Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

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Adam regularly represents clients in criminal antitrust investigations by the US Department of Justice and has served as lead coordinating counsel for clients under investigation in multiple jurisdictions by other international governmental agencies. Adam also defends clients in cartel class action lawsuits across the United States, as well as private antitrust litigation, including disputes regarding exclusivity, bundling and tying, joint ventures and group boycotts. Additionally, he has substantial experience counselling in the antitrust and IP area, including regarding the antitrust legality of patent pools, standard setting activities and technology transactions among competitors.

Adam is currently a co-chair of the Joint Conduct Committee of the American Bar Association antitrust section and previously served as vice-chair of the cartel and criminal practice and Intellectual Property Committees. He is an adjunct professor at Columbia Law School, where he teaches a class on international antitrust cartels.

1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The US Department of Justice's (DOJ's) Antitrust Division generally focuses its criminal enforcement efforts on 'hardcore' cartels that involve price-fixing, bid rigging and market allocation. Over the past 20 years, it has obtained most of its largest fines from prosecution of international cartels, which included many foreign-based participants. Recently, however, we have seen more enforcement focused on domestic cartels, including investigations of the pharmaceutical, healthcare and agriculture sectors.

The DOJ has also continued its recent focus on collusion among employers. The government has pursued investigations of 'no-poach' agreements, pursuant to which employers agree not to solicit or hire the employees of co-conspirators. Such conspiracies are subject to criminal prosecution when they are 'naked', meaning that they are not ancillary to a lawful pro-competitive agreement such as a joint venture. After several years of investigations, the DOJ only recently took its first enforcement actions, charging a healthcare provider for entering into a no-poach agreement with certain of its competitors. Similarly, the DOJ announced charges against a former owner of a therapist staffing company for 'wage-fixing'.

On the first anniversary of the establishment of the Procurement Collusion Strike Force (PCSF), an interagency partnership focused on deterring, detecting, investigating and prosecuting antitrust crimes in government programme funding, the DOJ announced the expansion of the PCSF. The PCSF now comprises 29 government agencies with a presence in a number of jurisdictions across several states. The DOJ has opened more than two dozen active grand jury investigations with the help of the PCSF. The work of the PCSF also led to the DOJ charging one company and an executive for participating in a decade-long conspiracy to rig bids and defraud the North Carolina Department of Transportation.

2 | What do recent investigations in your jurisdiction teach us?

In July 2019, the DOJ announced a new policy permitting the resolution of antitrust criminal prosecutions in certain circumstances through deferred prosecution agreements (DPAs) instead of plea agreements. For the DOJ to agree to resolve charges through a DPA, an admission of guilt, a criminal penalty and cooperation in the ongoing investigation is required. Over the past year, we have seen several charges resolved through DPAs.

Of the six companies charged in the DOJ's ongoing investigation into the generic drug industry, five have resolved charges through a DPA. The DOJ justified its use


Adam Hemlock

of DPAs in the generic space by observing that pleas would have resulted in the defendants' exclusion from federal healthcare programmes for five years, to the detriment of drug competition and consumers. In the second investigation to yield a DPA, a Florida oncology group agreed to pay US$100 million and admitted to conspiring to allocate chemotherapy and radiation treatments. Similar to the generic drug industry, the DOJ focused on the harm to patients if the Florida oncology group pled guilty. Lastly, the DOJ entered into a DPA with Argos, a Georgia-based company that produces and sells ready-mix concrete, for participating in a conspiracy to fix prices, rig bids and allocate markets. With Argos, the DOJ focused on the fact that the two employees primarily responsible for the conspiracy were previously charged and only joined the company after Argos's acquisition of the employees' previous employer. For all of these DPAs, the DOJ emphasised the companies' ongoing cooperation in the DOJ's investigation.

3 How is the leniency system developing and which factors should clients consider before applying for leniency?

The leniency programme continues to be the cornerstone of the DOJ's enforcement efforts and its primary means of detecting cartel activity. Leniency applications have led to the majority of the Antitrust Division's international cartel prosecutions, resulting in substantial fines, prison sentences and opportunities for recovery for victims. However, a successful leniency applicant can entirely avoid criminal liability for the reported conduct, as well as benefit from mitigated damages in any follow-on civil private damages suit.

First and foremost, the strength of the DOJ's case against the company must be considered. The applicable statute of limitations, and federal law limiting the DOJ's jurisdiction over foreign conduct, can act as potential full-stop defences to criminal liability and therefore counsel must promptly evaluate their applicability in each case. This is especially important because, in the United States, being a leniency applicant does not fully protect a company from liability from private lawsuits, such as the purchaser class actions and private state attorneys general cases that are typically filed against corporates following disclosure of a criminal investigation by the DOJ. This means that a company may potentially avoid civil exposure if it decides not to focus the DOJ's attention on sensitive conduct in the marketplace. Another key consideration is whether other companies with knowledge of the sensitive conduct may choose to self-report to, and cooperate with, the DOJ. That is because only one company can enjoy full leniency in the US and the benefits to 'second in' cooperators are far less substantial than those for the 'first in' leniency applicant.

Two significant legislative developments in 2020 may aid the DOJ's leniency programme. Provisions of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which protects leniency applicants in private suits, were set to expire in June 2020. However, on 25 June 2020, the act was amended and remains permanently enacted into law. ACPERA provides that leniency applicants enjoy single damages and no joint and several liability in follow-on civil litigation and thus provides a further incentive for corporations to seek leniency and disclose the existence of conspiracies to the DOJ. In addition, after years of attempts to pass protections for private sector employees who report criminal antitrust violations, on 23 December 2020, the Criminal Antitrust Anti-Retaliation Act became law. The act amends ACPERA by adding civil protections for whistle-blowers. This act will likely reinforce the recent initiatives by the DOJ that focus on early detection of antitrust violations and corporate compliance.

"It is often preferable not to seek a faster DOJ investigation, as the subject of the investigation often needs time to conduct its internal inquiry."

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure) and what are your experiences in this regard?

The pace with which the DOJ moves can be influenced by many factors outside the control of defence counsel, the individual or the corporation. Investigations can become a low government priority for any number of reasons and, as a result, at varying stages of the process the government may become less (or more) active in requesting documents, seeking witness testimony or interviews, scheduling meetings or otherwise engaging with the subjects of investigations. Other factors, such as the pace of cooperation with foreign authorities and the speed with which cooperating corporates and individuals provide assistance to the DOJ's attorneys, can impact the pace of an investigation. DOJ officials have recognised that expediting interventions into civil cases that involve ongoing criminal investigations and staying civil discovery will assist in protecting government investigations.

It is often preferable not to seek a faster DOJ investigation, as the subject of the investigation often needs time to conduct its internal inquiry. If it is otherwise

helpful to increase the pace of an investigation, there are some things a company can do to ensure that it is not the bottleneck. On the substance of the conduct, getting a firm and thorough grasp of the relevant conduct as soon as possible. When responding to a grand jury subpoena, understanding the organisation – including its people, documents and data – inside and out. In addition to being prepared for the questions that the DOJ's attorneys are likely to ask, it is preferable to be responsive and not to create unreasonable delay by taking too long to respond to the DOJ's queries. This can, for example, undermine the company's credibility and cause the DOJ's attorneys, in turn, to take more aggressive positions or discount the company's assertions. Our experience has shown that being responsive and well prepared goes a long way to keeping an investigation moving along and maintaining trustworthiness with the DOJ.

5 Tell us about the authority's most important decisions over the past year. What made them so significant?

In 2016, the DOJ and Federal Trade Commission issued guidance alerting human resource professionals that agreements among competing employers to limit or fix the terms of employment may violate the antitrust laws. The DOJ added that it intended to prosecute these types of violations criminally. This was a significant development because, in the past, the DOJ had resolved allegations of wage-fixing and no-poach agreements through civil enforcement actions.

More recently, the DOJ announced its first two indictments for wage-fixing and no-poach agreements. In December 2020, the Antitrust Division announced the indictment of Neeraj Jindal, the former owner of a therapist staffing company (which contracts with physical therapists), making him the first individual criminally charged with wage-fixing. The indictment alleges that Jindal and the owner of a competing therapist-staffing agency agreed to reduce pay to physical therapists. Later, Jindal allegedly solicited other competitors via text message to join the conspiracy. Then, in January, the DOJ announced its first grand jury indictment for a no-poach agreement. The first company indicted is Surgical Care Affiliates LLC (SCA), which owns and operates outpatient medical care centres. The DOJ alleged that SCA engaged in two separate conspiracies with other healthcare companies to suppress competition for the services of senior level employees. According to the DOJ, SCA and the two other healthcare companies allegedly agreed not to recruit senior level employees from each other. In the investigation, the DOJ discovered emails between the companies, evidencing their no-poach agreements. Both indictments represent material developments for criminal antitrust enforcement in the human resource space in the United States.

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6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

In the United States, cartel violations are investigated by the DOJ through federal grand juries, which are granted grand jury subpoena power to obtain documents and witness testimony. If the DOJ concludes that a violation has occurred, it can negotiate an agreement with the company or individual to plead guilty to a Sherman Act violation and pay a fine. All plea agreements are subject to federal court review and approval. If a defendant is unwilling to accept a plea agreement, the DOJ must seek an indictment from the grand jury and subsequently prosecute the case to trial in court.

At trial, the DOJ bears the burden of proving to a jury, beyond a reasonable doubt, that a violation has occurred. In practice, it is rare for corporate defendants facing cartel charges to go to trial in light of the substantial fine exposure and the reputational implications and stigma associated with a potential criminal conviction. Further, if a jury finds an individual guilty at trial, they have the opportunity to appeal that decision to a higher court. One high-profile trial that occurred last

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year was of a former JPMorgan Chase trader. He was convicted at trial for a price-fixing conspiracy with respect to foreign currency exchange trading. The ex-trader is currently appealing his conviction, which includes an eight-month prison sentence. He was set to surrender himself to the authorities on 4 December 2020, but on 2 December an appeals court allowed the ex-trader to delay his prison sentence pending his appeal while the court considers his arguments.

7 | How is private cartel enforcement developing in your jurisdiction?

Private damages antitrust litigation in the United States has remained at historically high levels in recent years. Cartel-related cases tend to take the form of class action litigations brought on behalf of consumers or entities that purchased the affected products. Because civil cases, especially large class actions, can take many years to resolve, private cartel litigation can remain very active even in times when government cartel enforcement has decreased. Most private damages claims that follow a criminal plea will result in a settlement of the claims by the company. The potential exposure on private antitrust damages claims in the United States is very high for three main reasons:

- any jury award of damages is automatically trebled, by law;
- each defendant in a cartel case is jointly and severally liable for the total damages caused by the conspiracy; and
- plaintiffs are entitled to attorneys' fees and costs in the event of a judgment in their favour.

Lawsuits filed by state attorneys general can also add to the cost of private antitrust litigation in the US. In the follow-on civil litigation brought against generic drug manufacturers, almost every state has brought actions through their state attorneys general, along with actions by the governments of the Northern Mariana Islands, Puerto Rico, the District of Columbia and the US Virgin Islands. Given the size of these cases, settlements can be very large, often exceeding the size of the criminal fine imposed by the DOJ. In the generic drug cases, one company already agreed to pay US$205.7 million in its DPA with the DOJ and continues to face exposure to high settlement costs through the ongoing civil lawsuits.

8 | What developments do you see in antitrust compliance?

In July 2019, the DOJ announced a new policy to incentivise corporate antitrust compliance programmes. For the first time, the DOJ will consider (and potentially provide credit for) corporate compliance programmes at the charging and sentencing

stages in criminal antitrust investigations, a notable change that is reflected in the DOJ's Antitrust Division Manual. In an effort to provide the public with 'greater transparency of the division's compliance analysis', the DOJ also published a document to guide its prosecutors' evaluation of corporate compliance programmes at the charging and sentencing stages. In June 2020, the DOJ further clarified its new policy, explaining that there is no 'one-size-fits-all' model for corporate compliance programmes. Instead, the DOJ will focus broadly on the programme's design, whether it was implemented in good faith and whether it actually works in practice. These open-ended considerations are viewed with other factors, such as the size of the company, to weigh the compliance programme. Notably, the DOJ may credit a compliance programme even if it failed to detect a violation.

Notwithstanding changes the DOJ has made, companies have responded to the large fines and massive civil exposure in the United States by implementing stronger compliance programmes. With the DOJ having pursued several large international cartel investigations for conduct occurring all around the world, it appears that many large multinational companies have become more vigilant in implementing worldwide antitrust compliance programmes. This requires implementation of

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a worldwide infrastructure for training and educating employees, which requires meaningful time, money and human resources. Such programmes are more effective if there is a strong message from senior management and a top-down approach to weaving compliance into the corporate culture. In recent years, large companies that have themselves experienced (or witnessed in their industry) the massive fines and civil litigation costs that can result from cartel investigations in the US have shown an increased willingness to make the investments necessary to put in place a strong global compliance regime. These efforts are likely to pay dividends in the years to come.

9 What changes to cartel enforcement policy or antitrust rules do you anticipate in the coming year? What effect will this have on clients?

With the start of a new presidential administration, the policy initiatives and focus of the DOJ will likely shift. During the previous administration, we saw a decrease in the total amount of fines collected and the number of cases brought against individuals and companies. There was also a significant decrease in the number of international cartel investigations. The new administration is expected to build on the DOJ's partnerships with international competition authorities. The Biden administration will likely continue some of the domestic policy initiatives of the previous administration, including the PCSF and its focus on agreements between employers in the labour market, such as wage-fixing and no-poach agreements. Similarly, on the domestic side of enforcement, the DOJ's focus on the healthcare industry will likely continue.

10 Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors have they been they applied?

Like the antitrust authorities in many jurisdictions, the DOJ continued its work throughout the covid-19 pandemic, even conducting hearings by video and telephone conference. At the start of the pandemic in the United States, the DOJ issued a strong warning to companies, stating that it planned to hold anyone accountable for violating the antitrust laws in connection with manufacturing, distributing or selling personal health protection equipment. The DOJ also warned that the PCSF would be on 'high alert' for collusive practices involving products such as face masks, respirators and diagnostics. Later, the DOJ reaffirmed its policy to prosecute no-poach and wage-fixing agreements in an official policy statement, warning that the DOJ will hold those accountable who exploit the pandemic to harm American workers by subverting competition in labour markets. The DOJ adjusted some of its existing policies to balance collaboration necessary to respond to covid-19 and to

get consumers the products they need, with conduct that would violate the antitrust laws. In particular, the DOJ expedited its process in its 'Business Review Letter' programme, which allows businesses to receive guidance from the DOJ about its proposed conduct. After a review of the materials that the business submits, the DOJ issues a statement about its enforcement intentions. The DOJ issued review letters about medical equipment, for meat producers who faced supply issues and about covid-19 medications. Once the programme began, the DOJ issued its first business review letter within 11 days.

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The Inside Track

What was the most interesting case you worked on recently?

Recently, I worked with two of my partners representing a major hotel chain that was alleged to have conspired with other hotels not to bid on each other's trademarks in Google search term auctions. My cases have historically involved physical products (chemicals, electronic components, auto parts, agriculture, pharmaceuticals), so it was interesting to litigate a market for an intangible, such as a search term.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

I continue to believe that individual prosecution for cartel behaviour should be further limited to only highly culpable individuals and that many individual prosecutions are not equitable. This is especially the case with prosecutions of some foreign nationals who may have engaged in their behaviour with limited understanding of US laws and within the context of their domestic business culture. This is not to say that cartel behaviour is excusable – but imposing significant jail time on certain individuals may not achieve deterrence, where other means of creating incentives for individual and corporate behaviour might be more effective.

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