

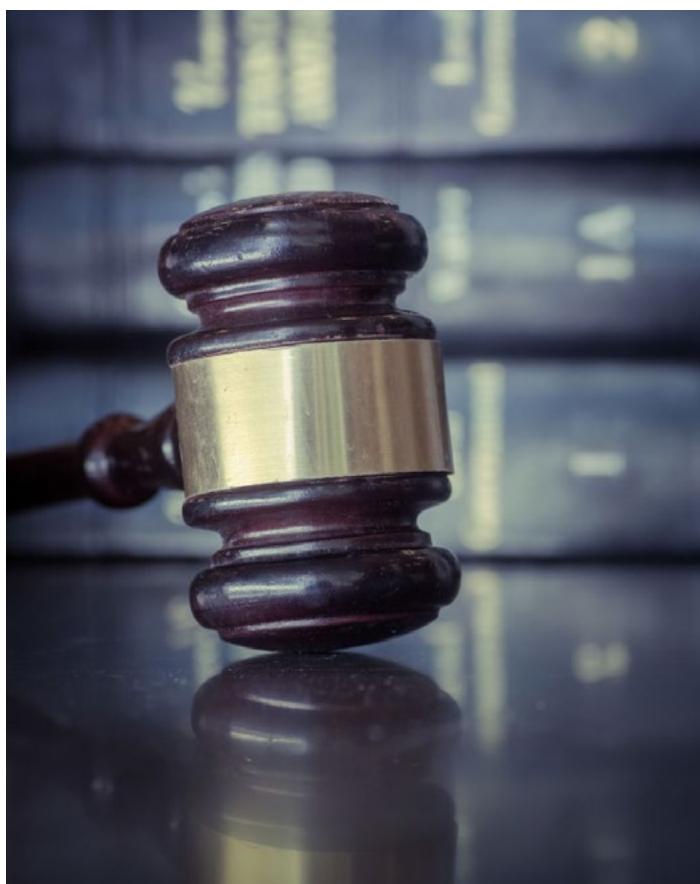


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Introduction

The word “cartel” conjures images of mobster movies, lurid headlines, and drug busts. But a less exotic brand of cartel can be far more relevant to the business world. In an economic sense, a cartel is simply a collection of independent businesses that would typically compete with each other, but which have instead agreed to cooperate with one another (or “collude”) to raise prices or otherwise control the market. Reflecting a belief that cartels can harm the economy, U.S. law creates tools to combat them, including both criminal statutes and civil lawsuits. This primer is intended to orient readers to the basics of cartel enforcement by federal authorities and cartel litigation in U.S. courts.



The lawyers of Vinson & Elkins have a long history of representing clients in cartel cases in the United States and throughout the world. On the criminal side, our lawyers have defended companies and individuals accused of price fixing, market allocation and bid rigging. On the civil side, we have represented both plaintiffs and defendants in lawsuits seeking damages and injunctive relief. Over the last twenty years our skilled lawyers have been involved in many of the largest and most important cartel cases in the country, representing both domestic and international clients.

Newly updated for 2023, this Cartel Primer distills our experience in cartel cases in a readable, practical format to help orient you to this complex area of law. We will discuss the challenges targets face in responding to cartel allegations, sharing examples from actual cases we’ve tackled. Our goal is not to make you cartel lawyers (we want you to hire us for that) but to acquaint you with the risks and issues companies face in cartel enforcement—issues we confront every day representing our clients.

The Primer is organized into three sections. Part one describes the statutory framework applied to cartels; part two discusses how government enforcement investigations work and the issues targets face in such investigations; and part three discusses the nature and conduct of civil litigation. This new edition takes into account developments over the last year, including newly announced government enforcement priorities and case law updates.

We want to thank you, our clients, for allowing us to represent you in important antitrust cases and trusting us to represent your best interests.

We also want to thank our team of lawyers at Vinson & Elkins who dedicated many hours to this project, including Craig Seebald, Alden Atkins, Jason Powers, Stephen Medlock, Chris James, Lara McMahon, Lillian Sun, and Evan Seeder.



Part One

Governing Law

The Sherman Act has served as the bedrock of American antitrust law since it was passed in 1890, preserving competitive markets that generate economic growth, innovation, and consumer welfare.¹ The U.S. Supreme Court has characterized the Act as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”²

The Act is divided into two operative sections. Section 1 prohibits anticompetitive agreements, those agreements between entities that are unreasonable restraints of trade. Section 2 prohibits monopolization and attempted monopolization, described as anticompetitive conduct that a single firm is capable of committing due to its size and power in the market. Cartels, which are the subject of this Primer, involve multiple firms, and their conduct falls within the scope of Section 1.

Categories of Section 1 Violations

By its plain text, Section 1 prohibits “every contract, combination . . . or conspiracy, in restraint of trade.” However, recognizing that every contract is, in a literal sense, a restraint of trade to some degree, the Supreme Court early on declared that Section 1 prohibits only agreements that *unreasonably* restrain trade. The agreements prohibited by Section 1 can be divided into two broad categories: agreements that are considered *per se* illegal and agreements that are subject to examination under the “Rule of Reason.”

Agreements classified as *per se* illegal are deemed to always harm competition. These include agreements between market participants to fix prices, rig competitive bids, restrict their output, or divide a market. For these *per se* unlawful agreements, liability attaches merely through a showing that the agreement existed. As a result, the courts need not consider the agreement’s intent or economic effect in order to find a violation.

All other alleged restraints of trade are subject to the Rule of Reason. Under the Rule of Reason, agreements are analyzed on a case-by-case basis and are only considered unlawful after an analysis of the relative pro- and anti-competitive effects. If a judge or jury concludes that the agreement in question is, on balance, anticompetitive, then the agreement is ruled unlawful.

Cartels, as traditionally understood, are groups that engage in the type of price-fixing, bid-rigging, and market-dividing conduct that fall within the *per se* unlawful category. For that reason, when enforcement authorities or private litigants allege they have identified a cartel, the alleged cartel participants will not be entitled to argue that their behavior was economically beneficial or justified in some way. The only question to be decided will be whether they in fact participated in a cartel.

Other Relevant Statutes

Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize or conspire to monopolize a market. There is no bright line for the market share required to have a “monopoly,” although generally courts require at least 50%. To determine market share, the court must define what the relevant market is. In doing so, courts look at both the product market and the geographic market to determine the extent to which reasonable substitutes are available.

Importantly, the antitrust laws do not make it unlawful to have a monopoly because a successful and innovative company might obtain a large market share through successful competition. To violate Section 2, the defendant must have obtained or maintained monopoly power through anticompetitive conduct. Thus, in monopolization cases, courts focus on whether the defendant’s conduct has been pro- or anti-competitive. This makes Section 2 cases very fact intensive that require extensive economic analysis. Section 2 cases are very difficult for a plaintiff to prove.

Section 2 also prohibits attempts and conspiracies to obtain a monopoly. For these claims, the focus is on the defendant’s conduct. Monopoly power is not required, although the plaintiff must prove a dangerous probability of achieving monopoly power.

An important difference between Section 1 (discussed above) and Section 2 is that Section 1 requires an agreement between two or more entities while Section 2 generally focuses on the conduct of a single firm. This means that Section 1 does not reach a unilateral attempt by one competitor to conspire with another competitor. To bridge this gap, government enforcement agencies sometimes challenge unilateral attempts under Section 2’s attempt to monopolize provision, asserting that if the attempt had been successful it would have resulted in monopoly power.

Because there are no bright lines for a Section 2 offense, government enforcement entities usually bring civil claims under the statute, even though as written Section 2 creates both civil and criminal offenses. Recently, however, enforcement agencies have brought a small number of criminal Section 2 cases where unilateral conduct

was particularly egregious, such as a brazen and well documented attempt to conspire.

Another important statute is Section 5 of the Federal Trade Commission Act. It allows the Federal Trade Commission (“FTC”) to challenge “unfair or deceptive acts or practices in or affecting commerce.” Because the phrase provides little clarity about what it prohibits, the FTC has generally interpreted it to be coextensive with Sections 1 and Sections 2 of the Sherman Act, with one important exception—sometimes the FTC has used Section 5 to challenge unilateral attempts to conspire. Very recently, however, the FTC issued a Policy Statement saying that it will interpret its Section 5 powers more broadly to challenge conduct that may not have actually caused anticompetitive harm but that it determines has a tendency to create negative consequences to competition. It remains to be seen what conduct the FTC will challenge under this broader interpretation of its Section 5 authority.

Enforcement Overview

The American legal system is set up for robust enforcement of the antitrust laws against cartels. The federal antitrust laws are enforced concurrently by two different federal agencies: the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”). While the DOJ must file its cases in federal court, the FTC can enforce the laws through administrative proceedings in front of its own Administrative Law Judges or in federal court. In addition, most states have competition laws modeled on the Sherman Act, which can be enforced by state attorneys general, and pose an added enforcement risk to cartels. And while non-U.S. jurisdictions have long had antitrust statutes of their own, it has now become common for U.S. investigations to be accompanied by enforcement actions in the European Union, Japan, Korea, Brazil and any other countries where the alleged conduct occurred. Balancing the sometimes competing schedules of priorities during an investigation can be a major focus of an effective defense.

Violators of the antitrust laws are subject to heavy criminal and civil sanctions. Criminal enforcement, which is the exclusive dominion of the DOJ, is focused solely on the *per se* cartel violations that are at the core of Section 1 (price-fixing, bid-rigging, etc.). Criminal penalties for violations

of Section 1 can reach as high as \$100 million per count for corporations and \$1 million per count for individuals. However, alternative fine statutes (described in more detail later) can cause violations with high market impact to easily exceed \$100 million for corporate defendants. Moreover, individuals face up to 10 years’ imprisonment for each count. The average prison sentence for an antitrust defendant is now two years.

Section 4 of the Clayton Act, another federal antitrust statute, also creates a private cause of action that gives private plaintiffs the power to pursue civil damages against antitrust violators. In those civil lawsuits, defendants face the risk of treble damages (meaning liability for three times the monetary harm caused by the cartel). Finally, while civil and criminal violations are subject to four- and five-year statutes of limitations, respectively, those deadlines are subject to a variety of tolling doctrines that can extend exposure for a much longer period of time. For example, an ongoing government investigation or class action lawsuit may put the running of limitations on hold, giving other authorities or plaintiffs additional time to consider bringing their own actions against the alleged cartel participants. In short, companies and individuals that find themselves on the wrong side of Section 1 of the Sherman Act face the potential for extensive legal liability from a number of different directions.





Part Two

Government Investigations

Most cartel cases start with a government investigation. While government investigations of potential antitrust wrongs can be criminal or civil, nearly all cartel cases are investigated as criminal matters. Because both individuals and companies can be criminally prosecuted for antitrust crimes, it is important to know about the U.S. grand jury system and how it works. In addition, it is important to know about the Justice Department's leniency program which provides significant benefits to companies and individuals who self-report antitrust crimes to the government. Knowing how the leniency program works can be the difference, in some cases, from a company not being prosecuted to company paying a huge fine. We also discuss below the best strategies companies can pursue to minimize exposure in a government investigation.

Investigations Can Be Civil, Criminal, or Convert from One to the Other

Federal enforcement actions are preceded by investigations. Both the DOJ and the FTC can investigate allegations of cartel activity. The DOJ can investigate cartels for either civil or criminal enforcement purposes. The FTC is a civil enforcement agency, meaning that it can bring enforcement actions for certain types of monetary sanctions, but not criminal penalties, such as imprisonment. Generally, an investigation that starts on a civil track is likely to remain there. There are exceptions though. Civil investigations can become criminal, and vice versa.

Case Example

Packaged Tuna Antitrust Investigation. Numerous criminal convictions arose from a price-fixing conspiracy in the market for canned tuna fish.³ The criminal investigation was launched during a pre-merger review that Chicken of the Sea and Bumble Bee, the merging companies, expected to be routine. However, that review uncovered evidence of a price-fixing conspiracy. The result was criminal convictions for two of the three companies involved in the cartel behavior, four executives, and criminal fines well north of \$100 million. These cases serve as a reminder that, although rare, investigations initiated as civil in nature can be transformed into full-blown criminal actions. Companies are therefore advised to treat civil inquiries from investigators quite seriously.

How Investigations Start

An antitrust investigation may originate in a number of ways. Customer complaints, corporate whistleblowers, investigations of proposed mergers, congressional inquiries, and self-reporting by cartel members can all result in an antitrust investigation. U.S. antitrust investigators can also be assisted by foreign competition authorities through processes outlined in mutual legal assistance treaties (“MLAT”) negotiated between the countries.

Prevalence of self-reporting. Since the creation in 1993 of a formal DOJ leniency program, self-reporting by cartel members has become the most common way for investigations to start. Under the Division’s leniency policy, also known as the “amnesty” policy, the first company or individual in a cartel to come forward and report previously unknown activity will not be prosecuted criminally, thereby avoiding the prospect of criminal fines that can reach \$100 million per violation. That said, by policy leniency is not available to the “ringleader” of the cartel, and obtaining leniency requires more than self-reporting. (DOJ’s adherence to this policy is spotty at best.) It is contingent upon the company performing certain remedial actions, including full cooperation with the government and admitting wrongdoing.

In addition to the self-reporting company’s avoiding criminal prosecution absent extraordinary circumstances, executives and employees of a company that self-reports previously unknown cartel behavior will also avoid criminal prosecution. If a company self-reports after the DOJ already has information about the cartel, the company is still eligible for leniency, but the DOJ theoretically has discretion over whether to offer amnesty to qualifying executives and employees. In practice, the DOJ has generally provided the same leniency benefits to the individuals as it would if it had no prior information about the cartel.

In 2022, the Antitrust Division updated its Leniency Policy and issued a new set of frequently asked questions (FAQs). In these revisions, the DOJ emphasized that amnesty applicants must take quick action to self-report after discovery of cartel conduct and to undertake remedial actions to prevent future wrong-doing. The FAQs also emphasize the need for amnesty applicants to “present concrete, reasonably achievable plans about how they will make restitution.” FAQ 35. The new guidance also clarified that leniency applies to other criminal activities in furtherance of the conspiracy such as wire fraud.

Leniency Plus. The full benefits of the leniency program are only available to the first company that reports its involvement in a cartel. As a result, companies whose management learned of employee involvement in a cartel only after an investigation had begun will have missed their chance at full leniency. To encourage companies under investigation to share additional useful information, the DOJ also promulgated a “Leniency Plus” policy, in which companies already under investigation for involvement in one cartel can receive leniency if they discover and report their involvement in additional cartels. The company receives leniency for offenses associated with the second cartel and receives a recommendation from the government to the court for a lower sentence on offenses associated with the first cartel. The Leniency Plus program of the DOJ has been a very successful tool for the government in obtaining guilty pleas, collecting fines, and resolving matters without trial.

There is a flip side of Leniency Plus. If a company or individual is participating in multiple cartels and does not self-report after being a target of an investigation, and if

the DOJ later finds out about the company’s involvement in other cartels, the Department will use its discretion to seek higher fines and penalties for a company that does not report all of its cartel-related conduct.

Cooperating companies can cut their potential damages in follow-on civil cases, which are a near certainty, by two-thirds under the Antitrust Criminal Penalty Enhancement and Reform Act. The law, which allows qualifying companies to avoid paying treble damages in such cases, enhances the already powerful incentives of the DOJ leniency programs that drive the origination of many antitrust investigations.

Government’s Investigative Toolbox

During cartel investigations, the government has a full suite of evidence-gathering tools at its disposal. These include court-ordered search warrants and wiretaps, grand jury subpoenas (for both documents and testimony), material witness subpoenas, witness interviews, and civil investigative demands (“CIDs”).

Each investigative tool comes with its own set of requirements and procedures. For search warrants and wiretaps, federal investigators must show a federal court that they have probable cause to believe evidence of a crime will likely be found during execution of the wiretap or search warrant. Search warrants can enable not merely searches of physical locations, but also searches of the target’s computers.

Grand juries are groups of 16 to 23 citizens selected at random and assembled to hear evidence put on by the investigators. The grand jury process allows the government to issue subpoenas to compel additional information, and ultimately, based on the evidence put on by the prosecutors, grand juries may vote to issue criminal indictments. The grand jury’s ability to compel information is virtually unchecked. For a CID, the government is merely required to have a reason to believe that a person or entity has information relevant to the government’s investigation.

Informal witness interviews are also used by investigators to obtain evidence. While individuals are not required to submit to an informal interview or answer questions in the

Case Example

*Automotive Parts Antitrust Investigation.*⁴ There are numerous instances of companies taking advantage of the Leniency Plus program to mitigate their liabilities, yet breaking open an entirely new avenue of investigation for the DOJ. The DOJ’s automobile parts investigation is a good example: The investigation started in 2010 focusing on one product, but grew to encompass numerous other products and additional defendants as targets of the early-stage investigations came forward and admitted misconduct involving other products to take advantage of the Leniency Plus program. Years later, the DOJ closed its largest investigation ever and obtained guilty pleas concerning multiple parts from numerous defendants.

absence of a subpoena or CID, individuals often voluntarily cooperate with interview requests, and sometimes provide more information to investigators than they initially planned to share.

Each of these investigative tools poses its own set of risks and intricacies for targets and recipients, but they also can create openings for skilled defense counsel to object to the inquiries, narrow their scope, and if it comes to it, make in-court challenges as to how incriminating evidence was collected.

Document Preservation Obligations

When a government investigation or litigation is reasonably anticipated, companies have obligations to preserve relevant documents and other evidence. Failure to do so can result in higher monetary fines or other sanctions for the loss of evidence (termed “spoliation”), and provide additional leverage to the government during its investigation.

Intentional destruction of evidence can create even worse outcomes for defendants. Evidence destruction can lead to separate obstruction-of-justice charges against the entity or individuals. Even if separate obstruction charges are not filed, destroying or tampering with evidence will have adverse ramifications during sentencing. Obstruction of justice can also increase the calculated sentencing range for antitrust convictions under U.S. Sentencing Guidelines (discussed further below), or simply give the sentencing court a reason to impose a higher sentence within the range of permissible sentences.

Receipt of formal court or investigative documents such as subpoenas or civil investigative demands puts a company on notice that an investigation or litigation is likely, and triggers the duty to preserve documents. However, the obligation to preserve documents can be triggered much earlier. For example, simply knowing of credible allegations of wrongdoing can trigger the duty to preserve. While there is unfortunately no bright-line rule for when preservation must occur, a company’s legal department should (after consulting with outside counsel) issue a “litigation hold” notice to its employees and its IT department as soon as an apparent duty emerges. The notice will alert affected

members of the organization to take immediate steps such as stopping automatic email deletion and device erasures, and preserving voicemails, texts, and messages in various messaging services, such as WhatsApp and WeChat. A company facing potential litigation or investigation should consult with experienced counsel to develop the “litigation hold” process and consider collecting and setting aside copies of server or device data.

Case Examples

United States v. Higashida, 2:16-cr-20641 (E.D. Mich.). In 2016, a Nishikawa Rubber Co. executive was charged with obstruction of justice for destroying records and communications that contained evidence of a price-fixing conspiracy. He pleaded guilty and was sentenced to 14 months’ imprisonment.

United States v. Katakis, 2:11-cr-00511 (E.D. Cal.) In 2017, a federal judge in the Eastern District of California sentenced a real estate investor to 10 months’ imprisonment for bid-rigging public real estate foreclosure auctions. In his explanation of the sentence, the judge noted that what distinguished the defendant from his co-defendants was his attempt to scrub his computer of incriminating evidence.

Grand Jury Proceedings

Under the Sherman Act, all violations of federal antitrust laws are criminal violations. Thus, such antitrust violations can only be prosecuted by grand jury indictment, unless a defendant waives this right, in which case the charging document would be an “information” which has the same effect as an indictment but was not returned by a grand jury.

What is a grand jury? A grand jury conducts an investigation of possible violations of criminal laws and has two purposes. The first purpose is to bring indictments against defendants. The defendant cannot present a defense or be accompanied by a defense attorney in a grand jury process. The standard of proof to indict a party is probable cause that the party has committed the crime. And generally, it is very unusual for a grand jury not to return an indictment when the government seeks one. The second purpose is that a grand jury functions as the government's investigative tool. The government may use the grand jury to obtain documents and testimony from witnesses relevant to the case. Because of the absence of defense counsel or judicial oversight, the government's grand jury powers are extremely broad and largely unchecked.

Powers and duties of the grand jury. The most powerful investigative tool of the grand jury is the subpoena. A subpoena compels individuals and entities to produce relevant documents or objects to the grand jury, and may also compel individuals to answer questions before the grand jury. Failure to comply with the subpoena will result in the noncompliant party being charged with contempt, and possibly with obstruction of justice.

The subpoena may be served anywhere in the United States if the court has personal jurisdiction over the party. It may also be issued to all U.S. citizens or residents located abroad, and any nonresident aliens in the United States. However, aliens located *outside* U.S. borders are not subject to grand jury subpoenas.

The subpoena power does have some limitations. It cannot be used for the "sole or dominating purpose" of preparing an already pending indictment for trial. Additionally, if the scope of the subpoena is overly burdensome or not necessary to the initial stages of an investigation, the parties may negotiate to limit the scope of the subpoena. If the subpoena is unduly burdensome, or if the act of producing the documents in the subpoena would be incriminating under the Fifth Amendment, the parties may respond with a "motion to quash," and refuse to respond. However, courts tend to give prosecutors wide berth when considering motions to quash.

Another major limitation of the grand jury subpoena is that, unlike in civil litigation discovery, it cannot be issued to obtain documents located outside U.S. borders. This

makes obtaining evidence abroad fairly difficult for the DOJ. Theoretically, the prosecutor may follow procedures under a formal Mutual Legal Assistance Treaty ("MLAT") between countries to obtain documents located overseas, but the procedure itself is very time-consuming. In these cases, the government may ask a judge to suspend the statute of limitations of the alleged crime for up to three years while the government seeks foreign evidence. Such a request can be made under seal without notice to the target. However, we have seen increasing levels of informal cooperation between countries where foreign regulators share information they have collected with U.S. prosecutors even in the absence of an MLAT.

The witness subpoena is an important tool for prosecutors because it forces the witness to "lock in" their testimony at the grand jury stage, on the record and under oath. Many times counsel will negotiate more informal interviews instead of under-oath testimony before the grand jury. But these interviews are also highly dangerous to potential subjects and targets of the investigation because incriminating statements may be used by the government unless the witness has immunity; and lying to a federal agent constitutes a separate crime. Of course, witnesses also have Fifth Amendment rights against self-incrimination and may decline to testify. This is a very important decision. Frequently these decisions come before the company or witness has had an opportunity to fully investigate the purported misconduct or be prepared by an attorney. The subpoena is also important if the government believes the witness will become unavailable at a later date.

If the witness is a "target" of the grand jury, meaning that the grand jury is considering charges against that individual, DOJ guidelines require that the government so inform the witness of their target status. However, there is little recourse if the government violates this policy or labels someone as a subject when they are really a target. As noted, if a witness is potentially culpable, he or she may refuse to testify by asserting the Fifth Amendment right to avoid self-incrimination. In most cases, such a refusal to testify will trigger negotiations with the government to obtain information in lieu of sworn testimony. This often includes a proffer by the witness's attorney, during which the attorney can provide context for the client's role in the matters at hand and describe what testimony the witness would likely give. An attorney proffer is often followed by an informal interview of the witness by the government.

The grand jury has the power to ask questions of the witnesses, but the primary task of investigation falls to the prosecution.

Grand jury secrecy. Grand jury proceedings must be conducted in secret, meaning that the grand jurors and the government may not share anything related to the proceedings, including the identities of the witnesses, what was said in witness testimony, and the content of subpoenaed documents. Secrecy prevents the potential defendants from fleeing or attempting to influence the grand jurors.

The main exception to the secrecy rule is that witnesses may describe their testimony to anyone they choose, including their employer, their attorney, or other defense counsel. The government may informally request that witnesses keep the grand jury proceeding confidential, but there is no formal rule preventing witnesses from disclosing their testimony. Therefore, for example, a company's counsel may find it advantageous to cooperate with its employee's counsel to learn what testimony was given to the grand jury.

No right to counsel for witnesses during testimony.

Witnesses in grand jury proceedings do not have a right to counsel while testifying, though they do have the right to counsel outside of the proceeding. This means that witnesses' counsel cannot be present when they testify.

Informal interviews. Witnesses are usually interviewed by prosecutors before grand jury testimony, and counsel can be present during these interviews. During this informal interview, the government will typically provide the witness' counsel with a list of topics and documents to be covered in the testimony. The government is not bound by secrecy rules for this informal interview. If a witness lies in an informal interview, it is not perjury because the witness is not under oath; however, the witness can be charged with lying to a federal agent under 18 U.S.C. § 1001, which provides for similar penalties.

Responding to a Raid

The U.S. government, which has become increasingly aggressive in its investigation of antitrust and other matters, sometimes initiates an investigation in what is sometimes known as a "dawn raid." Federal agents, often from the FBI, arrive first thing in the morning without any notice to serve and execute a search warrant. They will enter the reception area, request access to the premises, and begin seeking information and documents from lower-level employees. While the agents announce the purpose of the raid, they are unlikely to give the types of warnings and recitations of rights that people have come to expect based on television crime dramas. Such dawn raids are extremely disruptive to the business and the individuals involved; and may well involve attempts by agents to secure incriminating statements from key witnesses before they have had the chance to retain counsel.

If federal agents show up at your company, there are certain actions you should take. Here are ten essential steps:

- 1. Contact counsel immediately.** There is good reason to involve experienced counsel immediately. Counsel can assert an attorney-client relationship with respect to the employees that will make it more difficult for the agents to interview frightened and unprepared witnesses and obtain statements that are incorrect, incomplete or out of context and, as such, harmful to the company and the individuals.
- 2. Prevent the destruction of documents.** All employees should immediately be instructed not to delete documents, shred documents, destroy or remove emails, or otherwise hide potential evidence. You may believe that your employees would never shred documents or delete their hard drives. Yet in the majority of white-collar searches or cases, one or more people delete or destroy documents in some fashion, frequently under the guise of following document-retention policies. Destroying documents can be very damaging to the individuals and to the company – and be far worse than the troubling documents that are deleted or destroyed. First, destroying documents in anticipation of a federal investigation can be prosecuted as a separate crime, such as obstruction of justice, and this case may be easier for the government to prove than the original crime under investigation. Second,

the destruction of documents gives the government powerful evidence of an individual's consciousness or awareness of guilt. Third, since it is difficult to truly destroy documents without leaving incriminating traces, the prejudicial evidence is frequently recovered anyway, and the government's case is that much stronger.

3. Do not obstruct the search. Do not interfere. Forcible resistance or interference could be illegal. Employees on site should be cordial but not overly helpful. The agents are just doing their jobs, so there is no benefit to expressing frustration, or anger, or in protesting the company's innocence to the agents. Indeed, as we explain below, no substantive statements (including expressions of innocence) should be made at all. Frequently, the agents will want to make copies of computer systems and individual hard drives. This can cause great disruption. The company should not interfere with the agents, but work with them to minimize the disruption. Further, without disturbing the search, employees should observe what the agents do and how they conduct themselves, making detailed notes about where and what they search.

4. Do not make any statements. It is common practice for the agents to attempt to interview employees. The government tries to do this because this may be the only time they are able to interview people without lawyers and with no preparation. In almost every instance, the people who are interviewed in this setting say things that are later unhelpful to themselves and the company. Many people believe that they are required to talk to the government agents or that they can persuade the agents that they did not do anything wrong. First, no one is required to submit to an interview. Second, it is useless for people to try to convince the agents that they did not do anything wrong, as decisions of this nature will be made by prosecutors and only after thorough consideration. In short, individuals can only hurt themselves and the company by submitting to interviews during a search; they cannot help. However, it is improper for the company to instruct an employee to decline an interview request. Thus, it is essential to provide employees with legal counsel. Lawyers can tell the government they are representing the individual employees. There are restrictions on government agents that may limit or prohibit them from talking to represented individuals without their counsel

being present. In addition, the lawyer can advise the employees appropriately about the risks of speaking with the agent without preparation or adequate protection.

5. Instruct employees not to talk to each other about the case. Employees should further be instructed not to discuss the case with other employees, and certainly not with anyone outside the company (other than the company's counsel). They should also avoid exchanging emails or text messages about the case because they could be discoverable. Again, the temptation will be great for employees to discuss the matter and possibly to "get their stories straight." This is counter-productive. When employees speak to one another about the substantive matters under investigation, they leave themselves and the company open to charges of obstruction of justice.

6. Obtain a copy of the warrant and a list of materials seized. The company should ask the agents for a copy of the search warrant, as well as an itemized list of materials seized and/or copied. A search warrant is signed by a judge after review of an affidavit that spells out the evidence supporting the issuance of the warrant. Typically, the affidavit is under seal, but the warrant itself (which spells out the categories of items to be seized) is not.

7. Make clear you are not assenting to the search. The warrant entitles the agents to conduct the search. However, the agents may also ask whether the company agrees or assents to the search. The answer is "No." Here's why: If there is a legal error in the search (because the affidavit made false assertions about the case to the judge, or agents seize items beyond the scope of the subpoena), counsel may be in a position to suppress the evidence that the government obtains from the search. However, if the company assents to the search, flaws in the warrant will not matter.

8. Prepare overseas affiliates for similar raids. It is now a common occurrence that the U.S. DOJ will work in tandem with foreign prosecutorial agents, particularly in the European Union, Japan, Korea, Canada, and Brazil. In large cases, these governments will attempt to execute simultaneous raids in the U.S. and overseas. You should alert your affiliates about this possibility.

However, this does not mean that they should delete or destroy documents. Document destruction can be a crime even if it occurs overseas.

9. Get ready for press inquiries and consider public disclosure obligations. The company should be prepared for press inquiries and consider how to handle the public relations aspect of a governmental investigation. This concern is particularly acute for public companies, which may also have disclosure obligations to shareholders. Public relations aspects need to be handled in consultation with counsel so that statements are not counterproductive to the overall strategy.

10. Prepare for the next steps. The execution of a search warrant usually means that the government has undertaken an investigation of what it believes is evidence of the commission of a crime. Frequently, this is based on biased information provided by some other company, including competitors. In a criminal prosecution, the company faces substantial risks to its reputation, along with monetary fines, executives exposed to criminal prosecution, restrictions on travel for foreign executives, and possible debarment from government contracts. At the beginning of any case, the government will have much more information than the company. Information is power, so it will be essential for counsel representing the company to learn as quickly as possible everything it can about the possible exposure of the company.

Strategic Approaches for Responding to an Investigation

Companies learn of potential antitrust violations through various sources: dawn raids, formal grand jury subpoenas or CIDs, informal government inquiries, media reports, or even through an internal reporting function, such as a whistleblower hotline. Regardless of the source or posture of an investigation, the first order of business should be to assess the company's potential liability and the strength of the case against it. Frequently, antitrust investigations begin with little or no credible evidence that a violation has occurred. For example, enforcement agencies may have simply observed odd price movements in the market, spurring an investigation, but have no evidence that industry participants actually engaged in anticompetitive conduct.

Outside counsel should be engaged from the outset to conduct an internal investigation of a potential violation. Such an investigation will most likely include collection and review of internal documents, email communications and transaction records, as well as interviews of key employees with involvement or responsibility over the products, services, or relationships at issue. This work is protected by attorney-related privileges, and allows the company to assess its exposure risk internally, rather than under the government's watchful eye. Vinson & Elkins attorneys have exceptional experience scoping and conducting this type of investigation, as well as advising companies on their liability and risk exposure and the strategic approach for interfacing with the government.

In certain situations, it may be in the company's best interest to self-report the results of an investigation to the government and take advantage of the leniency program or other liability mitigating benefits. There may also be circumstances where it is appropriate to take a more aggressive approach in how much information to share with the government. However, cooperating with a government investigation does not necessarily mean the company must admit liability. Counsel can also advocate for a company in the pre-indictment stages of an investigation by presenting evidence and arguments to convince enforcement agencies that bringing criminal antitrust charges is unsupported or unnecessary. This can occur through informal in-person meetings, known as "attorney proffers," or in more formal written submissions, often referred to as "whitepapers." Vinson & Elkins attorneys have had great success disposing of investigations without charges being brought against our clients.

If the government does determine to pursue charges, the company must decide whether to continue defending the case through trial or negotiate an alternative resolution. This can be a very difficult decision with consequences that span beyond the immediate criminal case. Some of the benefits and drawbacks of fighting charges at trial versus admitting liability are laid out in the table below:

	Benefits	Drawbacks
Fight	The burden of proof lies with the government. It is difficult for the government to prove an antitrust conspiracy beyond a reasonable doubt. If the corporation wins the case, there are other positive collateral consequences. Civil cases have a lower burden of proof, but winning the criminal trial will be very helpful to the defendant's position, both in terms of the merits of the case and settlement negotiation.	Management will have to devote significant time and effort to preparing the defense, which will distract from running the business. The expense of going to trial is high. If the corporation loses the case, there is no cooperation credit, which could have saved millions of dollars, available to them. A jury verdict presents downside risk. Jurors may not entirely understand the complex legalities of the case, and could be more likely to return a verdict of larger monetary fines or longer jail times. No protection is provided for employees of the corporation.
Admit Liability	Pleading guilty in the criminal case presents finality; the corporation can reach a plea agreement and move on. Cooperation credit allows the corporation to significantly lower its monetary fine, which could total millions of dollars. The corporation can also work with the DOJ to secure more favorable treatment for its employees by ensuring they are covered by the corporate plea agreement or non-prosecution agreement instead of being "carved out."	An admission of guilt in the criminal case may lead to other negative collateral consequences. For example, significant exposure in related civil litigation. A plea agreement in the United States will limit how much a company is able to dispute in enforcement actions brought by agencies in other jurisdictions. The corporation might be settling a winning case where the evidence was ambiguous.

Second-in companies. A typical fact pattern in a cartel case is that a company is being investigated in an industry where one of its competitors already has been granted amnesty by the Justice Department. The cost-benefit analysis for "second-in-the-door" corporations can often be skewed toward a more cooperative position because another industry participant has already essentially confirmed the existence of misconduct in the market—though not necessarily that your company was directly involved.

This is especially complex because "second-in" corporations must often make the decision of whether to cooperate with the federal government *before* the government offers any type of cooperation credit. Because that decision comes at the outset of an investigation, it may also be based on unreliable information or a lack of information. Thus, there are benefits and drawbacks to each strategy, and clients and counsel should carefully consider which strategy is the best fit for their case. "Second-in" companies may consider the disclosure of another antitrust cartel conspiracy in exchange for leniency

under the Antitrust Division's Leniency Plus program, discussed above. The government often encourages subjects of the initial investigation to consider seeking leniency in additional markets, and will routinely ask witnesses in one cartel investigation an "omnibus question" of whether the witness has information about any other cartel.

It is important to explore this "omnibus question" with counsel in preparation for government interviews and plea negotiations, because it cuts both ways. For a "second-in" company that chooses a cooperation strategy and enters into plea negotiations, disclosure of an additional cartel can result in substantial benefits under the program, including amnesty for the new disclosed offense and a substantially reduced fine for the original offense to which the company is pleading guilty.

On the other hand, if the company is aware of the second cartel and chooses not to report it, and the government subsequently uncovers the misconduct, the Antitrust Division may urge the sentencing court to consider this

as an aggravating sentencing factor. This, on top of the increased Sentencing Guidelines calculations for multiple offenses, means that companies that choose to not self-report additional antitrust violations risk harsh consequences. Thus, taking advantage of the Leniency Plus program is usually an attractive strategic option.

Culpable Employees

When to obtain separate counsel. Generally, at the outset of an investigation, company counsel will represent both the company that is the subject of the investigation and the employees of the company. Such dual representation provides efficiency for the company. Take, for example, a situation in which a DOJ lawyer interviews an employee. In a dual representation, counsel for the corporate defendant would represent the individual and the company at the interview. But companies and their employees both need to be careful about potential conflicts of interest. A conflict of interest arises when the concerns or aims of various different parties are incompatible, such that counsel would not be able to simultaneously fully represent the best interests of each party.

Conflicts generally arise in two situations in cartel investigations. First, a conflict would arise where an individual employee's strategy diverges with the company's strategy. A conflict of interest can arise when the corporation chooses to cooperate with the DOJ, and the culpable employee does not. For example, a corporate amnesty applicant must fully cooperate with the government's investigation. If a culpable employee chooses not to cooperate, that employee will need separate counsel, because the corporation's attorney will not be able to simultaneously represent both the corporation and the employee's interests.

Second, conflicts of interest may arise when employees can be "carved out" of a leniency or plea agreement with DOJ and subject to potential prosecution. In a typical corporate plea agreement, certain culpable employees who participated in the cartel conduct on behalf of the company will be "carved out" of a corporate plea agreement.

The company's plea agreement will typically protect all of the employees from prosecution, except those who are carved

out. The names of the carved-out employees are listed in a confidential attachment to the plea agreement and filed with the court. Those employees can be individually prosecuted for their conduct. In these circumstances, a conflict arises because the company has resolved its liabilities through the plea agreement and the DOJ may insist that the company cooperate with the government in possible prosecutions of the carved-out individuals.

Justice Department lawyers are generally proactive in identifying potential conflicts of interest during an investigation and will tell corporate counsel when hiring separate counsel is advised. Many times, the DOJ will have information that is not known to company counsel and will inform corporate counsel of potential conflicts.

The government has a duty to protect criminal defendants against counsel's conflicts of interests. Thus, during grand jury proceedings, the Justice Department may issue a "Wheat letter" to company counsel, informing them that, if there is a dual representation and any of the individuals are called as government witnesses at trial, the government will seek to disqualify counsel from representing the company.

Terminating culpable employees. According to the DOJ, the most effective way to deter and punish antitrust violations is to hold culpable individuals accountable. However, there is no official DOJ position on whether a corporation should terminate the culpable employees at the outset of the criminal investigation, except that in the revisions to the leniency program made in 2022, the DOJ indicated that it may consider a leniency applicant's efforts to discipline or terminate individuals who are culpable and who have not cooperated.

Generally, if the corporation chooses a cooperation strategy, it may be in the corporation's best interests to retain the culpable employee. This is because the culpable individual has access to and the most knowledge of the alleged antitrust violations, and this information must be provided to the government in order to obtain cooperation credit. The corporation's greatest commodity in cooperating with a criminal investigation is the information it can leverage with the government; thus, keeping the culpable employee is often the chosen approach.

In a multi-jurisdictional investigation, the issue of what to do with a culpable employee can be a difficult one to navigate.

Unlike the U.S., other jurisdictions have required companies to terminate a culpable employee, and such decisions implicate employment laws in a variety of jurisdictions. In other countries, the legal and cultural expectation is that employees should not be terminated. It is important to consult with experienced counsel before making any decision to terminate a culpable employee.

New whistleblower law. In December 2020, Congress expanded protections for antitrust whistleblowers by passing the Criminal Antitrust Anti-Retaliation Act, which prohibits corporations from retaliating against employees who report criminal antitrust violations, whether to the federal government or to their internal corporate supervisors and compliance officials. The act states that employers may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against” an employee for reporting antitrust violations or assisting federal government investigations and proceedings with regards to such violations. It does not cover employees who “planned and initiated” the antitrust violations.

As a result, there is a fine line between punishing culpable personnel and taking some action which may be viewed, rightly or wrongly, as retaliating against someone for reporting violations. Smart employees, including ones who may be culpable, may try to protect themselves by making a whistleblower claim. Termination decisions need to be handled carefully and in consultation with counsel.

Employees who allege retaliation by their employer may file a complaint with the Secretary of Labor. If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, the employee may then file suit against the corporation in federal district court. Employees may be entitled to compensatory relief, including reinstatement with the same seniority status they would have had if not for the discrimination, back pay plus interest, and any special damages sustained as a result of the discrimination, like litigation costs and attorneys’ fees.

Extradition/travel risks. More and more, the Justice Department is seeking extradition of culpable employees who live in countries that have an extradition treaty with the United States or who travel to countries with an extradition treaty with the United States. Extradition is a formal process by which a person located in another country is surrendered by that country’s government to the U.S. government for

trial or punishment. The department’s Antitrust Division has increasingly used the process, too. Just last year, the division prosecuted the second and third executives ever to be extradited based solely on antitrust charges.

Foreign culpable employees who are “carved out” of plea agreements or non-prosecution agreements should be aware of the risks of traveling internationally, especially if they are charged and indicted. In some instances, culpable employees may be indicted but will not know it because the indictment was filed under seal. DOJ may monitor a culpable employee’s travel and immediately arrest the employee upon arrival to the United States.

Red notices. An International Criminal Police Organization (“Interpol”) International Wanted Notice, or Red Notice, is the closest instrument to an international arrest warrant in use today. After the U.S. government issues an arrest warrant, Interpol will issue a Red Notice, making travel to any country with an extradition treaty very risky. The federal government could coordinate with other countries to arrest indicted employees either in their home countries, or in countries where the employees are traveling temporarily for business or pleasure, before extraditing employees to the United States.

Generally, extradition may only be granted under an extradition treaty, but some countries may grant it to the United States even without such a pact. Usually, such countries will require an offer of reciprocity by the U.S. government. For example, the Republic of Cabo Verde, a country that does not have an extradition treaty with the United States but is party to a reciprocity agreement under United Nations conventions, recently allowed the extradition of a Colombian fugitive to the United States on charges of money laundering.⁵

Self-incrimination

A witness might be asked to give testimony in two circumstances: under a subpoena before the grand jury or at trial, or in a witness interview with the government.

Subpoenaed witnesses. The DOJ can compel a witness to answer questions by serving the witness with a subpoena to testify before a grand jury or at trial. But under

the Fifth Amendment to the U.S. Constitution, no person can be compelled to give self-incriminating testimony. The invocation of the Fifth Amendment is typically given generous interpretation by U.S. Courts; in other words, courts will not generally second guess a witness' invocation of the right against self-incrimination. It is also the case that a witness cannot selectively invoke the Fifth Amendment—meaning one cannot testify about some matters but invoke it as to others. In theory, witnesses can also refuse to produce documents to the grand jury if they are incriminating, because producing them would be equivalent to admitting they exist or that they are in the witness' possession, but this kind of “act of production” immunity is very limited.

The Fifth Amendment privilege against self-incrimination does not apply to corporations; corporations must comply with subpoenas that require the production of documents.

Witness interviews. The DOJ cannot compel a witness to answer questions outside of a grand jury or at trial. However, witness interviews are still an important investigative tool in criminal antitrust investigations. If an employee of a corporation that chooses to cooperate with the DOJ's investigation also wants to take advantage of the leniency program, the employee must generally agree to an interview with the Justice Department. In other circumstances, a witness might also agree to an interview to persuade the government not to indict him.

It is important to note that witnesses' ability to remain silent is their *most powerful strategic option*. Once witnesses speak, any of their statements may be used against them, unless the statements are obtained under an immunity order or agreement. The witness's statements may also suggest other leads or sources of evidence that the government may pursue. Thus, deciding to voluntarily participate in an interview is a crucial decision for the witness. However, choosing not to speak to the government means that witnesses will not be able to share their side of the story and their refusal to provide information may shine a spotlight on their conduct. This is particularly important if the witness and counsel feel that speaking with the government may persuade the government either to not make the witness a target of the investigation, or to not indict the witness.

Immunity. As alluded above, witnesses may be able to guarantee that their statements are not used against them under an immunity order or agreement. The following are

several ways that the government may agree to provide immunity to a witness:

- **Court-ordered.** In some cases, the DOJ may seek an order from the federal district court to compel the witness to testify under immunity. Under this process, the court prohibits the federal government and all states from any use of the compelled testimony, or any evidence or information derived directly or indirectly from the testimony, in any criminal prosecution of the witness. This overcomes the Fifth Amendment privilege against self-incrimination, meaning that the witness can be compelled to testify in exchange for court-ordered immunity. This type of immunity is very rarely invoked, especially because subsequent prosecution of the witness becomes extremely difficult. The DOJ usually does not seek this type of immunity unless it concludes that the witness' testimony is essential to the prosecution of other, more culpable individuals.
- **Informal.** An alternative to court-ordered immunity is informal immunity, which a witness' counsel can negotiate from the government. Informal immunity, also referred to as letter immunity, is essentially a written promise from the government that the witness will not be prosecuted. However, it is less protective than court-ordered immunity; it only limits the federal government, not states, and the scope of the immunity is usually narrowly defined to cover only suspected criminal conduct under the investigation. Because informal immunity is less protective, it does not overcome the Fifth Amendment privilege, meaning that a witness cannot be compelled to testify in exchange for informal immunity. Generally, the government is not inclined to give out informal immunity, particularly because it may undermine the credibility of the witness in later testimony.
- **Queen for a day.** A more common type of informal immunity agreement restricts the government's ability to use the witness' statements made during a specific interview. It is sometimes referred to as “queen for a day” immunity. The agreement does not state that a witness will not be prosecuted; only that the affirmative statements made by the witness, assuming they are truthful, will not be used by the government as evidence of culpability in its case-in-chief should the person later be charged with a crime. Even here, there are serious

limitations on “queen for a day” protection—it does not protect false statements made during the interview, which constitute a separate independent crime; and the incriminating statements may still be used by the government to follow investigative leads and to rebut contrary assertions made at trial by the defendant if the person is later charged.

Types of Pre-trial Resolutions

In an ideal world, experienced counsel can convince the government to abandon the investigation without pursuing charges. However in certain instances, full cooperation with the government’s investigation may give the client a better chance at obtaining a more favorable resolution. When a company or individual is facing a criminal antitrust investigation, there are several possible outcomes more favorable than an indictment.

Plea agreements. A plea agreement is a contract between the government and the defendant under which the defendant pleads guilty, usually in order to obtain some kind of cooperation credit in the form of lesser monetary fines or fewer criminal charges. The plea agreement usually outlines the fines that the defendant must pay, as well as any compliance or remediation commitments. The plea agreement is submitted to the court for approval. If a company or individual chooses to cooperate and enters a plea agreement, the agreement will provide immunity from any further prosecution. A guilty plea can, however, be used against the company or individual in civil litigation for treble damages by other companies or persons who were injured by the antitrust violation.

Typically, the immunity provision in the plea agreement will cover the majority of a company’s employees as well, with the exception of those employees that are “carved out.” Theoretically, carveouts are based on the individual employee’s culpability. In reality, however, the carveouts are ratcheted based on how early the company agrees to the plea agreement compared with other possible defendants in the investigation. This incentivizes companies to cooperate earlier. Thus, the fact that an employee is carved out of the plea agreement, alone, does not indicate that the government intends to charge that employee.

Deferred prosecution or non-prosecution agreements.

The DOJ also may enter into deferred prosecution agreements or non-prosecution agreements to resolve an antitrust investigation. These agreements are usually used to resolve charges that are brought in conjunction with other enforcement divisions and agencies, though there are rare but recent instances where they have been used by the Antitrust Division to resolve purely antitrust-based charges.

A deferred prosecution agreement (DPA) is a contractual agreement in which the government files a charging document against the defendant in court, but simultaneously requests to the court that the government be allowed to postpone the prosecution so that the defendant can demonstrate good conduct. The DPA generally must be reviewed by a court, and it usually requires the company or individual to cooperate with the government, admit relevant facts, or enter into compliance and remediation commitments. If the defendant complies with the terms of the DPA, the government will dismiss the filed charges. However, if the defendant violates the terms of the agreement, the government can reopen the case and use the defendant’s admissions against him or her in subsequent proceedings.

A non-prosecution agreement (NPA) is similar to a DPA. It is a contractual agreement in which the government agrees to refrain from filing criminal or civil charges to allow the company or individual to demonstrate good conduct. The key difference is that charges are never filed against the company or individual. The NPA is not reviewed by a court and is not made public unless the prosecutors seek to publicize their investigation results, or the agreement contains a provision that the company or individual must disclose the agreement.

Like a DPA, an NPA will typically require the company or individual to cooperate with the government, admit relevant facts, or enter into compliance and remediation commitments. In exchange, if the company or individual fully complies with the terms of the NPA, the agency will not file criminal or civil charges. However, if the company or individual violates the terms of the NPA, the government can reopen the case and use the company’s or individual’s admissions against them in subsequent proceedings.

Antitrust Division policy. The Antitrust Division of the DOJ traditionally does not enter into DPAs and NPAs, instead

usually relying upon its leniency program to encourage self-reporting. The Antitrust Division has only considered DPAs since a policy shift in 2019. Under the new policy, DPAs are to be applied in limited situations where a company committed an antitrust crime despite having an effective compliance program. Leaders at the Antitrust Division have also stated that the compliance program in place at the time of the antitrust violation needs to be robust and thoughtful, and that DPAs would be considered only for companies that self-report misconduct.⁶ Division leadership also noted that the Antitrust Division would continue to disfavor NPAs.⁷

Since this policy shift, the Antitrust Division has only entered into seven DPAs, spanning three different investigations. These DPAs are the first examples of the Antitrust Division using DPAs to resolve purely antitrust-based charges. At the same time, counsel should note that the government's willingness to enter into these types of agreements is cyclical. The Antitrust Division's policy may shift once more during the new administration.

Corporate monitorship. As mentioned above, criminal antitrust resolutions may require that the company enters into compliance or remediation commitments. A common example occurs when the government determines the company is not capable of implementing or executing an effective compliance program without significant oversight. In such a case, the government may impose an independent corporate monitor on a company, tasked with reviewing the company's adherence to the terms of the resolution agreement and evaluating the company's compliance program.

Corporate monitors typically represent the worst possible resolution for a company and should be avoided if at all possible. Monitors are very expensive as well as highly intrusive into the company's business operations. The monitor may also issue periodic reports that paint the company in an unfavorable light, which in turn could lead more intrusive requests for information, requests to courts for remedial actions, or an extension of the monitorship. In order to avoid the imposition of a monitor, counsel for the company will typically make a presentation to enforcement agencies advocating the strengths and effectiveness of the company's compliance policies and internal controls. Vinson & Elkins attorneys also advise companies on ways to improve their compliance programs to align with the government's expectations. Handled

correctly, a demonstration that the company has an effective compliance program—even if put in place *after* the investigation has begun—should prevent the imposition of a monitor.

Indictment

The threat of a criminal antitrust case can go away if the government decides there is insufficient evidence to charge the company or individual, if the company applies for leniency, or simply if too much time has passed for the government to pursue the case due to statutes of limitations. It is critical that companies and counsel avoid indictment if possible, although it may not always be possible. Sometimes cooperation is the best avenue. At other times it may be essential to test the government's evidence and display a willingness to litigate. If a company or individual is unable to obtain an alternative resolution, the government may persist in pursuing criminal charges against them. If the grand jury decides the evidence presented in the investigation establishes probable cause, the grand jury will issue an indictment, or *true bill*, against the accused. An indictment is the mechanism by which a company or individual is charged with a criminal antitrust violation, unless the company or individual waives it under a plea agreement.

Target letters. If a company or individual will be indicted in a criminal antitrust investigation, the government may first issue a *target letter*, which advises the company or individual that they are the target of the grand jury's investigation. A "target" must have substantial evidence linking them to the commission of the crime. The government sometimes (but not always) issues target letters when it believes it has sufficient evidence to pursue criminal charges in federal district court, and will usually issue such target letters in conjunction with a grand jury subpoena.

A target letter will generally state some variation of the following:

This letter is supplied to a witness scheduled before the federal Grand Jury... You are advised that you are a target of the Grand Jury's investigation. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you. Anything you do or say may be used against

you in a subsequent legal proceeding. If you have retained counsel, who represents you personally, the Grand Jury will permit you a reasonable opportunity to step outside the Grand Jury room and confer with counsel if you desire.

The targeted company or individual has the opportunity to testify before the grand jury; if the government does not subpoena the target to testify, the target may request or demand the opportunity to tell the grand jury their side of the story. The government has no legal obligation to allow the target to testify, but because refusing to do so may create the appearance of unfairness, such requests are usually granted and even encouraged. The target's testimony may subsequently be used against the target later in the case.

Pre-indictment procedure. In criminal antitrust cases handled by the Antitrust Division, the target's counsel will usually have the opportunity to meet with the government prior to the indictment to discuss the recommendation being considered by the government, though this meeting is not a guaranteed right afforded to all targets. In that meeting, counsel should consider presenting all arguments as to why the government should not recommend indictment, although there may be circumstances where sharing the defense is not wise. The government may use the information from this meeting to evaluate all the evidence and arguments of all prospective defendants.

The government should share exculpatory evidence (evidence that would tend to negate the guilt of the target) with the grand jury, but actual practices of prosecutors differ.

Specificity of charges. The indictment needs to allege the essential facts that are necessary to inform the defendant of the charges, so that the defendant can adequately prepare a defense. An indictment that only lists the elements of the crime, without the factual circumstances of the crime, is generally sufficient.

If the charges are not sufficiently clear to the defendant, defendant and counsel may move to require the government to supplement the indictment with a "bill of particulars," which more fully discloses the nature of the charges against the defendant. However, the bill of particulars cannot be used solely as a discovery tool to acquire evidentiary details about the government's case.

Criminal Discovery

Defendants in criminal cases have certain rights to discover information from the government and third parties related to the charges against them. However, these rights are much more limited than in civil cases. It is therefore crucial in criminal antitrust cases for defendants to understand how best to leverage the limited discovery rights available.

Federal Rule of Criminal Procedure 16. Under Federal Rule of Criminal Procedure 16, a criminal defendant has the right to request the defendant's own oral and written statements, which include any prior statements by the defendant to law enforcement and recorded testimony by the defendant in front of the grand jury. Similarly, the defendant may also ask to inspect and copy documents or objects within the government's possession, custody, or control.

The government is not required, to produce material under Rule 16 unless the defendant makes a formal request for this information. Additionally, if the defendant makes a request under Rule 16, the government has a right to request (and the defendant has an obligation to produce) similar material.

Brady rights. In *Brady v. Maryland*,⁸ the Supreme Court held that the government must provide "material, exculpatory evidence" and "impeachment evidence" in its possession to the defendant, and that suppression of such evidence violates a defendant's constitutional right to due process. So-called "Brady evidence" can be very important to defendants who go to trial against the government.

Evidence is "exculpatory" if it tends to show a defendant is innocent. What counts as "exculpatory" is, open to interpretation. A prosecutor and a defense attorney looking at the same piece of evidence might disagree as to whether it is exculpatory. This uncertainty reduces the value of the *Brady* right as a practical matter.

Brady evidence is considered "material" if there is a "reasonable probability" that the outcome of the trial would have been different had the government given the defendant the evidence.

The government must also disclose material impeachment evidence, which is evidence that could weaken the credibility of the government's testifying witnesses, although it is not required to do so until close to trial. For example, material impeachment evidence would include statements made by someone not testifying at trial that contradicts statements made by a government witnesses. Additionally, evidence that a witness is testifying as part of a deal with the government to get a lesser sentence or immunity in their own criminal case might also be considered impeachment evidence that the government is obligated to produce under *Brady*.

The DOJ has a standing policy to produce *Brady* material before trial. However, the Constitution only requires that the government produce *Brady* evidence so that the defendant has enough time to use it at trial. Consequently, the government is not required to produce *Brady* materials before a defendant pleads guilty prior to the start of trial.

Discovery under the Jencks Act. The *Jencks* Act⁹ allows criminal defendants to discover prior statements made by any government witness once that witness has testified on direct examination at trial. This applies to written statements, verbatim recording of oral statements, and a witness's statement to the grand jury. However, the government is not obligated to produce *Jencks* Act material unless defense counsel makes a motion to the court seeking this information. Further, Federal Rule of Criminal Procedure 26.2 requires the defense to produce the prior statements of its own witness if the government makes a motion after that witness's direct testimony at trial.

Motions under the *Jencks* Act are not as common in corporate criminal antitrust cases because the credibility of agents is not usually as significant an issue as it might be in other sorts of criminal cases because agents generally play less of a role in developing evidence in the first instance.

Differences between civil and criminal discovery.

There is a much broader right to discovery in civil cases. In federal court, parties in a civil case have a right to discover all relevant evidence under Rule 26 of the Federal Rules of Civil Procedure. Indeed, Rule 26 requires parties to disclose documents relevant to their claims or defenses in certain cases. Additionally, parties may freely seek documents and testimony from the opposing party and from third parties so long as the evidence is relevant, not privileged, and would

not be out of proportion to the needs of the case nor unduly burdensome or expensive.

By contrast, criminal discovery is much more limited. The only automatic disclosures are *Brady* materials, the usefulness of which, as discussed above, will depend on the government's own interpretation of what is "material" or "exculpatory." Otherwise, limited categories of information under Rule 16 or the *Jencks* Act are available at the defendant's request. As in civil cases, it is possible to obtain documents and testimony from third parties. However, Federal Rule of Criminal Procedure 17 allows this only if the material sought is relevant, the party seeking discovery can show that the information cannot be procured for trial by any other means and that production is necessary to prepare for trial and avoid delay.

Timing of discovery. The law is not particularly favorable to criminal defendants in terms of the timing of discovery. Most discovery is upon request, and even where it is not (such as with *Brady* evidence), the government dictates precisely when a defendant will receive discovery material. Often, the government chooses to produce most discovery earlier in the case. The more discovery that is produced, the more likely it is that the government considers its case against the defendant to be strong.

Given the restrictions and uncertainty in the discovery process, it is important for those facing criminal charges for violations of the antitrust laws to have experienced attorneys who know how to make the most out of the available criminal discovery tools. For example, Vinson & Elkins attorneys defending a client from criminal charges in a recent price-fixing case discovered that the government had used illegal wiretaps to obtain evidence against the client. The government did not disclose its use of wiretaps in its formal discovery responses. However, Vinson & Elkins attorneys were able to obtain this evidence and use it to their client's advantage.

Criminal Trials

In the United States, someone accused of a crime has a right to a trial. At trial, the government must prove to a jury or a judge that the defendant is guilty of the charged crime. The defense has an opportunity to present its own evidence to refute the government's case. Criminal trials in cartel cases are rare, but all cases in which the defendant does not plead guilty go to trial.

Proof at trial. Under the Supreme Court's decision in *In re Winship*, a defendant may only be convicted of a crime if the government proves every fact necessary to show that the crime occurred "beyond a reasonable doubt." Any fact that increases the penalty beyond the maximum provided by the law must also be proven beyond a reasonable doubt. "Beyond a reasonable doubt" puts a high burden of proof on the government. A jury (or a judge in some cases) must be close to certain that the defendant is guilty. If there is any "reasonable doubt" about the defendant's innocence, a defendant should not be found guilty. In other words, the government's evidence needs to be extremely persuasive to prevail in a criminal trial.

Civil trials, by contrast, require a lot less from the government. In civil antitrust cases, the government need only prove that it is more likely than not that an antitrust violation occurred. Another way of thinking about this would be to say that "beyond a reasonable doubt" means that the jury needs to be almost certain, whereas a jury or a judge must only be 51% sure of a defendant's liability in a civil case.

The requirement that every fact be proven "beyond a reasonable doubt" presents a special problem in criminal prosecutions brought under the Sherman Act. To violate the antitrust laws, anticompetitive conduct must qualify as an "unreasonable restraint of trade."

The "reasonableness" of a restraint of trade for most antitrust offenses is analyzed under the "rule of reason," which requires balancing whether the conduct at issue (1) is likely to have a significant anticompetitive effect on the market with (2) whether there is any procompetitive rationale for the restraint. But *per se* violations such as price-fixing, bid-rigging, and market allocation are presumed to be unreasonable restraints on trade. In criminal cases,

similar presumptions have been held unconstitutional under *Winship* because they allow the government to establish a fact required to show a Sherman Act violation without proving it beyond a reasonable doubt. This issue is ripe for a constitutional challenge.

Case Example

In *United States v. Jayson Penn, et al.*, the Antitrust Division of the U.S. Department of Justice sought and received the indictments of 14 executives and two companies for allegedly rigging bids for sales of "small bird" chickens to national quick-service restaurant chains and distributors. However, DOJ's case rested largely on the believability of a single cooperating witness. On cross-examination, the defendants established that the cooperating witness only had evidence of information exchanges between certain chicken companies and that those information exchanges may have occurred at the request of certain customers. After two hung juries, DOJ dismissed the charges against nine of the executives and both of the companies. The remaining five executives were acquitted in an unprecedented second retrial of a criminal antitrust case.

Role of the jury. Trial by jury is a distinct feature of the American criminal justice system. The jury is a fact-finding body composed of twelve individuals from the community who are selected at the beginning of trial. During trial, the jury listens to the evidence presented by the government and the defense. Jurors are supposed to consider the evidence presented at trial with an open mind. A juror's bias against the defendant or government can be grounds for removing that juror from the jury panel. It is also grounds

for excluding potential jurors from jury service if discovered when the jury is selected.

Once the evidence has been presented, the judge instructs the jury on how to apply the facts to the law. Next, the jury deliberates and decides, based on the evidence presented at trial, whether the defendant is guilty or innocent. In federal cases, all twelve jurors must unanimously decide whether the defendant is guilty or innocent. If jurors cannot agree on a verdict, a new trial must be held.

There is a constitutional right under the Sixth Amendment to a jury trial in all prosecutions for serious crimes. For individuals, a serious crime is any offense that can be punished with six months or more in prison. Individuals and business organizations may also have a jury trial right for crimes punishable by large monetary fines.

In criminal antitrust cases, both individuals and companies have a right to a jury trial because individuals can be sentenced to up to 10 years in prison, and corporations may be fined \$100 million or more. In some cases, the Federal Rules of Criminal Procedure allow a defendant to waive the right to a jury trial and have the case tried in front of a judge only (also known as a “bench trial”). However, both the government and the court must agree for the case to be tried without a jury.

Role of the judge. The judge controls the trial proceedings. Some of the judge’s most important duties include:

- **Evidentiary decisions.** It is up to the judge to decide which pieces of evidence can be considered by the jury. When a party objects to a piece of evidence offered by the opposing side, such as a witness’s testimony, the judge has discretion whether to admit or exclude the evidence.
- **Jury instructions.** After each side has presented its case, the judge must instruct the jury on the relevant law and how to apply the facts the jury finds to the law. Mistakes made by the judge in instructing the jury can be grounds for reversing conviction on appeal.
- **Motions.** During trial, the judge may decide certain legal questions raised by the parties. For example, if the government’s case is particularly weak, the defense may make a motion for judgment of acquittal. The

judge must decide whether to grant the motion (thus dismissing the case against the defendant). Similarly, the judge may decide that a new trial is warranted based on some defect in the trial (such as a biased juror).

- **Fact-finder.** In cases tried before a judge without a jury, the judge assumes the fact-finding role of the jury. In addition to the above duties, the judge must consider the evidence and decide whether the defendant is guilty or innocent.
- **Sentencing.** If the defendant is found guilty, the judge generally will determine the defendant’s sentence.

Criminal Penalties

Criminal antitrust violations have become increasingly severe in the United States and elsewhere. In most jurisdictions outside the United States, penalties are primarily monetary. In the United States, individuals are increasingly being sentenced to prison.

Criminal penalties are imposed at the sentencing phase of a criminal prosecution. The sentencing phase occurs after the defendant is found guilty at trial or after a defendant pleads guilty. Decisions about what a defendant’s penalty will be are typically made by the judge, but the judge considers arguments from both the prosecution and the defense about what sentence should apply.

Criminal statutory penalties. An individual convicted of criminal violations of the Sherman Act may be sentenced to up to 10 years in prison per count. Both corporations and individuals can also be ordered to pay criminal fines. Individuals may be ordered to pay up to \$1 million for each count, whereas corporations may be ordered to pay up to \$100 million for each count. There is also an “Alternative Fine Provision,”¹⁰ under which corporations can be sentenced to pay up to “twice the gross gain or twice the gross loss” caused to the victims of the illegal conduct. This can lead to criminal fines over \$100 million. The DOJ’s Antitrust Division frequently takes the position that the amount of “twice the gross gain or twice the gross loss” ought to be calculated on the gross gain or loss that results from the conduct of the defendant and all the other members of an alleged cartel.

Other sentencing conditions might include:

- A period of supervised release or corporate probation, during which the court continues to exercise oversight over the defendant, and the original sentence can be enhanced if certain conditions are violated or additional crimes are committed.
- Payment of restitution to victims of the antitrust violation;
- Forfeiture of property affiliated with the conspiracy;
- Adoption of compliance programs to prevent and/or detect future violations;
- Agreement by the company to submit to random inspections of corporate records;
- Requiring the company to publicize both the crime and the company's respective role in the crime.

Sentencing Guidelines. The U.S. Sentencing Guidelines (“the Guidelines”) play an important role in determining criminal penalties. Specifically, the Guidelines are used to calculate a defendant’s sentence by analyzing factors such as the crime charged, the nature of the defendant’s conduct during the offense, and other considerations to identify a range of possible sentences for the defendant. The judge then can impose a sentence within that range. The Guidelines are considered advisory, and judges are allowed to depart from the Guidelines’ suggested sentence. Under a separate statute known as Section 3553,¹¹ the Court must also consider a variety of factors in determining a final sentence that may include fairness, age of the defendant, prior criminal history, and the level of culpability. Nevertheless, courts still tend to follow the Guidelines, and the Guidelines play a very important role in plea negotiations.

Mechanics of the Sentencing Guidelines

Determining a defendant’s sentence under the Guidelines can be quite complicated. The Guidelines use a “points” system, beginning with a “Base Offense Level” that the government applies to any type of antitrust violation. Points are then added or subtracted to the base according to various factors intended to enhance or reduce the penalty depending on how serious the particular defendant’s violation was. The final number of points is then used to determine the penalty assessed against the defendant. For corporations, it determines the size of the criminal fine, and for individual defendants (such as company executives) it determines the length of a potential recommended prison sentence.

Determining a corporation’s fine. First, the court determines the “base fine.” For antitrust offenses, the base fine is set at 20% of the “volume of commerce” affected by the defendant’s conduct. Depending on how the volume of commerce is calculated (as discussed below), the base fine can be quite large. The Guidelines then calculate the corporation’s “culpability score” using a points system—*increasing* the score if, for example, the corporation is very large, a high-level employee was involved in the conspiracy, the corporation obstructed the government’s investigation, or *decreasing* the score if, for example, the corporation has an effective compliance program, cooperated with the investigation, or accepted responsibility for its conduct (typically by pleading guilty). The final culpability score is used to determine minimum and maximum “multipliers,” applied to the base fine to determine the range of fines recommended by the Guidelines.

The final culpability score may also be increased if the corporation is a repeat offender, with prior enforcement actions for similar misconduct. The following is an example of this calculation for a hypothetical company:



Corporate Fine Calculation: Volume of Commerce \$1 billion

Base Fine	\$1 billion * 20%	\$200 million
Culpability Score	Base Score [5] Large Company with more than 5,000 employees, and CFO participated in the offense [+5] Effective Compliance Program [-3] Acceptance of Responsibility [-1]	Culpability Score of 6
Determine Multipliers	Culpability Score of 6	Minimum: 1.20 Maximum: 2.40
Determine Range of Fine	Minimum: 1.20 * \$200 million Maximum: 2.40 * \$200 million	Between \$240 million and \$480 million

Determining an individual's sentence. A similar process is used for individual defendants, but rather than determining a range of fines, the final Guidelines calculation corresponds to a number of recommended months in prison. The Base Offense Level in criminal antitrust cases of 12 points, which equates to a sentence between 10 and 16 months in prison for a defendant with no criminal history. The offense level is then increased or decreased according to the characteristics of the specific offense. Similar to the corporate fine calculation, the volume of commerce has the most impact on the final sentencing range, as it can increase

the final offense level anywhere from 2 points (if the volume of commerce is over \$1 million but below \$10 million) to 16 points (greater than \$1.85 billion). A defendant's criminal history is also taken into account, with longer sentences recommended for those with prior convictions.

Under the Guidelines, a convicted individual defendant is also required to pay a fine between one and five percent of the volume of commerce (but not less than \$20,000), with a maximum of \$1 million. The following is an example for a hypothetical individual defendant:

Individual Sentencing Recommendation: Volume of Commerce \$10.2 million

Base Offense Level (convicted of bid-rigging)		12
Specific Offense Level Adjustments	Volume of Commerce (+4) Bid-rigging involved (+1) Obstructed investigation (+2) Pleaded guilty and accepted responsibility (-3)	12 + 7 - 3 = 16
Criminal History	None – <i>no enhancement</i>	
Determine Sentencing Range	Final offense level (16)	Corresponds with 21 to 27 months in prison
Determine Range of Fine	1-5% of \$10.2 million	Between \$102,000 and \$510,000

After the recommended Guidelines range is calculated, a court may depart or find a variance from the recommended sentencing range depending on the circumstances of the offense or the individual characteristics of the defendant. The government may recommend a downward departure for a defendant who provides “substantial assistance” in the government investigation (i.e., cooperates and provides evidence that assists in prosecuting other defendants). That said, the Guidelines favor a term of imprisonment for antitrust offenders. Alternatives to incarceration (e.g., home confinement) are possible, but the DOJ typically seeks actual jail sentences for most individual defendants regardless of whether the defendant cooperated and/or pleaded guilty. Again, the Guidelines are advisory only and most judges now spend more time considering factors under Section 3553.

“Volume of Commerce” calculation. Overall, much depends on how the “volume of commerce” is calculated, and the calculation method is often a matter of intense debate. The predominant approach taken by courts is to define the “volume of commerce” as including all sales that were affected by the defendant’s misconduct. Under this approach there is typically a presumption that all sales taking place during the conspiracy were affected. A defendant may overcome this presumption by presenting highly specific evidence that certain sales were not affected, and were instead made at market price. Some courts take a more strict approach to the volume of commerce calculation, however. The Sixth Circuit, for example, presumes all sales made during the duration of a conspiracy were affected, regardless of whether or not discrete sales were made at an inappropriately fixed price. Because of the uncertainty surrounding this “volume of commerce” calculation, counsel plays a critical role in persuading the court to use a more favorable calculation.

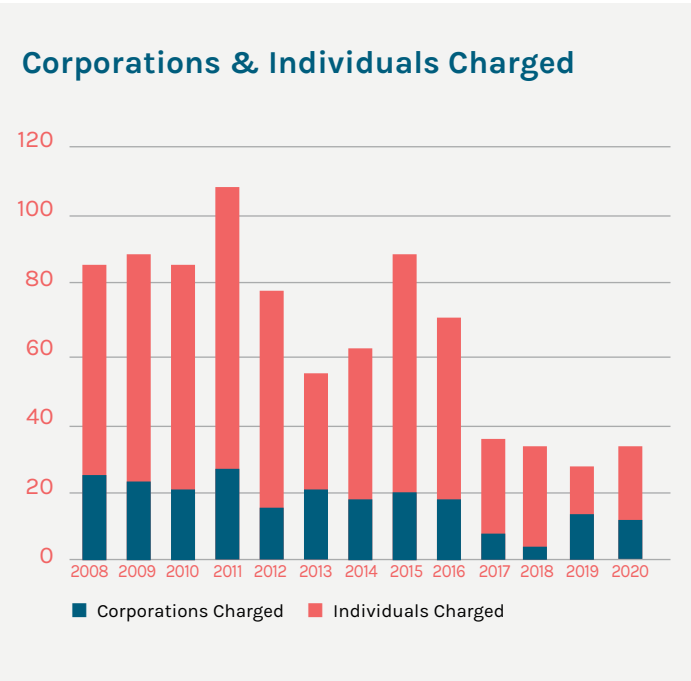
Enforcement Trends

Criminal cases filed by the DOJ

From 2013-2022, DOJ filed an average of 36 criminal antitrust cases per year, but there has been a general downward trend. Approximately half as many cases have been filed in the last seven years of this decade (2016-2022) than were filed in the first three years (2013-2015), and only eighteen cases were filed in 2022. An increase in enforcement could accompany the recent funding increase, but that has not yet materialized.

Frequency of charges against individuals vs. corporate defendants

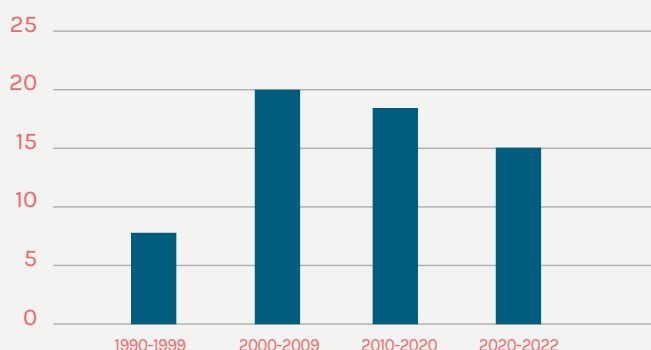
Recent DOJ policy has been to focus criminal enforcement against culpable individuals, incentivizing corporations to cooperate in investigations by exchanging leniency for evidence against those individuals. This is borne out in the data. Between 2008 and 2020, the DOJ prosecuted 620 individuals and only 226 corporations. In other words, the DOJ brings nearly three times as many prosecutions against individual defendants.



Prison sentences

Historically, prison sentences for antitrust violations were somewhat rare. Between 1970 and 1999, roughly 40% of defendants in criminal antitrust cases were sentenced to prison time. In the last 20 years, however, that percentage is closer to 64%. The average prison sentence for criminal antitrust violations between 2020 and 2022 is 15 months. The length of incarceration has increased dramatically over the past half century. So far, the longest recorded individual prison sentence in an antitrust case is five years.

**Average Sentence
of Incarceration in Months**



Fines

The average corporate fine between 2010 and 2019 was approximately \$59.5 million, whereas the average individual defendant fine was about \$129,000. Compared with the previous decade (2000-2009), these numbers represent a decrease in the average fine for individuals of about 30% and an increase in the average fine for corporations of roughly 112%. As of the beginning of 2022, the Antitrust Division has imposed 37 corporate fines of \$100 million or more, with the largest individual corporate fine to date at \$925 million.

DOJ's Priorities in 2023

DOJ will continue to prioritize investigating and prosecuting agreements between competitors that allegedly restrain trade, but we anticipate that DOJ will focus on prosecuting those agreements in four broad areas.

No poach and wage-fixing agreements. Following two significant losses at trial in cases involving agreements between companies not to poach certain types of employees from each other (“no-poach” cases), DOJ secured its first guilty plea when a healthcare staffing company agreed to plead guilty to allocating employee nurses and fixing their wages in violation of Section 1 of the Sherman Act. The defendant, VDA OC LLC, was sentenced to pay a \$62,000 criminal fine and \$72,000 in restitution. DOJ will likely attempt to build momentum from this guilty plea by continuing to focus on investigating and prosecuting wage-fixing and no-poach agreements as criminal antitrust violations. DOJ has additional no-poach and wage-fixing criminal matters that are scheduled to go to trial in early 2023. Moreover, since President Biden announced his “Whole of Government” approach to competition in the July 2021 Executive Order on Promoting Competition in the American Economy, both DOJ and the FTC have made competition in labor markets an enforcement priority.

Procurement Strike Force. Former in November 2019, DOJ’s Procurement Collusion Strike Force (“PCSF”) continued to bring enforcement actions and shows no sign of stopping in 2023. The PCSF is an interagency partnership consisting of staff attorneys from DOJ’s Antitrust Division, lawyers in 13 U.S. Attorneys’ offices, and investigators from the FBI, various offices of inspectors general, the General Services Administration, and the U.S. Postal Service. The PCSF prosecutes federal contractors accused of bid-rigging and other antitrust violations; it has also been successful in prosecuting complex fraud and collusion cases even without a Sherman Act charge. Since 2019, the PCSF has opened over 60 investigations and prosecuted 30 companies and individuals. In 2022, the PCSF secured multiple indictments of military contractors and a jury verdict against a former executive accused of rigging bids to the North Carolina Department of Transportation.

ESG. Shortly before the U.S. midterm elections, a group of conservative members of Congress sent letters to several law firms warning that certain Environmental, Social, and Governance (“ESG”) activities may be viewed as “climate cartels” and investigated as violations of Section 1 of the Sherman Act. On December 6, 2022, Republican members of House Judiciary Committee, including the likely incoming chair of the committee, announced an investigation into whether companies adopting collective ESG initiatives may be violating the Sherman Act. In addition, some state attorneys

general have also begun investigating cross-company ESG efforts as potential antitrust violations. It is likely that these lawmakers and attorneys general will put pressure on the DOJ and FTC to open up similar investigations.

Benchmarking. Private plaintiffs, the DOJ, and the FTC will likely continue to investigate and litigate cases related to benchmarking. Benchmarking is a process through which third-party consultants collect, anonymize, and disseminate information to industry participants. Benchmarking is not inherently anticompetitive, and can have some pro-competitive benefits if managed correctly. In 2022, DOJ unveiled a civil investigation into wage benchmarking efforts in the poultry industry. It is likely that DOJ will continue to bring similar enforcement actions in 2023.

Importance of Compliance Programs

It is difficult to overstate the importance to companies of having an effective antitrust compliance program. In addition to detecting problematic conduct before it leads to antitrust liability, a well-designed compliance program can significantly reduce the damage done to companies from violations of the antitrust laws in terms of criminal penalties, exposure to civil liability, and harm to business operations and reputation.

In the field of antitrust, compliance programs were historically unimportant. But, over the past decade, the existence of a well-designed and effective compliance program has become a major factor taken into account by the DOJ's Antitrust Division in assessing whether and how to punish antitrust violations. Specifically, and as discussed below, an effective compliance program may lead to a decision by the Antitrust Division not to criminally prosecute a company, and where the DOJ does decide to prosecute, the existence of a compliance program may serve to reduce the penalties imposed for antitrust violations.

What makes a compliance program “effective?”

The Antitrust Division has identified the following eight elements of an effective antitrust compliance program:

- **Design and comprehensiveness.** A program is designed to prevent and detect violations of the antitrust

laws. The program in effect is formal, well-integrated into the company's business practices, accessible to the company's employees and agents, and reinforced through internal controls (like reporting mechanisms).

- **Culture of compliance.** The company's culture encourages ethical conduct. It is particularly important for the company's leadership and senior management to support the program and take responsibility for compliance failures.
- **Responsibility for the program.** A high-ranking member of the company is responsible for supervising the program, and is given sufficient control and resources to make the program work. This could be, for example, a Chief Compliance Officer, or other executive who reports to the Board of Directors.
- **Detection.** The program should be built in order to detect antitrust violations as they occur. Compliance programs need to be carefully tailored to the antitrust risks implicated by the company's specific business practices as well as risks inherent to the company's industry. Data collection techniques, for example, can be used to evaluate pricing changes or likewise uncover suspicious patterns in business conduct. Detection measures could also include specialized training for human resources and other recruitment staff who oversee hiring at the company.
- **Training and communication.** The program should ensure that employees understand what conduct is prohibited by antitrust laws. Additionally, there should be mechanisms in place to make sure that trainings are accessible to employees.
- **Periodic review, monitoring, auditing.** An effective compliance program is periodically reassessed to ensure that it still addresses the company's antitrust risks. Additionally, the company should have some ability to monitor whether employees are following the program.
- **Facilitates reporting.** Compliance programs should include some way for employees to report suspected violations of antitrust laws to management. These reporting mechanisms ought to be publicized so employees know they are available. Additionally, companies should incentivize reporting by, for example,

allowing employees to make anonymous reports. The company should avoid disincentivizing reporting through behavior such as retaliating against employees who report suspected violations.

- **Incentivizes compliance and disciplines non-compliance.** Companies should take measures to incentivize compliance within the company and take consistent disciplinary measures against those who violate the company's policies related to anticompetitive conduct.

Impact on Resolution

- **Early detection and leniency.** In addition to preventing antitrust violations, an effective compliance program will increase the likelihood of early detection of potential violations, and may therefore help a company be eligible for the DOJ's Corporate Leniency Program. The leniency program requires that a company must (i) detect illegal cartel activity before the government does, (ii) immediately cease such activity, and (iii) be the first cartel participant to report this offense to the Antitrust Division. So early detection is critical.
- **Decreased penalties.** Even if a company is not eligible for the DOJ's Corporate leniency program, an effective compliance program may still serve to reduce the penalties a company is required to pay for violations of the antitrust laws. As previously discussed, the criminal fine a corporation is sentenced to pay depends in part on its "culpability score." If the corporation has an effective compliance program, it may be entitled to a three-point reduction in its culpability score. For example, assuming a base fine of \$1 million and culpability score of five, this reduction could save the defendant \$400,000 in additional penalties. However, to qualify for this reduction, the DOJ must determine that the compliance program is effective according to the factors listed above. Further, the reduction does not apply if "after becoming aware of an offense," the corporation took too long to report the offense to the government. Nor does the reduction apply if a high-ranking individual in the company was involved in the conspiracy or approved of it.
- **May influence departure or variance from Sentencing Guidelines.** The existence and nature of a corporate compliance program may be a factor that is considered in the court deciding to impose a sentence below the range recommended by the Guidelines.
- **Precludes appointment of an external monitor.** In cases where the corporation has not established an adequate compliance program and the government otherwise determines that a corporation is incapable of self-governance, the DOJ will recommend that the court appoint an external monitor. But if a company can demonstrate that it has an effective compliance program, the DOJ is unlikely to recommend that a monitor be appointed.
- **Deferred prosecution eligibility.** Companies with a compliance program are in a better position to negotiate a DPA with the government in antitrust cases. The Antitrust Division's recent policy shift concerning DPAs makes them potentially available to a self-reporting company if (1) its compliance program is the reason the violation was detected; (2) the program caused the violation to be remediated; and, (3) the company subsequently cooperates with the Antitrust Division's investigation. If these conditions are met, a company would be eligible to obtain a DPA even if it was not the first to report the alleged misconduct to the government (unlike the leniency program).



Civil Investigations by the Government

As discussed at the outset, the Sherman Act is a civil and criminal statute, which means individuals and companies can face potential criminal and civil liability for violations of federal and state antitrust laws. So, in addition to criminal investigations, government regulators regularly conduct civil investigations of alleged antitrust and unfair competition violations.

At the federal level, the Federal Trade Commission and the DOJ both investigate potential antitrust violations. Investigations of monopolistic conduct are usually civil investigations. The FTC also investigates conduct that could be considered unfair methods of competition, such as false advertising and data-security breaches. Additionally, in the U.S. system of government, states may investigate and enforce their own antitrust and unfair competition laws, sometimes in addition to or in conjunction with federal investigations.

Discovery procedures in civil investigations. The government uses different tools to obtain information in civil investigations than it does in criminal investigations. At the early stages of a civil investigation, a government agency will seek a subject's voluntary cooperation to obtain information. But investigators can compel information, too. Instead of grand juries and search warrants, the government uses Civil Investigative Demands, or CIDs, to obtain documents, testimony, or answers to interrogatories (written questions from the government) to investigate potential violations. Discovery under a CID can be more time-consuming than discovery in a criminal matter.

A CID can be issued to anyone or any entity the government believes possesses information relevant to a civil investigation. This could be the target of an investigation or a party the government has identified as a potential witness. Regardless, CIDs are required to specify the investigated conduct that is or could lead to a violation of antitrust and unfair competition laws, but in practice, CIDs state only what law is implicated (e.g., the Sherman Act) and describe the potential violation in general terms (e.g., "restraint of trade."). While the validity or scope of a CID can be challenged in court, the government can likewise sue to enforce a CID in the event its recipient fails to cooperate. According to the

Supreme Court in *Oklahoma Press Publishing v. Walling*,¹² subpoenas from administrative agencies, like CIDs, will be enforced so long as the government can show that the "investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."

- **Compelled document production.** CIDs can compel production of documents, including documents from unrelated court proceedings that are subject to a protective order.
- **Compelled testimony.** A CID may require the recipient to give sworn, oral testimony in a deposition-like setting. Only the witness, the witness's lawyer, investigative staff, and a stenographer can be present during the testimony. The witness's lawyer's role is limited during oral testimony. Cross-examination is not permitted. Further, a witness can refuse to answer only on the basis of a legal or Constitutional privilege, such as invoking the Fifth Amendment privilege against self-incrimination.

Burden of proof. It is easier for the government to prove that an antitrust or unfair competition violation occurred in the civil context. To succeed in a civil enforcement action, the government need only prove that it is more likely than not that a violation of the antitrust or unfair competition laws occurred. This is called the "preponderance of the evidence" standard. By contrast, in a criminal matter, the government has the much heavier burden of proving a violation occurred "beyond a reasonable doubt."

Possible consequences of a civil investigation. The government has a range of options once a civil investigation has concluded. It can close the investigation, bring an enforcement action, resolve the investigation through a consent decree, or choose to use information obtained through the investigation in a later proceeding.

- **Closing the investigation.** The government can close an investigation in the event it does not detect conduct believed to violate antitrust laws, or if the government otherwise opts to take no action.
- **Enforcement action.** The government can bring an enforcement action in a federal or state court to challenge conduct it believes violates antitrust laws.

The FTC, for its part, may institute an administrative proceeding before an administrative law judge as a result of an investigation.

- **Consent decrees.** Civil investigations brought by the DOJ's Antitrust Division are often resolved by "consent decree," which is effectively a settlement with the government. Once the parties agree to a resolution, a consent decree is filed with the court for its approval. Once approved, the consent decree is legally binding on the defendant. Typically, the terms of the consent decree are negotiated with the government before it files a complaint. Consent decrees allow both the defendant and the government to avoid the risks associated with going to trial. Additionally, consent decrees allow defendants to avoid some exposure to liability in private antitrust suits because a consent decree does not have the same preclusive effect as an adverse judgment in an antitrust enforcement action brought by the U.S. Generally, the government will not agree to consent decrees that last less than 10 years. Parties may, however, seek court modification or termination of a consent decree.
- **Future use of investigative findings by the government.** The government is free to use any information it obtains from a civil investigation in any court or proceeding. In addition to civil enforcement actions, an investigation can also lead to a subsequent criminal investigation by the DOJ based on information obtained during the course of the civil investigation.

Given this range of possible outcomes, it is important for individuals and companies facing a civil antitrust investigation to have an experienced legal team available to provide assistance. Vinson & Elkins lawyers, for example, have represented clients in multiple civil investigations by the DOJ and FTC, including some of the largest civil investigations conducted by these agencies. We have also represented clients in multiple state investigations, including cartel investigations by the state attorney general's offices in California, Connecticut, Florida, Mississippi and Ohio. Based on this experience, our team helps clients develop strategies to navigate and defend civil antitrust investigations.

Possible remedies. Though specific remedies vary depending on which government agency is conducting the investigation, the government generally may seek monetary

and injunctive relief, among other remedies, in settlement of an investigation or through a civil lawsuit.

- **Monetary remedies.** The FTC, DOJ, and most state attorneys general are authorized to seek "civil monetary penalties" for violations of federal and state antitrust laws. DOJ's Antitrust division may also sue to recover money damages to business or property of the U.S. caused by the violation. The DOJ is authorized to seek damages of up to three times the amount of actual loss claimed by the government. State attorneys general in roughly half of the U.S. may seek statutory damages in antitrust cases.
- **Injunctive relief.** After notice and a hearing, the FTC has the authority to order a respondent to "cease and desist" from unfair methods of competition or deceptive acts and practices. These orders remain in effect for 20 years in some cases and, as discussed above, violating them can lead to civil penalties. But the FTC may also seek other forms of relief for violations of this type of order. Cease and desist orders often require respondents to make regular reports demonstrating compliance with the order. The FTC, DOJ, and most state attorneys general can also seek injunctions ordering a defendant to stop activity believed to violate antitrust and unfair competition laws. An injunction can be "preliminary" (effective only for the duration of a court proceeding), or "permanent" (effective until a court says otherwise). Historically, the FTC had used this authority to seek disgorgement of ill-gotten money, but in 2021, the Supreme Court held that the FTC Act does not authorize disgorgement.¹³ Efforts are underway in Congress to amend the statute to expressly authorize the FTC to seek disgorgement.
- **Forfeiture.** Under Section 6 of the Sherman Act, the U.S. government can seize property being transported interstate that is "owned under any contract or by any combination or pursuant to a conspiracy" that violates the Sherman Act. Forfeited assets are deposited into the DOJ's "Asset Forfeiture Fund."



Part Three

Civil Litigation

While criminal litigation is what we often read about on the front page of a newspaper, civil litigation can be just as injurious to a company. Antitrust actions are broadly available. The Clayton Act establishes a private cause of action for damages under the federal antitrust laws and allows “any person” injured by an antitrust violation to sue for three times the monetary injury suffered. Natural persons, business associations, the federal government, state and local governments, and foreign governments all constitute “persons” under the Clayton Act, and all of them can therefore bring claims over alleged cartel injuries.¹⁴

Who Can Sue?

Nearly anyone directly injured by an antitrust violation can sue for damages. Complexities arise, however, when it is not clear that the plaintiff was *directly* injured by the violation, or when it is not clear that the antitrust violation in question caused the plaintiff's injury at all.

Antitrust standing requires injury from harm to competition. All plaintiffs other than the federal government must establish antitrust standing to recover under federal antitrust laws. To establish antitrust standing, a plaintiff must show each of the following:

- **Injury-in-fact.** The plaintiff must show a cartel's conduct resulted in an actual injury to the plaintiff's business or property (in damages cases) or a threatened injury (in injunctive relief cases).
- **Causation.** The plaintiff must show its injury was materially or substantially caused by the alleged antitrust violation.
- **Proximity.** The plaintiff must have been directly impacted by the antitrust violation at issue, which typically means the plaintiff bought or sold in the market that was affected by the alleged cartel. Those who did not participate in the constrained market itself, but who suffered some later or secondary impact from the antitrust violation, may be deemed too "remote" from the antitrust violation to bring a claim.
- **Antitrust injury.** Finally, the plaintiff must show antitrust injury. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful."¹⁵ Injuries from causes other than competitive constraints do not give rise to antitrust standing. So, for example, a plaintiff who paid a supra-competitive price to a cartel member has antitrust standing. But a plaintiff who was injured simply by a cartel member's failure to deliver goods on time would not have antitrust standing; the injury from the cartel member's breach of contract is not the result of the cartel having illegally restrained competition. Purchasers from cartel members generally have an antitrust injury, while competitors of cartel members usually do not.

Some "indirect" purchasers may be deemed too remote to sue. A cartel will often raise the price of a good or service not just for those who buy directly from the cartel participants, but also for those downstream in the supply chain. For example, when a "direct" purchaser like a distributor pays a higher price to a manufacturer participating in a cartel, the distributor may be able to "pass on" that price increase to its own customers, like retailers or end users who end up paying more for finished products or resold goods they purchase from the distributor.

But how much of the cartel-induced price increase is absorbed by the direct purchasers and how much (if any) is passed on to indirect purchasers can be a complicated question. Federal courts, concerned that so-called "indirect purchasers" of cartelized goods will not be "efficient enforcers" of antitrust law, generally hold that such indirect purchasers cannot recover damages for federal antitrust violations under the U.S. Supreme Court's *Illinois Brick* decision."¹⁶

There are exceptions to this rule, however. Indirect purchasers can seek injunctive relief rather than damages actions. Or, if the apparent "direct purchaser" was controlled by or conspiring with the cartel participant, an indirect purchaser can bring a damages action against the cartel participant. Indirect purchasers under cost-plus contracts, *i.e.*, those who can clearly demonstrate they were the first purchaser in the chain to pay an overcharge, can also bring claims. Additionally, the legislatures of about half of the states have enacted statutes specifically granting indirect purchasers antitrust standing, thus allowing indirect purchasers to sue for damages under state antitrust laws.

State and local governments can bring their own civil claims. A state attorney general can bring actions under either the state or federal antitrust laws for damages suffered by the state and its subdivisions when they purchase affected goods from cartel participants. A state attorney general can also commence what is called a "*parens patriae*" action, or a lawsuit brought by the state under federal antitrust laws to recover damages done to citizens living in the state.

States vary with respect to the extent to which they pursue such claims. Some states have active antitrust practices of their own, while others tend to limit their antitrust cases to ones in which they can share the enforcement effort with the federal government or multi-state coalitions. Some states retain private attorneys to bring these claims on a contingent fee basis. An underlying issue in these *parens patriae* cases is whether a recovery by the state may be kept by the state or should be distributed to the citizens on whose behalf the state brought the claim.

Jurisdiction Over Foreign Defendants

Personal jurisdiction. In order to hear an antitrust case, the court must have personal jurisdiction over the defendant. Personal jurisdiction refers to the court's authority to make decisions that affect all parties in a case, including domestic and foreign defendants. Issues regarding jurisdiction over foreign defendants in antitrust suits typically arise when a plaintiff is suing a U.S. subsidiary and its foreign parent company. While U.S. courts may be able to reach and adjudicate matters against the subsidiary, establishing personal jurisdiction over the foreign parent is more difficult.

A court may attempt to exercise personal jurisdiction over a foreign defendant in one of two ways: through general jurisdiction or specific jurisdiction.

- **General jurisdiction.** U.S. courts have general jurisdiction over a defendant corporation when the plaintiff brings suit in a court (1) in the defendant's state of incorporation, or (2) at the defendant's principal place of business. A corporation's principal place of business is typically the location of its headquarters. In most cases, a foreign defendant is headquartered and incorporated in its home country. Thus, it is difficult for a U.S. court to establish general jurisdiction over foreign defendants.
- **Specific jurisdiction.** In most cases, a court's personal jurisdiction over a foreign defendant is established through specific jurisdiction. The Supreme Court articulated the guiding principle of specific jurisdiction in *International Shoe v. Washington*.¹⁷ In that case, the Court held that a defendant must have

"certain minimum contacts" with the forum state, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Under this standard, a court must find that (1) the foreign defendant has had sufficient contacts with the forum state, (2) the plaintiff's claims arise out of the foreign defendant's contacts with the forum, and (3) requiring the defendant to defend a suit in the U.S. is both fair and reasonable.

Foreign defendants should note that objections to personal jurisdiction can be waived. If the defendant does not object to jurisdiction at the first opportunity to do so, such as when filing an answer or appearing before the tribunal, courts will presume that the defendant has waived the issue. If this occurs, the defendant may not object to personal jurisdiction later.

Specific jurisdiction – minimum contacts. Section 12 of the Clayton Act authorizes nationwide service of process for antitrust defendants. This has led courts to adopt a jurisdictional test that examines a foreign defendant's contacts with the U.S. as a whole rather than its contacts within a specific state. There are a number of theories and tests an antitrust plaintiff may use to establish a defendant's minimum contacts in the United States.

- **Systematic and continuous contacts.** A U.S. court may exercise personal jurisdiction over a foreign defendant if the defendant has continuous and systematic contacts with the U.S. that are related to the suit. For example, in the case of an antitrust conspiracy, any action taken by the foreign defendant and its co-conspirators in the U.S. would suffice to establish specific jurisdiction. If the contacts are unrelated to the suit, jurisdiction may still apply if the defendant has substantial contacts in the U.S. that make it reasonably foreseeable that it would be hauled into court there. This occurs when the foreign defendant itself (rather than a subsidiary) conducts essential business activities in the U.S., which, in the aggregate, place the defendant under the court's jurisdiction. Essential business activities include directly selling or promoting products to U.S. consumers, recruiting U.S. employees, or maintaining U.S. facilities. Sporadic activities, such as business trips and communications with U.S. entities, generally are not enough to establish jurisdiction under this theory.

- **Effects test.** A court may find that it has jurisdiction over a foreign defendant if the plaintiff shows that the defendant has taken actions outside of the U.S. that foreseeably resulted in harm within the U.S. However, a showing that the defendant knew or may have known that its conduct caused harm in the U.S. is not enough. An antitrust plaintiff must also show sufficient facts showing that the foreign defendant “expressly aimed” or targeted its tortious conduct at the U.S. If these facts are not shown with particularity, a court is unlikely to find jurisdiction under the effects test.
 - **Alter-ego jurisdiction.** Alter-ego jurisdiction occurs when a foreign parent company treats its U.S. subsidiary as an extension of itself, such that the two entities operate as one. Normal corporate relationships between a parent and its subsidiary are not enough to establish jurisdiction under this theory. Instead, an antitrust plaintiff must allege sufficient facts demonstrating that the parent company exercises a greater degree of control over its subsidiary than is normal. Conclusory statements to this effect are not enough.
- If alter-ego jurisdiction applies, then the court will impute the U.S. subsidiary’s conduct to the foreign parent for the purposes of establishing minimum contacts. The more independently a U.S. subsidiary operates, the less likely that its foreign parent will be deemed subject to alter-ego jurisdiction. U.S. subsidiaries of foreign companies should strive to follow corporate formalities to avoid alter-ego jurisdiction.
- **Agency jurisdiction.** Courts may find that personal jurisdiction applies if there is an agency relationship between the foreign parent and its U.S. subsidiary. An agency relationship exists when (1) a parent and subsidiary agree that the subsidiary will act on the parent’s behalf and (2) the parent retains control over the subsidiary’s actions. As with alter-ego jurisdiction, a plaintiff must allege sufficient facts showing that the parent company has control over the subsidiary.
 - **Co-conspirator jurisdiction.** This type of jurisdiction exists when the foreign defendant knows or should have known of actions taken by co-conspirators in the

Case Example

In *In re Chocolate Confectionary Antitrust Litigation*,¹⁸ the District Court of Pennsylvania held that it did not have alter-ego jurisdiction over a foreign parent company where the foreign parent (1) profited from its U.S. subsidiary’s dividends; (2) established group-wide accounting protocols; (3) approved capital expenditures and budgets; (4) approved and had influence over executive compensation; (5) could choose the subsidiary’s officers, (6) collected information regarding corporate performance; and (7) received distributions from the subsidiary. The court found that the facts did not establish a greater degree of control than what is normally present in a parent-subsidiary relationship. However, the court held that the plaintiff had established sufficient evidence of alter-ego jurisdiction over another foreign parent company where that foreign parent (1) established group-wide strategies and required its U.S. subsidiary to obtain approval before implementing a project; (2) was accountable for the products produced by its subsidiary; (3) managed its business by global product group rather than permitting the U.S. subsidiary to operate its own business; (4) controlled the subsidiary’s day-to-day processes; and (5) conducted U.S. market research and evaluated the supply functions of its subsidiary. V&E partner Steve Medlock represented one of the defendants in *In re Chocolate Confectionary Antitrust Litigation*.

U.S. As with the other theories, plaintiffs must plead facts supporting their assertion with particularity. Courts have routinely rejected co-conspirator jurisdiction in antitrust cases when the plaintiff fails to show that the defendant knew or should have known of the conspiratorial conduct.

Specific jurisdiction - fairness and substantial justice.

Even if the plaintiff establishes that the requisite minimum contacts exist, a U.S. court may find that it cannot hear the case if exercising personal jurisdiction would not comport with the notions of fair play and substantial justice. To determine whether jurisdiction is fair and reasonable, courts consider a number of factors, including: (1) the burden on the foreign defendant; (2) the U.S. interest in adjudicating the case; (3) the plaintiff's interest in convenient and effective relief; (4) the interstate judicial system's interest in effective resolution of controversies; and (5) the state's shared interest in furthering fundamental substantive social policies. Of the five factors, courts give the burden on the defendant considerable weight when conducting the analysis.

Jurisdictional discovery. Courts may allow limited discovery for the purposes of establishing jurisdiction. If the Court doubts that the complaint alleges sufficient facts to show jurisdiction, the Court may nevertheless permit some discovery to permit the plaintiff to obtain evidence to establish jurisdiction. In doing so, the court must strike a careful balance between providing the plaintiff with sufficient information and protecting the defendant from being subjected to U.S. authority should jurisdiction not exist.

If jurisdictional discovery is granted, foreign defendants must comply with the order. Failure to provide the plaintiff with the information requested could result in court sanctions. This may include a finding that jurisdiction does exist if fair and reasonable under the circumstances. If the foreign defendant's home country has laws restricting the export of information or data for legal proceedings in other countries, the defendant will have to try to navigate the requirements of both its home country's laws and the expectations of the U.S. court.

Typical Progression of a Civil Antitrust Case

Criminal cartel investigations prompt civil litigation.

Private litigation in the cartel environment often begins with a federal criminal investigation. Once an investigation into alleged cartel activity is announced, it is common for private plaintiffs who may have been affected by the cartel to begin filing lawsuits to preserve their claims. As government investigators begin issuing indictments or announcing findings, the facts revealed in those investigations create a blueprint for private plaintiffs to amend their complaints or file new ones.

Private claims that follow government investigations are generally more likely to survive the motion-to-dismiss stage, because the government's identification of cartel participants, witnesses, specific conduct, and the affected market gives plaintiffs critical help in meeting the required pleading standards. Additionally, private plaintiffs can rely on convictions or guilty pleas as evidence of antitrust violations described in the plea and can make allegations of a broader conspiracy in a civil case more plausible.

Whether claims will be aggregated is an important early question.

Alleged cartel activity affecting significant sectors of the economy often results in large numbers of potential claimants. The costs, burdens, and risks of litigating multiple claims put competing pressures on plaintiffs, defendants, and the courts to consider whether and how to streamline the process. There are two primary methods of aggregating claims:

- **Class actions.** Rule 23 of the Federal Rules of Civil Procedure permits a plaintiff to bring an action on behalf of an entire class of persons with similar claims, provided that the class satisfies the elements of numerosity, commonality, typicality, and adequacy, and the plaintiff can show that common, class-wide issues would predominate over individual issues in the litigation. These requirements are discussed in more detail below.
- **Multidistrict litigation (MDL).** The Judicial Panel on Multidistrict Litigation is authorized by Congress to transfer civil actions filed in different districts that share common issues of law or fact to a single district

court for consolidated pretrial proceedings. The cases aggregated into an MDL may be individual cases, putative class actions, or both. Often, an MDL will contain different categories of cases—such as direct purchasers, indirect purchasers, different classes, and individual plaintiffs—asserting claims arising from the same conduct by the defendants. Consolidation into an MDL often facilitates settlement or other pre-trial resolutions, but if the cases are not resolved short of a trial, the cases are typically returned to their original courts for trial proceedings.

All parties, and the court system in general, may benefit from aggregations that create efficiencies. But aggregation also tends to band together plaintiffs and defendants whose claims or defenses may have varying strengths or weaknesses, and how any individual plaintiff or defendant is affected by aggregation depends on highly specific circumstances. The parties will consider, among other things:

- Will all plaintiffs be grouped into a single class or MDL, or will competing interests require separate groupings?
- How many plaintiffs would be likely to opt out from a class action and pursue their own claims?
- How many defendants are participating in the cases and how closely aligned are they?
- Will one or more of the defendants likely face bankruptcy?
- Who will have leverage in settlement negotiations?

It is likely that the two sides in any case will have competing interests on these issues, and there may even be disagreements among the aligned parties on each side. Whatever the outcome, the aggregation decision will impact how the remainder of the litigation plays out.

Cases follow familiar patterns of development. If cases have been aggregated, the newly banded-together plaintiffs will often consolidate and amend their complaints, giving the court a single pleading that combines and updates the factual allegations the various plaintiffs had individually made. Defendants will answer the complaint or complaints, admitting or denying the facts alleged, or will move to dismiss all or part of the plaintiffs' complaints, as we will

describe below. Whether fact discovery begins immediately or should await a decision on defendants' motion to dismiss is typically a matter within the court's discretion to decide.

Fact discovery, including the collection and production of documents and data, will follow the initial filings. Depositions of witnesses will typically begin after document production has begun, but document collection and production will often continue as the case develops. Deadlines for the designation of expert witnesses and preparation of expert reports will usually be set for a time after fact discovery is at least substantially complete.

In complex antitrust cases, there will often be more time reserved for expert witnesses, like economists, to do their work than would be required in typical commercial litigation, as well as additional time set aside for the court to review that expert work. Parties will often request time to prepare rebuttal expert reports and will allow time for motions or hearings on the admissibility of expert testimony. Resolution of expert issues will sometimes precede summary judgment motions, but courts may prefer to handle those matters together.

Cartel litigation is typically long in duration. Civil antitrust lawsuits often take a long time to resolve, even when there are very few parties. Discovery may be voluminous; expert testimony is often richly developed and must follow development of a complete factual record; dispositive briefing is detailed and complicated; and trials can be lengthy. If each of these steps requires coordination among dozens or hundreds of plaintiffs and a significant number of defendants, the process typically takes several years. Even a rapid settlement in a class action may not result in quick peace for defendants if individual class members find the settlement inadequate, and have claims large enough to justify opting out of the class settlement to pursue separately.

Case Examples

In re Automotive Parts Antitrust Litigation. This massive, decade-old litigation grew out of the Justice Department's investigation into alleged price-fixing and bid-rigging in the automotive parts industry. As the government's investigation turned up evidence of price-fixing and bid-rigging, multiple parts manufacturers and their employees pleaded guilty to charges of cartel conduct. A wave of plaintiffs, including auto dealers, consumers, and state governments, filed follow-on lawsuits, many of which were asserted as class actions seeking to represent buyers of specific kinds of parts, ranging from air conditioners to windshield wipers. A multi-district litigation was formed in the Eastern District of Michigan to manage these cases, and Vinson & Elkins represents one of the manufacturer defendants. Resolution is complex due to the number of affected products and distinct groups of claims. Multiple classes have settled claims, but in several instances, manufacturers and class representatives began settlement negotiations, only to see substantial numbers of opt-outs, new classes, and an influx of new claims from insurers.

In re Delta Dental Antitrust Litigation is a challenge to the structure of Delta Dental insurance businesses since the Delta system began to operate in the 1960's. After dentists filed 34 antitrust class actions alleging that the Delta system caused them to receive less reimbursements for their services than they would have in a more competitive market. The Judicial Panel on Multidistrict Litigation centralized the cases as a Multidistrict Litigation in the U.S. District Court for the Northern District of Illinois in 2019. Plaintiffs in that case sought and received limited discovery of board of directors documents from the 1960's onwards. Vinson & Elkins represents one of the Delta Dental member companies.

Types of Actions

Both damages and injunctive relief are available in cartel cases.

Damages are measured based on harm caused by the cartel. Generally speaking, damages in a cartel case are calculated by determining the difference between the price the plaintiff actually paid under cartel conditions and the competitive price the plaintiff would have paid absent the cartel (usually referred to as the "but-for" price), a measurement that almost always requires expert economic testimony. Other measures like lost profits or lost business value may be recoverable in specific cases, but in all cases, the plaintiff must segregate damages caused by the defendant's antitrust violation from losses that are attributable to other factors.

Damages are typically trebled. To deter antitrust violations and encourage private enforcement of the antitrust laws, the Clayton Act provides that a successful plaintiff in an antitrust action "shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."²⁰ The trebling of damages is automatic and nondiscretionary.

However, if the defendant has participated in the DOJ's leniency program described earlier, the Antitrust Criminal Penalty Enforcement and Reform Act ("ACPERA") may exempt that defendant from trebling in related civil cases if the defendant cooperates with the plaintiff. Finally, while most state antitrust laws permit treble damages, a few limit the plaintiff's recovery to actual or double damages.

Each alleged conspirator faces liability for all

conspirators' conduct. Cartel defendants face liability disproportionate to their alleged gains, because defendants are jointly and severally liable for all injury caused by the conspiratorial conduct, and there is no right of contribution. This means, for example, that a cartel member would be liable not only to its own customers who paid inflated prices, but also to the customers of the other cartel members. If, however, a defendant participated in the DOJ's leniency program, and fully cooperates during subsequent civil proceedings, ACPERA may limit that defendant's liability to only the damages it caused.

Courts can enjoin wrongful conduct. Under Section 16 of the Clayton Act, any person that is threatened with loss or damage by a violation of the antitrust laws can sue for injunctive relief.²¹ A plaintiff can obtain an injunction without showing that actual injury has occurred; a showing of threatened injury is sufficient. The injunction can be as broad as necessary to terminate the illegal conduct or otherwise ensure that violations do not recur.

Case Example

ETSI Pipeline Litigation. On behalf of the ETSI Pipeline Project, a joint venture attempting to build a coal slurry pipeline, Vinson & Elkins sued various western railroads who conspired to prevent the pipeline from competing against them. The case resulted in a jury verdict and subsequent judgment of \$1 billion in damages, the first-ever billion-dollar verdict in an antitrust case. The client ultimately received a net amount of \$425 million against the non-settling defendant.

Motions to Dismiss

Defendants often seek dismissal of an antitrust complaint early in the litigation, if either (1) the facts alleged by the plaintiff would not demonstrate a violation of antitrust law, or (2) the allegations establish a clear defense to liability.

The basics. Rule 12 of the Federal Rules of Civil Procedure governs the process of filing a motion to dismiss. Defendants typically file a motion to dismiss and a supporting brief setting forth their arguments. The length of these briefs depends on the case issues and on the local rules of the court, but a 20-to 30-page brief is common.

In multiple-defendant cases where each defendant would present similar grounds for dismissal, defendants should consider filing a joint brief, rather than each defendant filing its own separate brief. Some courts may even require a joint brief, though a court will typically allow a defendant to file a short, separate brief if it presents unique issues.

Timing. Under Rule 12, a motion to dismiss must be filed within 21 days after service of the summons and complaint. Courts will usually allow the parties to negotiate extended periods of time to file and respond to the motion. In cases involving foreign defendants, the difficulties of effecting service of process can complicate the briefing schedule. Parties will therefore usually negotiate a schedule in which motions to dismiss are filed after all defendants, including the foreign defendants, are served.

Arguments in a motion to dismiss. When considering a motion to dismiss, the court must assume all the facts plaintiff alleged in its complaint are true. The plaintiff must allege specific facts rather than mere conclusions. Defendants may not present additional facts in a motion to dismiss or even dispute the facts alleged. In essence, a defendant seeking dismissal is limited to arguing that, even if the facts alleged are all true, those facts would not establish an antitrust violation. While each complaint is unique and antitrust counsel will tailor the arguments to the circumstances, there are several common arguments in motions to dismiss.

The most common argument in cartel cases is that the plaintiff has not alleged facts sufficient to support an inference of conspiracy. The Supreme Court set forth the standard for

pleading a conspiracy case in *Bell Atlantic v. Twombly*.¹⁹ In that case, the Supreme Court held the complaint must allege facts “plausibly suggesting” there was an unlawful agreement among the alleged conspirators that restrained competition. Merely alleging that the defendants had engaged in similar or parallel conduct, such as raising their prices by similar amounts at similar times, will often not be enough, if those similarities could just as easily be the result of independent conduct (and not the result of an illegal agreement). As the Supreme Court said, the plaintiff must allege enough facts suggesting a conspiracy to “nudge[] their claims across the line from conceivable to plausible.” A plaintiff who makes a bare assertion of conspiracy on the basis of parallel conduct alone has not done enough to state a claim for relief under the *Twombly* standard. Rather, the plaintiff must allege that the parallel conduct and other facts—often called “plus factors”—make a conspiracy plausible.

Another common argument is that a plaintiff lacks “standing” to sue. As discussed above, a plaintiff has standing if the plaintiff was harmed by the defendant’s conduct and has a legally recognized claim of injury. In the antitrust context, standing in a federal case often turns on whether the plaintiff participated directly in the market that defendants allegedly harmed, such as by purchasing products directly from the defendants at prices that the defendants conspired to raise or fix.

Plaintiffs who were only indirect purchasers, such as downstream buyers or consumers, cannot typically sue under federal law, and their cases could be dismissed for lack of standing. However, as discussed above, if the plaintiffs seek to recover under state antitrust laws, many of those laws allow indirect purchasers to bring claims.

In some instances, a defendant may be able to argue that the allegations in the complaint are subject to arbitration. For example, claims brought by franchisees, dealers, distributors or purchasers against manufacturers may be subject to arbitration clauses found in their distribution, franchise or purchase agreements. If parties have agreed to resolve all or part of their disputes through arbitration, a court may stay the case until arbitration is completed, compel the parties to arbitrate, or dismiss the complaint outright. Before moving to dismiss, it is critical to review sales contracts and sales terms with plaintiffs to see if there is a viable argument that the claims should be arbitrated.

Defendants, especially foreign defendants, may move to dismiss on the basis that the court lacks personal jurisdiction over the defendant. The two ways a plaintiff can establish jurisdiction over a defendant (general jurisdiction and specific jurisdiction) are discussed above.

Decisions. Courts generally have three options in ruling on a motion to dismiss:

- **Grant the motion with prejudice.** A dismissal with “prejudice” is a judgment that the plaintiff’s allegations do not state a valid claim and that the deficiency could not be cured by amending the complaint. This is the defendant’s best outcome on a motion to dismiss, since the dismissal ends the case and prevents the plaintiff from reasserting the same claims.

Case Example

In *Puerto Rico v. Hitachi Automotive Systems, Ltd.*, 2021 WL 148004 (E.D. Mich. Jan. 15, 2021). Vinson & Elkins obtained dismissal with prejudice of Puerto Rico’s antitrust and all related claims. Puerto Rico alleged the defendant manufacturers engaged in price-fixing with respect to certain auto parts, but because Puerto Rico was not suing on behalf of anyone who had directly purchased auto parts from the defendants, the court found that Puerto Rico lacked standing to bring its claims.

- **Grant the motion “without prejudice,” or with “leave to amend.”** Even if a court finds the plaintiff’s allegations insufficient to state a claim, the court often will permit the plaintiff another chance to plead its claims. Typically, the plaintiff will then file another complaint alleging additional facts to try to fill the gaps in the original complaint or correct its defects. Defendants will then typically be entitled to argue that the amended complaint is still insufficient and the court may conduct the motion-to-dismiss analysis again.

- **Deny the motion to dismiss.** The court may conclude that the complaint plausibly alleges an antitrust conspiracy. Because the court must accept the pleaded facts as true, the court may deny the motion to dismiss even if it has significant doubts about the plaintiff's ability to prove an antitrust case after discovery. Courts may be particularly inclined to deny motions to dismiss when one or more of the defendants has entered a guilty plea to criminal cartel conduct. But even in denying a motion to dismiss, the court may give a preliminary opinion on legal issues that can inform the parties' understanding of the strengths and weaknesses in their positions and help guide the development of the case. A court also has the option to grant a motion to dismiss in part, allowing the case to proceed, but with a more narrowed set of claims or scope.

Discovery

Discovery in civil antitrust litigation is often quite

broad. Discovery is the process by which parties exchange nonprivileged information that may become evidence at trial, or which is otherwise relevant to the case. Plaintiffs routinely seek a broad scope of discovery in antitrust cases, arguing that, first, a wide-ranging inquiry into defendants' business activity is necessary to develop economic models of competitive prices and anticompetitive impacts, and second, evidence of anticompetitive conduct would naturally be in the allegedly conspiring defendants' possession and would otherwise be unavailable to the plaintiffs. Plaintiffs will usually argue that conspirators try to hide their tracks to justify wide-ranging discovery not only of emails but also text messages, encrypted message apps, instant messages, social media and telephone records.

Plaintiffs often use the threat of costly and intrusive discovery to encourage defendants to settle early. The first defendant to settle may be able to obtain an ice-breaker settlement that is not significantly more than the expected costs of discovery and litigation. Once one defendant settles and agrees to cooperate with the plaintiffs, there is greater pressure on the remaining defendants to settle.

Parties should quickly take care to preserve their documents. As in criminal cases, parties in civil litigation have a duty to preserve relevant information, and that duty generally arises once a party reasonably foresees a potential

for future litigation. A party with reason to believe it may become involved in litigation over cartel claims should act swiftly to preserve relevant information by issuing "document hold" notices to relevant company employees, gathering key items to prevent their disposal, and insuring that electronic data backups and email storage are preserved rather than being overwritten. Counsel should take note that the duty to preserve documents attaches to all relevant information, including physical and electronic documents, emails, text messages, calendars, collaborative electronic content, and video and audio recordings. Failure to preserve information could result in sanctions in some cases, including adverse inferences at trial.

Once a case begins, Rule 26(f) of the Federal Rules of Civil Procedure requires parties to develop a discovery plan and discuss any known issues regarding document preservation. Establishing a plan and addressing preservation issues early in the discovery process limits uncertainty and reduces the risk of discovery disputes in the future.

Types of discovery requests. Parties in antitrust cases have the full range of civil discovery tools available to them, including:

- **Requests for production of documents, electronically stored information, and other items:** A requesting party may demand production of relevant physical and electronically stored information in the responding party's possession. In cartel cases, plaintiffs will look for evidence of actual or contemplated cartel activity, like: communications among the alleged cartel participants and other competitors; **evidence** that such communications occurred close in time to important business decisions; internal communications discussing the alleged cartel activity; internal strategy documents regarding the products or services at issue; general business documents from decision-makers that would reveal or disprove their knowledge of alleged cartel conduct; and financial documents and data. Communications sent via encrypted messaging applications, such as WeChat, SnapChat, etc., are also fair game for discovery.
- **Interrogatories.** Interrogatories are written questions from one party to another, which must be answered in writing and under oath. They are most useful for identifying specific facts, documents, or witnesses each

party will rely on to advance its claims or defenses. Where a business record supplies the information requested in an interrogatory, a responding party typically has the option to simply produce that business record. The number of interrogatories permitted is limited by default to 25, but courts have the discretion to raise or lower the limit.

- **Depositions.** A deposition is an oral examination of a witness (*i.e.*, sworn testimony) taken out of court. The questioning party will typically use the deposition to develop its understanding of the case, establish key facts to use at trial or in motions, and assess the credibility of a potential witness. A party seeking discovery from a corporation or other organization also has the option of issuing a Rule 30(b)(6) notice to depose the organization on a defined set of topics. The organization, in turn, must identify one or more individuals to testify on the company's behalf. The organization is obligated to prepare the designated witness to testify about the organization's knowledge regarding the defined set of topics and will be bound by the individual's testimony. Under the default rules, each party may take depositions of up to ten witnesses, each of which is limited to seven hours of testimony. Especially in complex cases, parties will often negotiate to modify those limits by agreement or ask the court to do so in the absence of an agreement. Depositions of a non-English speaking witness who requires translation into English often are allotted extra time, for example.
- **Requests for admission.** A party may request another party to admit or deny the truth of a factual matter or admit the authenticity of a specific document or piece of evidence. Unlike interrogatories, a request for admission is not answered in narrative form; each statement is generally either "admitted" or "denied." For that reason, it is used mainly for specific and straightforward factual points, such as admitting to the authenticity of potential trial exhibits.

Managing electronically stored information (ESI). ESI is a term describing all documents, information, or data stored in computers or on electronic media, like emails, text messages, databases, scanned documents, images, or video or audio files. The obligations to preserve, search, and produce information in discovery apply to ESI just as they do to hard-copy documents, but challenges arise from

the volume of ESI generated by businesses and the tools by which that ESI can be organized and searched. Early attention to ESI issues by the parties and the courts can help manage those challenges. Indeed, the Federal Rules of Civil Procedure now require parties to discuss and define the scope of ESI early in the discovery process.

These management challenges are especially acute in cartel cases due to the often-sprawling nature of cartel investigations. Plaintiffs and defendants will often have opposing views on how many witnesses' data must be collected and preserved, how that data should be searched and reviewed, and how much time should be allowed for that work to be completed.

Parties should expect detailed negotiations over the production of "structured" data (like sales databases), and the search terms used for "unstructured" data, like email and other communications. Increasingly, parties are using computerized tools called Technology Assisted Review ("TAR") to use algorithms to identify documents that are likely to be responsive. Often the adversary will try to dictate the procedures to be used for TAR review. Negotiations on such matters always take place against a backdrop of concerns about the cost of the discovery process and the parties' ability to timely develop their case. Even when agreements can be reached to limit the scope of discovery, ESI can encompass a vast amount of information that will require significant time and resources to collect.

Production of ESI may benefit from the help of outside experts well-versed in the collection and management of electronic data, especially where a party's in-house information technology team has limited time or resources to devote to data collection efforts, or in instances where data requires restoration or is difficult to access. Parties often must hire experienced electronic discovery vendors who can provide the tools and services to search data, and can supply technical expertise. Specialists can help insure that data is collected in a safe and forensically defensible manner, and can limit disruption to normal business operations by allowing information technology staff to stay focused on their daily work. Parties with especially large data collections may also be able to make use of data review teams and TAR tools to manage the burden and expense of discovery.

Courts have become more sophisticated in the management of disputes about electronic discovery over the years, and

the Federal Rules of Civil Procedure and local court rules now give the courts guidance and standards to employ in considering what types of data are subject to discovery and how to resolve problems. But in nearly all cases, early identification of ESI issues and thoughtful planning will pay dividends in preventing or mitigating problems.

Protection of sensitive information. At the outset of discovery, parties in cartel cases must consider what type of confidentiality protection is needed for competitively sensitive information, like business strategies, trade secrets, input costs, and product pricing. This concern is heightened when the litigants include competing businesses, who could use information generated in discovery against one another in the marketplace. When competitive concerns exist, courts may issue protective orders to control the disclosure and flow of information between the parties. For example, a court may order that certain designated information should be disclosed only to outside counsel or expert witnesses in the case, and not to businesspeople who could make commercial use of it. Courts encourage the parties to reach agreements on whether protective orders are needed, and in what form.

Discovery issues for foreign parties or witnesses. The discovery process often becomes more difficult and time-consuming when dealing with defendants or third parties located overseas. If a defendant is subject to the jurisdiction of a U.S. court, it will be bound by U.S. law and will generally be required to participate in discovery according to U.S. standards, regardless of the location of the specific documents or information in its possession. However, courts will take into account the foreign nation's interest and regulations when determining whether to compel discovery from a foreign defendant, including considering whether information sought can be obtained by other means. For instance, a few countries, such as Japan and China, do not permit their citizens to be deposed in their home country in a U.S. antitrust case. In Japan, depositions of Japanese nationals can be taken at the U.S. embassy or consulate.

U.S. courts may also obtain evidence from foreign parties or witnesses by submitting a letter of request under the Hague Evidence Convention, a treaty facilitating the collection of evidence in the 53 nations that are signatories to the Convention.

Under the Convention, a signatory country may seek evidence from another signatory country by submitting a

letter of request. However, the responding country need not comply with the request if it is contrary to the responding country's own laws. The responding country may also require that evidence be provided according to its own procedures. For example, some countries require testimony to be taken by a magistrate and do not permit counsel for a party to put questions directly to a witness. This makes the collection of evidence from overseas sources more difficult, because pretrial discovery is not a practice used in a majority of signatory countries.

In addition, in response to the U.S. practice of broad discovery, some countries have enacted laws that restrict the production of evidence to other jurisdictions. For example, some European countries have enacted laws referred to as "blocking statutes" governing the production of evidence for judicial proceedings in other countries. As another example, China recently enacted a data security law that prohibits exporting data for foreign judicial proceedings without express approval of a government agency. Courts in the U.S. must balance the interests of parties to U.S. litigation to obtain the evidence they need with the respect due to the sovereign interests of foreign nations.

As a result of these issues, if evidence is needed from a foreign country, the parties should plan ahead and prepare for delays.

Joint Defense Agreements

Defendants in antitrust actions typically coordinate to some degree and may enter into a joint defense agreement ("JDA"). JDAs are grounded in the common interest doctrine, which protects from discovery information shared by parties with a common legal interest in opposing a mutual adversary. A JDA is an oral or written agreement between separately represented defendants that allows the defendants and their counsel to share confidential information without waiving the attorney-client privilege, work product doctrine, or other applicable privileges. By sharing their information, defendants are able to investigate facts based on information known to others, develop a unified trial strategy and ensure that they are better prepared for interviews, depositions, and trial testimony. One difficulty of JDAs is that they can be complicated and time-consuming to negotiate.

While a JDA does not have to be memorialized in writing, there are, several advantages to executing a written JDA. First, all of the defendants will have a clear understanding as to what is and is not covered by the JDA. Second, it will be easier to add or remove parties to the JDA during the course of the proceedings. Third, a court will not be able to retroactively decide that the defendants never entered into a JDA.

Regardless of whether it is oral or written, a JDA should address the following issues:

- **Scope.** The JDA should define the scope of the joint defense information (“JDI”) that it covers. Typically, JDI includes witness and interview statements, memoranda of law, briefing memoranda, transcripts, notes, outlines, recordings, correspondence, factual analyses and mental impressions, and documents or conversations containing plans or theories for mutual, separate, or joint defenses. JDI should only be used in connection with the legal matter presently before the parties.
- **Confidentiality.** Each party should be obligated to keep JDI strictly confidential. The JDA should limit the disclosure of JDI to the parties and their counsel. The JDA may also describe the inside counsel and party witnesses permitted to receive certain types of JDI and how they may use it, which may be important when co-defendants are business competitors who would otherwise be reluctant to share information with one another. Additionally, the JDA should make clear that an unauthorized disclosure of JDI, regardless of whether it is inadvertent, does not waive any of the applicable privileges.
- **Compulsory requests for JDI.** In the event a party receives a subpoena or other compulsory request for JDI, that party should promptly disclose the request to the other parties. Disclosure of JDI pursuant to a subpoena or other compulsory request should be limited to the extent legally permissible.
- **Attorney-client relationships.** The JDA should explain that the sharing of JDI does not create an attorney-client relationship between counsel for one party and any of the other separately represented parties.
- **Conflict of interest waivers.** Conflict of interest issues may arise if a party withdraws from the JDA and testifies against one or more of the remaining parties. A conflict-of-interest waiver will prevent the former party from disqualifying counsel for the remaining parties on conflict-of-interest grounds.
- **Withdrawal.** The JDA should require a withdrawing party to provide notice to the remaining parties prior to withdrawal. Additionally, if one party ceases to have a common interest with the other parties, that party should be required to notify the other parties and withdraw from the JDA. This becomes particularly important if a member of the JDA settles and agrees to cooperate with plaintiffs’ prosecution of claims against the remaining defendants.
- **Expenses.** The JDA should specify whether the parties have agreed to share expenses and costs, including attorneys’ fees and experts’ fees.
- **Contribution.** There is no right to contribution under the federal antitrust laws. Parties to a JDA may, however, agree to pay contribution or otherwise divide an adverse judgment amongst themselves.

Class Certification

In some cartel cases, whether a case can be pursued as a class action may determine whether the case can practicably be pursued at all. If defendants are accused of conspiring to manipulate the price of a good by a small amount, it may be that no single plaintiff will have been impacted severely enough to warrant the substantial investment required to pursue antitrust claims on its own, including the complicated fact-discovery and expert economic analysis required to try those claims. In a sizable number of antitrust cases, defendants have defeated a motion for class certification.

In such instances, it may be necessary to aggregate claims into classes that encompass hundreds, thousands, or even millions of consumers before the potential damages are large enough to justify challenging an allegedly illicit business practice. In order for the litigation to proceed on behalf of the proposed class, the court must conduct a class certification

analysis to determine if a class action is appropriate.

A class cannot be certified simply because it would not otherwise be economically feasible for a single plaintiff, or small group of plaintiffs, to bring the case alone. Defendants and the absent class members may raise substantive and due process reasons that a class action would be unfair or inappropriate in a particular case. Whether a class action procedure can be used to decide the claims at issue while respecting the parties' substantive rights is decided in the motion for class certification.

Class actions must satisfy certain requirements.

A party seeking class certification in an antitrust case ("the putative class representative") must define the class of plaintiffs the putative class representative intends to represent, and bears the burden to prove that the class satisfies the requirements set out in Rule 23 of the Federal Rules of Civil Procedure.

First, the putative class representative must establish that the prerequisites for class certification set out in Rule 23(a) are satisfied. Those requirements are numerosity (the class is so large that joining all the parties would be impractical), commonality (there are one or more questions of fact or law that must be decided for every member of the class), typicality (the class representative's claim is typical of the class members' claims), and adequacy of representation (the class representative can fairly represent the absent class members).

Second, the putative class representative must establish that the class action fits one of the types of actions described in Rule 23(b). Most cartel cases are alleged to fall under Rule 23(b)(3), which allows for class treatment when the issues common to the class predominate over individual issues, and class action treatment would be superior to other methods of adjudication.

If a court concludes these requirements have been met, the court may certify a class and try a case that will decide not only the claims of the class representative, but also the claims of the similarly situated persons captured within the class definition. In most cases, if a class is certified, the defendant may be at risk for enormous damages, potentially reaching several billions of dollars.

Certification in antitrust cases often turns on whether there are common questions and whether those questions predominate over individual issues.

In determining whether class members' antitrust claims can be tried in a single proceeding, the most critical issue is often assessing whether class members engaged in transactions that are similar enough that they present the same issues and can be decided based on common forms of proof. Establishing that multiple class members were harmed by the same cartel, and in the same way, will be easier when the transactions they engaged in were similar, systematic, and regular, such as purchases of the same or similar fungible commodities.

It may be more difficult to band together claims of class members who purchased different goods or services, who purchased goods or services in individually negotiated transactions, who made purchases at different times and places, or whose purchases would be governed by the laws of different states. Where class members' circumstances or relative negotiating positions differ markedly from one another, each plaintiff may have been more or less susceptible to harm by the alleged cartel than others were. Thus, they may have little in common that would justify deciding their claims in a single action.

Case Example

Robinson v. Texas Automobile Dealers Association, 387 F.3d 416 (5th Cir. 2004): Vinson & Elkins represented a major dealership chain in this case, in which Texas auto buyers alleged dealers conspired to impose standardized fees on new car purchases. The Fifth Circuit Court of Appeals, observing evidence a significant number of buyers were able to offset the allegedly fixed fees in individual purchase negotiations, found that plaintiffs could not establish antitrust injury without examination of individual circumstances. The appeals court reversed the district court's order certifying a class action.

Certification may depend on whether statistical tools can be fairly used to demonstrate injury and calculate damages class-wide. Putative class representatives often argue that statistical analyses, such as regression analysis, can ferret out a consistent, predictable impact caused by a cartel on prices, even when each transaction in the market has its own unique characteristics. But since the application of these statistical tools is critical to determining whether claims can proceed as a class, the court will need to satisfy itself that the tools can be validly applied to both demonstrate the fact of each class member's injury and determine the damages that would be due to each class member. The U.S. Supreme Court held in *Comcast v. Behrend*²⁰ that a district court should not certify a class without evidence that damages can be measured and quantified on a class-wide basis. When the court finds that the class representative's approach to damages calculation is faulty, as when there are facial deficiencies in the validity of the class representatives' economic analysis, a class should not be certified.

One of the most important issues on class certification is whether the plaintiffs can prove with common evidence that substantially all putative class members have been injured. Plaintiffs often try to prove injury by showing the average impact of the alleged conspiracy on members of the class. Defendants, on the other hand, will try to show that a significant number of class members could not have been injured due to their unique circumstances. The courts are grappling with the issue of whether a class can be certified if some number of class members may not have been injured by the alleged conspiracy. Some courts have held that a class should not be certified unless the plaintiff can show that all class members were injured, or that there are no more more than a *de minimis* (or trivial) number of uninjured class members. But the Ninth Circuit Court of Appeals (which hears appeals from California and other western states) recently held a district court could certify a class of tuna purchasers without resolving the debate between the two sides' economists about how many of members of the retailer class had actually paid higher prices due to the tuna producers' agreement to raise prices.²⁰ The court held that the correctness of the purchasers' economic model establishing injury was an issue for trial, as long as the plaintiffs had shown by a preponderance of the evidence that the class-wide economic data was at least capable of deciding the case.

This of course means that at the class-certification stage, both plaintiffs and defendants must be prepared to engage in sophisticated economic analysis. Plaintiffs will need to demonstrate they can assess class-wide injury using data and methodologies that account for individual factors influencing prices for class members without requiring the introduction of individualized evidence to fairly decide each class member's claim. Defendants need to understand and argue whether plaintiffs' proposed methods stand up to rigorous scrutiny. Both sides, therefore, are well served to consider early retention of expert economists to develop and test the viability of damages assessment using class-wide evidence.

Case Example

In re Lithium Ion Batteries Antitrust Litigation, 2017 WL 1391491 (N.D. Cal. Apr. 12, 2017): Vinson & Elkins represented a non-U.S. defendant and its U.S.-based affiliate in multi-district class action litigation alleging price-fixing of lithium ion cells and batteries. Separate class actions filed by direct and indirect purchasers were consolidated before a single judge in the Northern District of California. The direct purchaser plaintiffs and the indirect purchaser plaintiffs moved separately to certify their respective proposed classes. V&E's clients, along with the other defendants, argued against certification of both classes. The district court denied the plaintiffs' requests for certification. With respect to the indirect purchasers, the court found that the plaintiffs' experts failed to sufficiently explain how the impact of the conspiracy was passed on to each level of indirect purchaser. With respect to the direct purchasers, the court found that the evidence submitted failed to sufficiently establish that any impact and damages resulting from the alleged conspiracy could be calculated on a class-wide basis.

If a class is certified, opt-out litigation will affect

both sides. Class members in Rule 23(b)(3) class actions have the right to opt out of class treatment and pursue their claims individually. Whether class members will do so depends on whether their claims are large enough to warrant the expense of separate litigation, their assessment of the strength of their claims relative to the class's claims, and other factors. Both class representatives and defendants must be cognizant of how opt-outs might affect their respective litigation strategies. For example, a defendant who seeks litigation peace through a class settlement may find that peace short-lived if class members opt out of the settlement in large numbers.

Expert Witnesses

Selecting qualified, capable expert witnesses is critical in the prosecution or defense of cartel civil litigation. Each case presents its own unique needs, but parties should consider expert needs in four distinct areas.

- Industry.** Judges and juries often benefit from orientation to the basics of the industry in question, especially where transactions are complicated and products are differentiated on factors other than price. A knowledgeable witness who is able to explain key background about the industry can help the judge and/or jury to understand the evidence they will hear. Industry experts may also be helpful as consulting experts, to assist counsel and other experts (such as damages or economics experts) in understanding the issues to be presented at trial.
- Class certification.** In class actions, expert witnesses are often retained to analyze whether transactions and claims at issue are amenable to class adjudication. Such experts might include economists who analyze transaction records to determine whether class members can be identified, whether the records are sufficient to prove the plaintiff's claims, and whether there are differences between the various class members that would be relevant to their claims. Class certification experts may also give preliminary opinions about damages to demonstrate that they are, or are not, calculable across the class, a requirement discussed above.
- Merits.** In a cartel case, economists specializing in the "industrial organization" field will often present opinions on whether the defendants' alleged conduct is consistent with economic theories of collusion resulting in economic harm. Such testimony might include an analysis of defendants' pricing behavior to test whether it appears to be the result of economically rational individual decisions, or shows trends or characteristics explicable only by conspiracy.
- Damages.** Expert testimony on damages is a necessity in any antitrust matter. The class opinions, merits opinions, and damages opinions discussed above may sometimes be presented by a single witness. However, the complexity of damages issues in any given case may require the attention of a separate economic expert able to focus on developing models of competitive pricing and explaining transaction data in plain language.

Expert discovery is often complex and costly, and can have outcome-determinative impact.

Cartel cases and other antitrust cases are typically more expert-driven than other commercial litigation. The "battle of experts" in an antitrust case involves detailed and rigorous economic analysis. To allow sufficient development of the issues, parties will often agree to multiple rounds of expert disclosures, including expert reports, rebuttal reports, and even multiple depositions.

Such discovery enables the parties and the courts to closely scrutinize each side's expert opinions. In addition, one or more parties may file motions, referred to as *Daubert* motions, challenging the sufficiency of the other side's expert testimony and opinions. A successful *Daubert* motion may result in the exclusion of a party's experts or the limitation of their opinions, either of which can have a substantial impact on a case.

Evidence and Documents that Weaken a Defense

In a cartel case, the plaintiffs seek to prove a conspiracy among the defendants, such as an agreement to raise or set prices, rig bids, allocate customers, or limit output. Such agreements may not be overt, but an alleged conspiracy can be inferred from indirect evidence. For that reason, plaintiffs often seek evidence that implies the defendants must have communicated with one another and reached an understanding, even if there is no direct evidence of the defendants expressly agreeing to take concerted action. Plaintiffs will rely on emails and texts between competitors as well as phone records to show frequent communication between competitors, and they will try to correlate those communications to important competitive decisions like price increases.

Defendants should expect to be confronted with any suspicious communications, both internal and external, and asked to explain them. Communications indicating a consensus or understanding among the alleged conspirators, or documenting a given defendant's anti-competitive intent, can be valuable to a plaintiff. But almost inevitably, ambiguous or even innocent communications can be read to imply unlawful intentions too.

Among the types of evidence that will attract attention in cartel cases:

- Documents indicating that competitors have directly communicated about prices or bids; about sales or production forecasts; about available product supplies; or about customers for whom they compete. Such documents could include direct communications with competitors, or internal documents summarizing discussions, meetings, or other contacts with competitors.
- Documents that suggest an excessive concern for secretiveness or consciousness of guilt, such as emails about competition issues that include words like "please destroy after reading," "do not forward – delete straight away," "let's not communicate in writing about this," or "don't tell legal."
- Evidence that employees suddenly began communicating with business associates or competitors in unusual ways, such as through personal email accounts, secure or encrypted messaging applications, "burner" phones, or after-hours.
- Evidence that employees intended to use industry gatherings like trade shows or conventions as an opportunity to meet directly with competitors about competitive issues.
- Documents that suggest cooperation among competitors with respect to the market, including language claiming that there is or ought to be an "industry agreement" on a subject; a "coordinated industry response" to a market condition; or asserting the existence of an "industry policy" or "industry view." Documents with colorful language like "conspiracy" or "cartel," even when said in jest, will likely be the centerpiece of plaintiffs' case.
- Documents that praise coordinated or parallel conduct by market participants, such as advocacy that industry players should each "maintain pricing discipline," "prevent market disruption," or "maintain" or "control the market"; or documents criticizing competitors for failing to adhere to a perceived industry norm.
- Documents which might be interpreted to mean that the defendants agreed to allocate customers or market share, such as referring to each competitor's "fair share" of the market.
- Documents in which employees describe the activities of a competitor as wrongful or objectionable, such as complaining that a competitor is "destroying margins," "competing too aggressively," or "stealing our customers."
- Documents in which employees describe competitors' strategies or actions in a manner indicating they have "insider" knowledge or understandings of that competitor that could suggest there have been communications with that competitor's personnel.
- Documents predicting upcoming competitive actions by a competitor, such as changes to price or supply, particularly if they include information that is not yet publicly available.

- Public statements that could be seen as signaling competitors, such as public announcement of prices that do not go into effect well into the future (thus testing whether competitors will follow) or statements about what “the industry” “should” do to maintain profitability.

Documents like these can make witnesses uncomfortable, stand in the way of obtaining summary judgment on what would otherwise be dubious claims, and present difficult issues at trial.

Summary Judgment

Parties use summary judgment as a tool to avoid the burden of a trial when it appears that there is no genuine issue of material fact in the case.

Rule 56. Rule 56 of the Federal Rules of Civil Procedure governs the process of filing a motion for summary judgment. Under Rule 56, summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The substantive law determines which facts are material, and a dispute about material facts is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. When a party moves for summary judgment, courts view facts and inferences in the light most favorable to the party opposing summary judgment.

Generally, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery. However, the parties and the Court may discuss and set a different schedule for summary judgment motions to be filed.

Matsushita Electric Industrial Co. v. Zenith Radio Corp.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the U.S. Supreme Court held that, when a party moves for summary judgment, antitrust law limits the range of permissible inferences from ambiguous evidence.²¹

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade. In antitrust lawsuits, the existence of a conspiracy is often a central issue. The *Matsushita* Court ruled that, in antitrust cases, the plaintiff bears the burden of presenting evidence that

tends to exclude the possibility that the defendants acted independently.

This means that a plaintiff seeking to survive a defendant’s summary judgment motion will not succeed if the plaintiff merely shows that the defendants’ conduct is as consistent with ordinary, permissible competition as with illegal conspiracy. For example, if two competing gas stations charge the same price for gasoline, it would be *plausible* to infer the stations agreed to charge the same price; but it would be *equally plausible* to infer that one station has simply matched the other’s price in the ordinary course of competition. The matching prices, standing alone, would not make it *reasonable* to infer the existence of a conspiracy. In other words, if an illegal conspiracy is only one possible explanation for defendants’ conduct, and there are other, non-illegal explanations, the court should enter summary judgment dismissing the plaintiff’s case.

The Court in *Matsushita* also held that, where a plaintiff’s claim is one that simply makes no economic sense, the plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary. For example, if a plaintiff contends defendants conspired to cut their prices for years to drive out competitors with the hope of raising prices sometime in the distant future, the plaintiff must present some basis for concluding that supposed plan would be a rational one to attempt; otherwise, the more reasonable inference would be that the defendants were engaged in competition rather than conspiracy. Thus, when ruling on motions for summary judgment, trial courts consider whether the plaintiff’s claim is economically plausible.

Other notable antitrust cases regarding summary judgment standard. The principles enunciated in *Matsushita* and other cases have been applied and further developed in the lower courts. In *Williamson Oil Co. v. Philip Morris USA*, the Eleventh Circuit affirmed summary judgment dismissing Section 1 claims against defendants because plaintiffs had not demonstrated it was plausible to infer that parallel price moves were anything more than the typical workings of competition in action.²²

The defendants there allegedly used repeated public signals of future pricing strategy and exchanges of sales data to coordinate twelve parallel price increases. But the defendants’ pricing decisions—following the market leader’s

price increases under circumstances when maintaining low prices would reduce profits without capturing additional market share—were consistent with what one would expect from defendants acting independently from one another, and in their own economic self-interest. In affirming summary judgment, the Court outlined a three-step process for analyzing a motion for summary judgment in a price-fixing case:

1. The plaintiff must establish a pattern of parallel behavior;
2. The plaintiff must demonstrate the existence of one or more “plus factors” that tend to exclude the possibility that alleged conspirators acted independently; and
3. The defendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price-fixing conspiracy.

Williamson Oil is significant because it illustrates that even twelve different instances of parallel action can be found insufficient as a matter of law to support an inference of conspiracy, and that antitrust law permits competitors to consider and react to their competitors’ statements and actions. If the plaintiff’s evidence does not tend to exclude the possibility of independent behavior or tend to establish a price-fixing agreement, then summary judgment in favor of the defendants is proper.

Similarly, in its *In re Text Messaging Antitrust Litigation* decision, the Seventh Circuit affirmed a district court’s grant of summary judgment in favor of the defendant.²³ Importantly, the Court in this recent case defended companies that mirror their competitors’ price increases, making it clear that defendants will obtain summary judgment in the absence of a showing by the plaintiff that defendants engaged in blatant parallel actions that were inexplicable without collusion. In short, mere “tacit collusion” does not violate antitrust law.

Case Example

In 2017, Vinson & Elkins won summary judgment in favor of defendant AirTran Airways. The dispute arose in 2008, when U.S. airlines began charging passengers for their first checked bag in response to losses caused by skyrocketing fuel prices. When Delta and AirTran each decided around the same time to follow this industry trend, plaintiffs claimed that the two companies violated Sherman Act § 1. In making this allegation, the plaintiffs relied on public statements of AirTran’s CEO that AirTran had the infrastructure necessary to implement a first-bag fee, had not yet imposed the fee primarily because Delta had not done so, and would “strongly consider” adopting the fee if Delta did. Plaintiffs additionally relied on unsuccessful efforts of AirTran’s Director of Customer Service Standards to communicate with Delta employees during a single week in mid-summer 2008. The issue in this suit was whether a conspiracy could exist through truthful public statements, followed by a competitor’s decisions on the same subject.

A district court granted summary judgment to Delta and AirTran. Citing *Matsushita*, the court held that, viewing the evidence cumulatively and in the light most favorable to the plaintiffs, a reasonable factfinder could not infer the existence of a conspiracy, as the evidence did not tend to exclude the possibility that the alleged conspirators acted independently. In 2018, the Eleventh Circuit affirmed the district court’s grant of summary judgment in favor of AirTran, and in 2019 the Supreme Court denied certiorari, marking a major victory for the Vinson & Elkins antitrust team.

Strategic Alternatives

A defendant may consider various strategies when litigating an antitrust case. These include (1) going to trial, (2) settling early, or (3) litigating to a favorable point and then settling. The best choice depends on the defendant's particular circumstances, as each strategy has its pros and cons. We note that very few antitrust cases ever go to trial as most cases settle at some point before trial or get dismissed.

Going to trial. At trial, the defendant has the opportunity to present a defense to a judge or jury, who will then decide fault and damages. Defendants may consider going to trial if they have a strong defense, have not actually committed any antitrust violations, or if there is a high likelihood that the plaintiff's claims will be dismissed.

Pros of going to trial

- **Avoiding all liability.** Having the opportunity to avoid all liability is one of the biggest advantages of going to trial. If a judgment is entered in the defendant's favor, the defendant avoids having to pay the plaintiff any damages. Such a finding could also protect the defendant's reputation. Trials are generally public record. Thus, a finding that the defendant is not liable for an antitrust violation would publicly clear its business's name.
- **Avoiding the consequences of liability.** When a defendant is found liable, it is labeled as a business with antitrust violations. This makes the defendant more susceptible to additional antitrust suits, such as claims by other plaintiffs arising from the same conduct. Even in cases arising from different conduct, the plaintiff is likely to describe a defendant previously held liable as a "recidivist." Future suits would lead to more time and money spent defending cases, not to mention the risk of being held liable. By going to trial and obtaining a judgment against liability, the defendant would avoid these consequences.

Cons of going to trial

- **Trials are time-consuming and may disrupt business.** Lawsuits can take years to fully resolve

in court. This can cause disruptions and distractions for the defendant's business, as preparing for trial requires the defendant's participation. For example, officers and directors of a business involved in an antitrust suit must participate in the discovery process. In antitrust cases, often the most senior executives of the company must provide discovery. This includes making themselves available for depositions, taking the time to identify and collect all documents and data relevant to the case, and reviewing briefs and other pleadings. That requires valuable time that would otherwise be spent managing the business.

- **Antitrust cases are expensive to defend.** Deciding to go to court comes with a hefty price tag. Defendants must hire antitrust litigators who are versed in the complexity of antitrust law, and experts who can run effective market analyses and serve as witnesses at trial. Defendants must also bear the cost of preserving, reviewing, and producing all of the discoverable information in their possession. This includes going through and collecting all relevant hard-copy documents and electronically stored information. These expenses can easily add up to millions of dollars by the end of trial.
- **Treble damages and legal fees.** As discussed above, federal antitrust laws authorize plaintiffs in most cases to recover treble damages—three times the monetary value of the harm suffered—and legal fees for antitrust violations if they prevail on their claims. Legal fees encompass all of the plaintiff's costs in connection with the suit, including attorney's fees.
- **Joint and several liability with no right to contribution.** In a multi-defendant suit, defendants can be held jointly and severally liable with no right to contribution from the other defendants. This means that each conspirator is liable not only for its own acts (for example sales to its own customers) but also for the acts of its co-conspirators (such as competitors' sales to their customers). It also means that a plaintiff can obtain a judgment against a group of defendants, and then collect the full amount of that judgment from whichever

defendant or defendants it chooses. A defendant who pays such a judgment cannot compel the other defendants to contribute to the damages amount. Thus, the plaintiffs may decide to settle with one or more defendants for small amounts and then pursue the bulk of its large damages claim from a single, solvent defendant that decides to go to trial. Defendants should note that judgment-sharing agreements, discussed above, may help mitigate these consequences in the event any one defendant is found liable.

Settling early. A settlement is the negotiated resolution of a case outside of court. Antitrust defendants may consider settling when circumstances suggest the cost of trial and the risk of an adverse judgment outweigh the cost of settling, or when prolonged litigation will cause serious disruption to their business.

Pros of settling early

- **Controlling the outcome.** Unlike a trial where the final outcome is uncertain, a defendant in a settlement knows exactly what the final result will be. Parties to a settlement agreement typically control its outcome, and neither party is bound by its terms until the agreement is signed. Thus, a defendant would know what it would be liable for in advance, and could use this knowledge to make an informed decision.
- **Avoiding time-consuming litigation and reducing costs.** Avoiding the trial process altogether saves an antitrust defendant significant time, money and disruption to its business. With an early settlement, the defendant does not have to worry about being deposed, producing information during the discovery process, or having to go to court, unless the defendant agreed to cooperate with the plaintiffs and provide certain discovery as part of the settlement. This allows defendants to focus on running their business rather than on defending a suit. An antitrust defendant also does not have to worry about the fees associated with going to trial, such as the cost of discovery or hiring outside experts.

- **Ice-breaker defendant typically pays less.** Settlement amounts are already generally less than the amount the plaintiff seeks in damages, especially if the damages exposure is trebled. However, if there are multiple defendants in a suit, the first defendant to settle is typically offered a so-called ice-breaker settlement. These settlement offers tend to be lower than those offered to defendants who settle later.

Cons of settling early

- **Risk of future claims.** If a settlement agreement becomes public, the defendant may be viewed as having implicitly acknowledged that it could have been held liable for antitrust violations. This is the case even when a defendant has not admitted liability as part of the terms in the agreement. The mere fact that there has been a settlement may incentivize other plaintiffs to file claims against the defendant for the same conduct or other conduct. For example, plaintiffs routinely refer to prior antitrust settlements to try to bolster the plausibility of antitrust claims in future cases. The defendant would then have to deal with the time and cost associated with defending or settling the other suits. In class action suits, settlements are almost always public because court approval of the settlement terms is required.
- **Class members may opt out.** A defendant in a class action suit may not completely resolve all disputes by entering into a settlement agreement with the class. Class members may choose to opt out of the settlement agreement and continue pursuing their claims independently. Whether a class member will opt out depends on the nature of that plaintiff's business and claims. Typically, opt-out plaintiffs are large companies with significant claims against the defendant. An opt-out plaintiff may opt out of a settlement with one defendant while remaining in the settlement for another defendant.

Litigate to a favorable point and then settle. A defendant in an antitrust suit may also wish to litigate the matter up to a certain point before settling. This can occur because the defendant believes it has a strategy that will result in dismissal of a portion of the claims or the plaintiffs from the case, and settling will be easier when the case

is smaller. Late settlement can also be the result of either side's reassessment of the likely trial outcomes based on information developed in the discovery process.

Pros of settling later

- **Informed decision.** Unlike settling early, settling later provides the defendant with more information regarding the merits of the case. Often, an early settlement occurs before the discovery process has begun. If a defendant settles later, it will know more about the case the other side is building against it. This could better inform the defendant's settlement negotiations and its decision to be bound by the agreement.
- **Demonstrating defects and risks in the opponent's case.** A defendant may believe that discovery will demonstrate significant problems with the plaintiff's case. The problems may go to liability, the amount of damages or class certification in a class action. Thus, a defendant may obtain a more favorable settlement by making the plaintiff confront weaknesses in its case.
- **Control over the outcome.** As mentioned before, parties to a settlement agreement control its outcome. This is true even when the settlement is entered into later in the litigation process. While plaintiffs sometimes make larger settlement demands of "holdout" defendants, even late settlements are likely to be available at a lower cost than the damages sought at trial.

Cons of settling later

- **Litigation costs and business disruptions.** A defendant who settles later in the process would likely have to pay some litigation costs, such as the costs of producing discoverable materials and attorney's fees. As discussed above, defendants must participate at all points of the litigation, which would require management to spend time on the litigation rather than running the business. In addition, discovery would likely require the defendant to disclose highly sensitive commercial information. Even though the court will likely enter a protective order restricting disclosure of confidential

information, the production of highly sensitive information risks accidental disclosure or disclosure at a public trial. Thus, a defendant who waits until later to settle risks causing disruptions to its business practices in the meantime.

- **Settlement offer will likely be higher.** Settling later in the process would likely mean that the defendant would not receive the benefit of an ice-breaker settlement. Defendants who settle late typically have to pay a higher amount than those who settle early. However, a defendant may still be able to offer cooperation in exchange for a lower settlement offer. This is especially true if the plaintiff has already settled all of the weaker cases and the defendant has information that could be useful against the remaining defendants.

Settlements

Settlements can provide certainty as an alternative to a litigation process that can be long, expensive, and decidedly uncertain. When it comes to cartel litigation, two types of settlements exist: class settlements, and settlements with individual plaintiffs.

Class settlements. Rule 23(e) of the Federal Rules of Civil Procedure requires court approval before the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised. Court oversight of the settlement process ensures that the settlement is fair, reasonable and adequate to all members of the settlement class, including class members that are not actively participating in the litigation (often called "absent class members.")

When evaluating proposed class-action settlements, the court's analysis is two-fold. First, the settlement class must meet the requirements for certification provided by Rule 23(a) and (b).

Second, the court must find, after a fairness hearing, that the proposed settlement is "fair, reasonable, and adequate." Rule 23 does not define "fair, reasonable, and adequate," but most circuits have adopted multi-factor tests evaluating, among other factors, the complexity, expense, and likely duration of the litigation; the reaction of the class to the

settlement; and whether the proceedings and discovery have advanced to the point at which the class can reasonably assess potential outcomes of the case. Some courts require plaintiffs to submit the estimated damages if they were to prove liability.

Factors to weigh in assessing potential settlements include:

- **Monetary settlements.** Defendants entering into a monetary settlement will agree to pay a specific sum of money to be allocated among class members, or may agree to pay a variable amount determined by the number and size of claims received from class members as part of a claims procedure. Once a monetary settlement is reached, the plan for distributing the settlement fund is subject to court approval under the fair, reasonable, and adequate standard. Additionally, the court maintains equitable jurisdiction over the administration of the settlement fund. In a multi-defendant class action, the first defendant to enter into a monetary settlement often reaches what is called an “icebreaker settlement,” or a settlement at a discount relative to what the plaintiffs expect to recover from other defendants. By demonstrating the seriousness of the plaintiff’s claims, reducing the number of aligned defendants, and assuring some level of funding to the plaintiff’s counsel, the initial icebreaker settlement may place some pressure on the remaining defendants to capitulate.
- **Cooperation and other non-monetary provisions.** Frequently, icebreaker settlements include not only a monetary amount to be paid by the first settling defendant, but also an agreement that the settling defendant will cooperate with the plaintiffs. Non-monetary cooperation as a form of settlement is very important to plaintiffs, as this cooperation may help the plaintiffs litigate their claims against remaining defendants and convince those remaining defendants to enter into settlement negotiations with the class. Cooperation terms may be required of multiple settling defendants, but the icebreaker defendant typically gets the most value for agreeing to cooperate. In addition to cooperation, non-monetary settlement terms may include provisions such as injunctive relief. Injunctive relief might involve defendants agreeing not to engage in a certain business practice or activity that is thought to deter competition or raise prices.
- **Accusations of self-dealing by plaintiffs and their counsel.** Class action settlements typically permit the plaintiffs’ counsel to seek attorneys’ fees from the settlement proceeds. To avoid the appearance of paying counsel to settle their clients’ claims, defendants rarely agree to the amount of attorneys’ fees, instead relying on the Court to determine a reasonable attorneys’ fee. In addition, there are organizations that look for settlements that could be characterized as self-dealing,



such as settlements where counsel earn handsome fees but individual class members receive little or nothing because the costs of distributing money to each class member exceeds the value of his or her claims. Settlements with *cy pres* distributions to charitable organizations, as opposed to class members, will likely be scrutinized closely.

- **Possible opt-out litigation.** Most class actions in the antitrust context are Rule 23(b)(3) classes. Rule 23(b)(3) allows class actions when two prerequisites are satisfied: (a) questions of law or fact common to class members predominate over any questions affecting only individual members, and (b) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Importantly, individual class members in a 23(b)(3) class can opt out of the settlement if they believe it to be unfair or do not otherwise wish to participate, and then bring their own lawsuit against the defendant. Opt-out litigation is an attractive option for class-action plaintiffs who believe that they will recover more damages by bringing a new suit against defendants on their own. However, class members who opt out have no standing to later challenge the class settlement agreement. In short, it is important for defendants in a class action to keep in mind that a settlement may result in additional opt-out litigation. While this carries risks, it also may benefit the defendants, as it is possible that the class successfully settles with the defendant while an individual plaintiff who opts out is unsuccessful in litigating its claim.

Trial

In antitrust trials, parties face the difficult task of distilling complex economics and voluminous evidence into a simple story a jury can understand. Understandably, many litigants would rather settle than face the risk of trial. But because of the complexity and expense of antitrust case development, the risks are not one-sided.

Risks to a plaintiff. The biggest risk that a plaintiff faces by going to trial is the risk that the jury will decide in favor of the defendants and the plaintiff will walk away with nothing. For example, in *In re Processed Egg Products Antitrust Litigation*, ten defendants settled with the plaintiffs, while three defendants went to trial against the class after over a decade of litigation. The plaintiffs sought more than a billion

dollars in damages. At trial, the jury concluded that two of the defendants were not involved in an alleged conspiracy, and the third defendant – while involved in the alleged conspiracy – was not liable because the conspiracy did not have an anticompetitive effect. As a result, the plaintiffs received nothing at trial.²⁴

While every plaintiff faces the risk of losing at trial, the antitrust plaintiff faces a risk of a different magnitude. Preparing an antitrust dispute for trial can take several years, occupying client focus and attorney time. Just like antitrust defendants, antitrust plaintiffs must bear the cost of hiring expert witnesses, including economists, to analyze data, participate in discovery, and testify at trial. The cost of preparation and economics work may be borne by the plaintiffs, their counsel (who frequently work on a contingency-fee basis), or even outside litigation financiers. As a result, an antitrust trial always puts a substantial litigation investment at risk.

Risks to a defendant. Antitrust defendants face not only the cost of litigation, but the risk that, if they go to trial and lose, they may suffer an enormous judgment. Moreover, when a plaintiff wins in antitrust litigation, the damages awarded are automatically trebled.

The risk to defendants of proceeding to trial is exemplified by several cases. One such case is the ETSI case, discussed above. In that case, Vinson & Elkins represented plaintiff ETSI in an antitrust suit against several railroads that resulted in a judgment in favor of ETSI. While several railroads settled with ETSI, one held out. After a two-month trial, the jury awarded ETSI \$1 billion. Conspiracy cases such as the ETSI suit are difficult for plaintiffs to win because they require an extensive amount of time and money. However, if a plaintiff is successful in a conspiracy case, the consequences to the defendant can be catastrophic.

In re Urethane Antitrust Litigation is also illustrative.²⁵ There, a class of plaintiffs alleged that the defendant and several chemical companies conspired to fix prices for polyurethane chemical products. The class comprised all industrial purchasers of polyurethane products during the alleged conspiracy period. At trial, the jury returned a verdict against the defendant, and the court entered a judgment in an amount over \$1 billion. The Tenth Circuit affirmed the judgment on appeal. While the defendant's request for U.S. Supreme Court was pending, the plaintiffs and the defendant reached an \$835 million settlement.

Conclusion

The U.S. legal system is designed to vigorously combat cartel activity. Companies that are accused of cartel conduct face criminal prosecution and civil liability. Government enforcers bring a full suite of evidence-gathering tools to bear in criminal cases, while civil plaintiffs can pursue wide-ranging and expensive discovery. The public and serious nature of these disputes can attract the attention of the media, the industry, and the community, putting the defendants' reputations at risk.

With consequences ranging from lengthy prison terms to millions of dollars in fines, antitrust claims may have a devastating impact on a company's competitive position – even threatening its survival – which makes the advice of experienced counsel invaluable. Involving such counsel early can not only help businesses avoid costly missteps and manage risk in the matter at hand, but also develop compliance strategies and programs to limit or avoid legal exposure in the future. Companies are well-advised to develop a plan to identify and manage their risks before problems emerge, so that, if a crisis comes, they will be ready to respond.

Endnotes

- 1 15 U.S.C. § 1, *et seq.*
- 2 *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958).
- 3 Including, *e.g.*, *United States v. Bumble Bee Foods, LLC*, 17-cr-00249 (N.D. Cal.); *United States v. Starkist Co.*, 18-cr-00513 (N.D. Cal.); *United States v. Lischewski*, 18-cr-00203 (N.D. Cal.).
- 4 *In re Automotive Parts Antitrust Litigation*, No. 20-1599 (6th Cir. 2021).
- 5 *United States v. Saab Moran*, 19-cr-20450 (S.D. Fla.).
- 6 **See** Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs*, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.
- 7 *Id.*
- 8 373 U.S. 83 (1963).
- 9 18 U.S.C. § 3500.
- 10 18 U.S.C. § 3571(d).
- 11 18 U.S.C. § 3553.
- 12 *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).
- 13 *AMG Capital Management, LLC v. FTC*, No. 19-508 (April 22, 2021).
- 14 15 U.S.C. §§ 12-27, as amended.
- 15 *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 US 477, 489 (1977).
- 16 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734-35 (1977).
- 17 *International Shoe v. State of Washington*, 326 U.S. 310 (1945).
- 18 *In re Chocolate Confectionary Antitrust Litigation*, 999 F. Supp. 2d 777 (M.D. Pa. 2014).
- 19 *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).
- 20 **Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods, LLC**, 31 F.4th 651 (9th Cir. 2022).
- 21 *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
- 22 *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003).
- 23 *In re Text Messaging Antitrust Litigation*, 782 F.3d 867 (7th Cir. 2015).
- 24 *In re Processed Egg Products Antitrust Litigation*, 962 F.3d 719 (3d Cir. 2020).
- 25 *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014).

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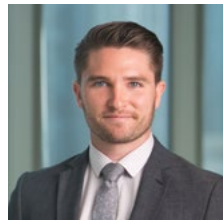
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