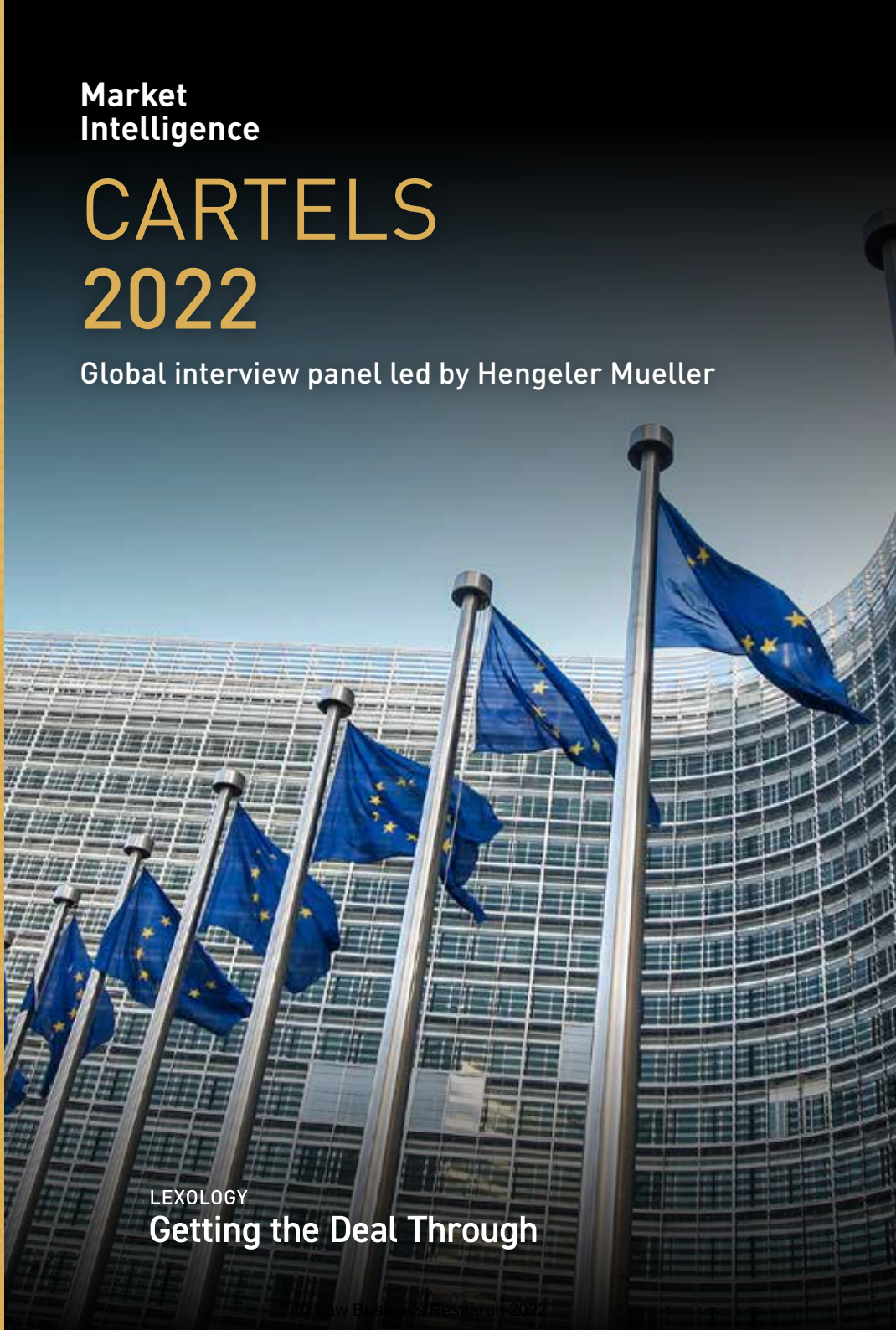
Market
Intelligence

CARTELS 2022

Global interview panel led by Hengeler Mueller



LEXOLOGY
Getting the Deal Through

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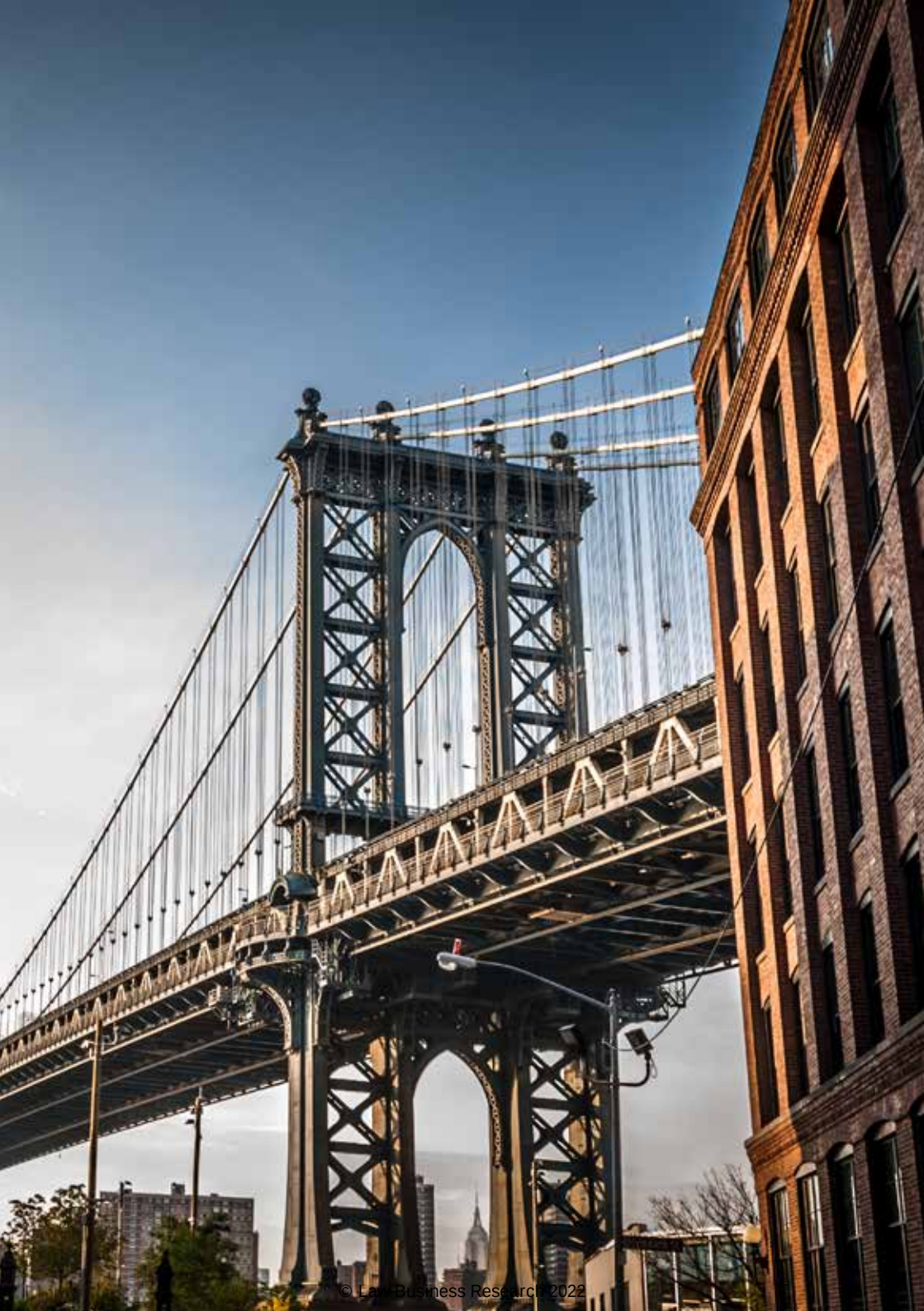


United States

Adam Hemlock is a partner in Weil's antitrust practice. He represents clients in civil and criminal antitrust investigations and litigations, and he is recognised as a leading antitrust lawyer in a variety of industry publications, including *Chambers Global*, *Chambers USA* and *The Legal 500*.

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.

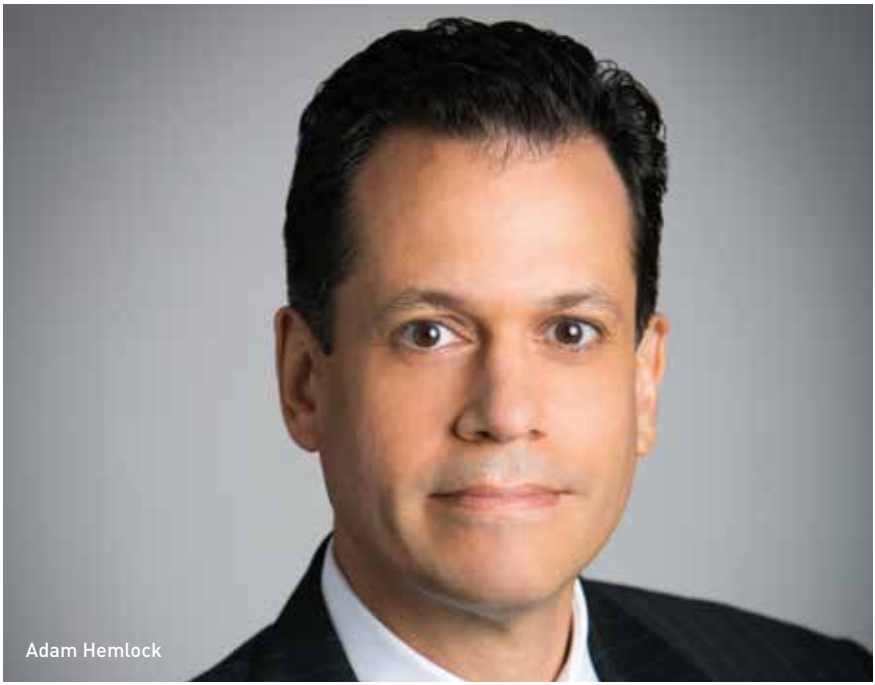
Adam is currently a co-chair of the Joint Conduct Committee of the American Bar Association antitrust section and previously served as vice chair of the cartel and criminal practice and intellectual property committees. He is an adjunct professor at Columbia Law School, where he teaches a class on international 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. Over the past few years, however, we have seen more enforcement with respect to domestic cartels, including investigations in the pharmaceutical, healthcare, aerospace, and agriculture sectors. Fines resulting from DOJ investigations decreased from US$639 million in 2020 to only US$150 million in 2021.

The DOJ has continued its focus on collusion among employers, prosecuting 'no-poach' and wage-fixing agreements. The DOJ recently brought its first wage-fixing criminal prosecution, and defeated a motion to dismiss by the defendants in November 2021. The court noted that naked price fixing agreements have long been held per se, or automatically, illegal – regardless of their actual effect on competition, and held that price fixing in the market for labour 'is no different'. The DOJ has since cited that decision in other employment-related cartel prosecutions, seeking to convince courts to treat HR-related cartel behaviour as no different than cartel conduct impacting goods and services.

Since its establishment two years ago, the Procurement Collusion Strike Force (PCSF), an inter-agency partnership focused on deterring, detecting, investigating and prosecuting antitrust crimes in government programme funding, has expanded significantly. The PCSF established the Data Analytics Project, through which the DOJ collaborates with other federal agencies to use bid data and develop analytical tools to detect potential bid rigging. The Data Analytics Project has already held multiple workshops for government data scientists, analysts and auditors, during which participants discussed the use of data analytics to prevent bid rigging, with plans to conduct more workshops in the future. In addition to the Data Analytics Project, the PCSF has launched the PCSF Global Initiative, aiming to build connections with US law enforcement agents stationed overseas and foreign competition agencies around the globe to tackle potential collusion impacting US government spending abroad. The initiative has already demonstrated results, as the DOJ secured a guilty plea and a US$15 million fine from a Belgian security firm and two of its former directors for their roles in a conspiracy to rig bids, fix prices and allocate customers for security services contracts.


Adam Hemlock

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

In 2021, we saw new instances of the DOJ resolving criminal antitrust prosecutions via deferred prosecution agreements (DPAs) rather than plea agreements. On 4 January 2021, Argos USA LLC (Argos), a Georgia-based producer of ready-mix concrete, entered into a three-year DPA with the DOJ for participation in a conspiracy to fix prices, rig bids and allocate markets. Later that month, on 19 January 2021, Berlitz Languages and Comprehensive Language Center entered into two separate DPAs for charges regarding a conspiracy related to the provision of foreign language training services.

DOJ prosecutors continued their enforcement efforts in certain 'necessity goods' markets. The agency continued to conduct discovery and prepare for trial in its prosecution of Teva Pharmaceuticals and Glenmark Pharmaceuticals for allegedly conspiring to fix the price of certain generic drugs, including commonly prescribed cholesterol and arthritis medications, as well as drugs used to treat brain cancer and cystic fibrosis. The charges are a continuation of the DOJ's efforts to prosecute price-fixing, bid-rigging and customer allocation in the generic pharmaceutical

industry generally, as part of which five other corporations have paid fines totalling US$425 million and three individuals have pleaded guilty.

DOJ prosecutors also advanced their prosecution of an alleged conspiracy to fix the prices of and rig bids for broiler chickens. The DOJ has charged 10 individuals, as well as certain corporate defendants, for their roles in the alleged conspiracy. In February 2021, Pilgrim's Pride pleaded guilty and agreed to pay a fine of approximately US$107 million to settle charges that it has engaged in the alleged conspiracy. The DOJ's efforts to prosecute cases involving goods sold to more vulnerable consumers, and goods with an inelastic demand, are likely to continue in the future, especially given the economic instability brought by the covid pandemic.

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.

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4 | What means exist in your jurisdiction to speed up or streamline the authority's decision-making 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 a company does seek to increase the pace of an investigation, there are some steps it can take. A company should attain a firm and thorough grasp of the relevant conduct as soon as possible. When responding to a grand jury subpoena, a company's legal team should understand 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, the team should be prompt in responding to the DOJ's queries. An incomplete or delayed response can undermine the company's credibility and cause the DOJ's attorneys 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.

The DOJ brought its first criminal wage-fixing prosecution in *United States v. Jindal*, filing an indictment alleging a conspiracy to fix the wages of physiotherapists

and physiotherapist assistants in the Dallas, Texas area. Defendants filed a motion to dismiss, arguing that the indictment at most alleged an agreement to fix wages, which did not fall under the definition of price-fixing. Further, defendants argued that the DOJ's criminal prosecution was unconstitutional under the Fifth Amendment due to lack of fair warning, since no court had previously found that wage fixing agreements constituted criminal conduct. In November 2021, a judge denied defendants' motions to dismiss, reasoning that courts had sufficient judicial experience with wage fixing to justify the per se designation. The court also held that defendants had sufficient warning that they could be criminally liable for wage fixing, since for more than 100 years, courts have repeatedly held that price-fixing was per se illegal under the Sherman Act, and wage fixing was a form of price-fixing.

Most recently, in January 2022, a Colorado district court refused to dismiss the DOJ's claims against dialysis provider DaVita Inc, where the DOJ alleged that two healthcare companies agreed not to solicit each other's senior level employees across the United States. Defendants argued in their motion to dismiss that the parties' non-solicitation agreement should be analysed under the rule of reason, not the per se rule. The court sided with the DOJ, holding that the agreements

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constituted per se violations of the Sherman Act, since horizontal market allocation agreements are traditionally subject to per se treatment, and agreements allocating or dividing an employment market are horizontal market allocation agreements. Accordingly, because the alleged no-poach agreements allocated or divided the employment market, they could constitute a per se violation. The DOJ is currently prosecuting other no-poach cases where motions to dismiss are pending against healthcare companies, including *US v Surgical Care Affiliates*, another case alleging an agreement to restrict hiring senior-level employees, and *US v Hee*, a case alleging a conspiracy between two companies to refrain from raising nurses' wages or hiring nurses from one another.

In December 2021, the DOJ indicted a former Pratt & Whitney engineering services director of conspiring with other aerospace companies to restrict the hiring of engineers and other skilled labourers. In that case, the DOJ alleged Raytheon, Belcan, Cyient, Quest Global and several other firms placed outright restrictions on the hiring of each other's skilled aerospace workers, and Pratt and Whitney's engineering services director enforced these restrictions by reminding other firms not to poach each other's employees.

These cases, coupled with the DOJ's speeches and policy statements, make clear that it will continue to vigorously investigate and prosecute cartel conduct in the human resources space.

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. If a jury finds an individual guilty at trial, the individual has the opportunity to appeal that decision to a higher court. In practice, it is rare for corporate defendants facing cartel charges to go to trial in light of the substantial fine exposure, reputational implications and stigma associated with a potential criminal conviction. If a defendant is tried and convicted, it may be able to appeal that decision to the applicable Court of Appeals.

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A recent decision by a US court addressed efforts by the DOJ to seek interviews of persons affiliated with corporate targets. Glenmark, a producer of generic drugs, was charged with participating in three separate conspiracies to fix the prices of at least 10 products. Glenmark alleged that the DOJ engaged in prosecutorial abuse and violated rules of professional conduct by compelling interviews with executives without prior notice to the corporation's counsel in the criminal litigation. The court initially granted Glenmark's emergency relief motion, ordering the DOJ to stop all non-attorney contact, and to cease and desist from conducting such interviews. The judge emphasised that the DOJ may seek voluntary, not compulsory interviews with the companies' executives, and that the DOJ must communicate with employees of the company in the presence of counsel if Glenmark so requests.

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

Private 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.

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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. Notably, the DOJ may credit a compliance programme even if it failed to detect a violation.

To date, the DOJ has not entered into a DPA with a company based on the effectiveness of its antitrust compliance programme. However, since the DOJ

traditionally pursues cartel investigations for conduct occurring all across the world, it appears that many large multinational companies have become more vigilant in implementing worldwide antitrust compliance programmes. Implementing such programmes requires building a worldwide infrastructure for training and educating employees, an expensive and time-consuming effort. 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. As a result, there is a meaningful chance we will see a resolution of a dispute with a DPA rather than a guilty plea based on the effectiveness of a compliance programme in 2022.

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

As noted above, recently we witnessed greater activity in the domestic cartel space and an expanded focus on cartels in employment markets. The domestic matters the DOJ pursued in 2021 were at a smaller scale than the large international investigations it has conducted in earlier years. As a result, US fine totals for 2021 remained at historically lower levels. The lower fine totals reflected a shift in focus but not a drop in enforcement, a development the DOJ acknowledged in its 2021 Spring Update, where the Antitrust Division noted that it was preparing for 13 criminal trials.

We can expect a continued focus on employment cartel behaviour in 2022. We can also expect a continued focus on collusion with respect to government procurement, both domestically, as the government employees in agencies across the US continue to receive training on using data analytics to detect bid rigging, and internationally, as the Strike Force continues to build connections with competition agencies around the world. Moreover, increased scrutiny of worldwide labour markets, the rise of the UK's Competition and Markets Authority as a global cartel enforcer, and a renewed focus on financial institutions may signal the possibility of larger international cartel investigations in 2022.

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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 their 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. The DOJ continues to respond expeditiously to all covid-related requests, aiming to resolve requests addressing public health and safety within seven calendar days of receiving all necessary information.

Most recently, on 17 February 2022, the DOJ announced an initiative to protect Americans from collusive schemes amid supply chain disruptions caused by the covid-19 pandemic. Assistant Attorney General Jonathan Kanter commented: 'The Antitrust Division will not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions.' As part of the initiative, the Antitrust Division is prioritising any current investigations where competitors may be profiting from exploiting these challenges. The DOJ is taking measures to investigate collusion in industries particularly affected by supply disruptions, such as agriculture and healthcare. The DOJ has also formed a working group focusing on global supply chain collusion with its partners, the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority. The working group is developing and sharing intelligence and utilising existing international cooperation tools to detect and combat collusive schemes.

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The Inside Track

What was the most interesting case you worked on recently?

Our team has been working on many of the cases at the forefront of the DOJ's cartel enforcement efforts, including in the employment, agriculture, hospitality, pharmaceuticals, tech/internet, consumer retail, entertainment and other industries. Each of these cases has brought forth original challenges and unique strategic issues. We also see the Justice Department continuing to evolve in its enforcement approach, with a range of methods and techniques depending on the facts of the case and the trial attorneys involved.

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 always 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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Judicial review
Sector focus
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