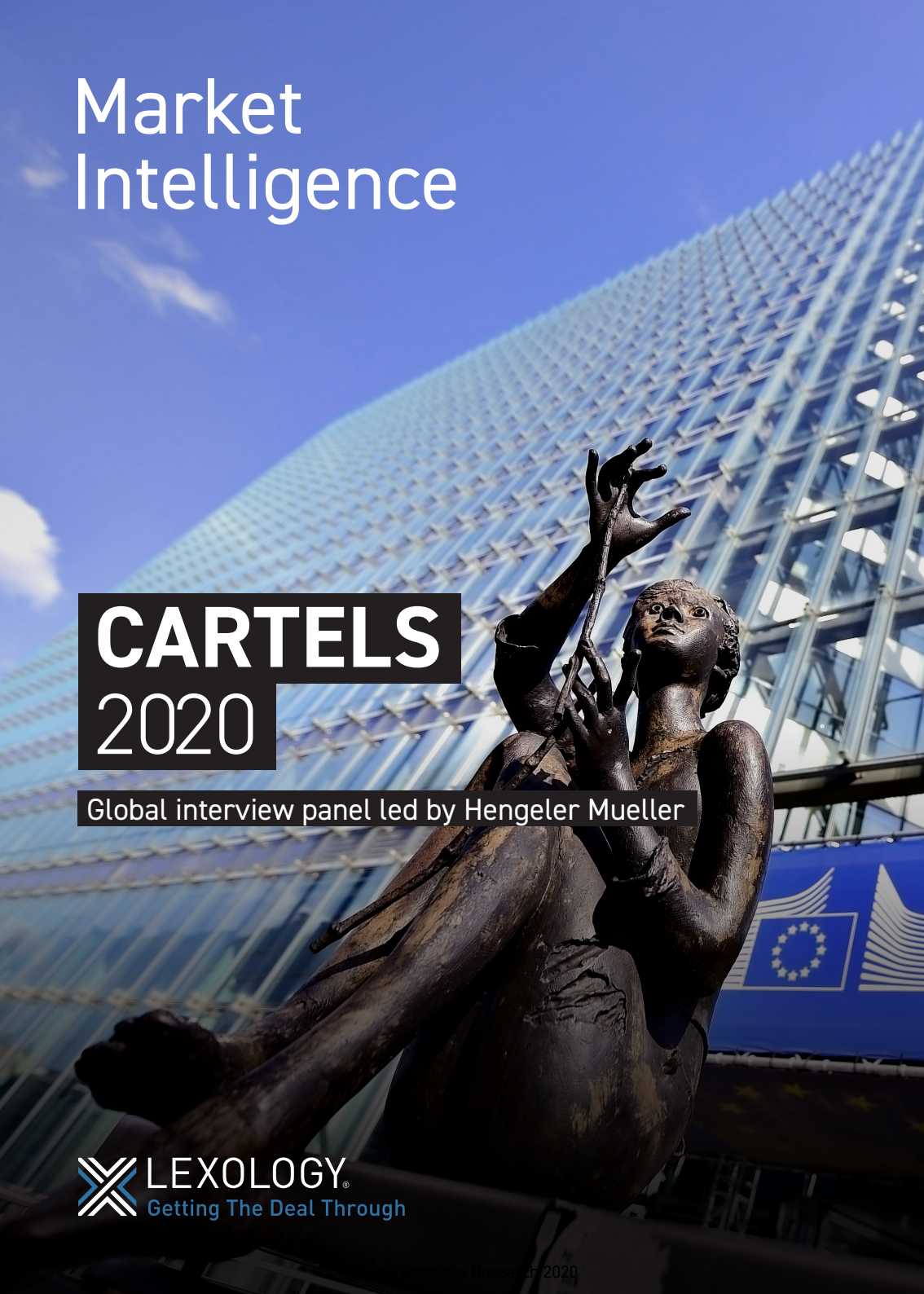
Market Intelligence

CARTELS 2020

Global interview panel led by Hengeler Mueller



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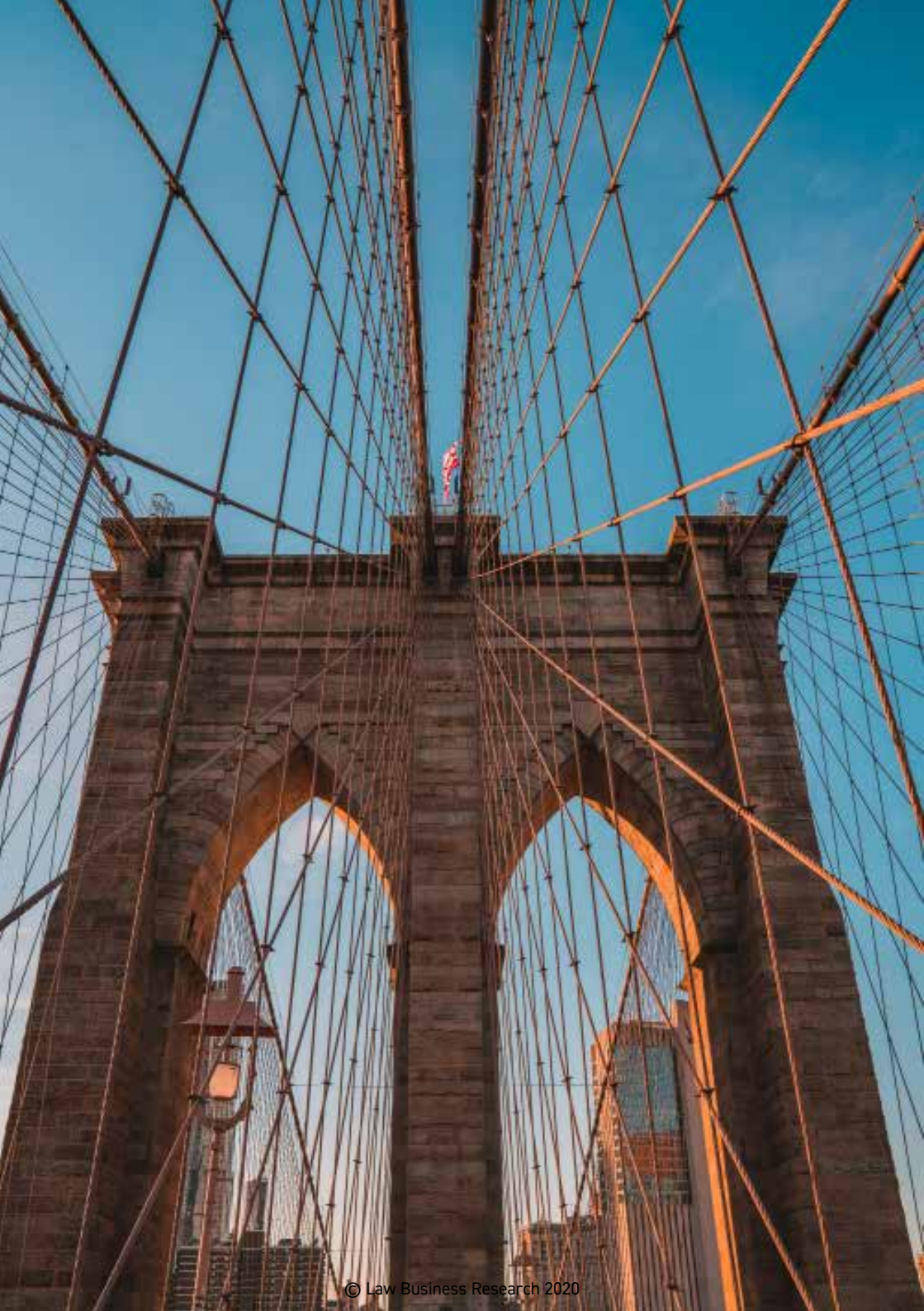

United States

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 US, 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/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 ABA 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.

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

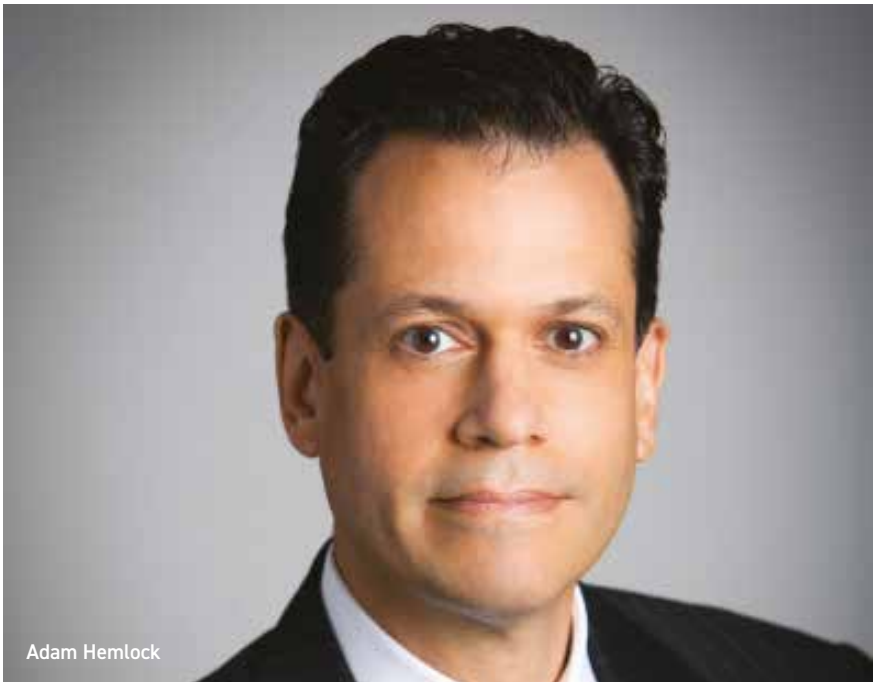
The US Department of Justice's (DOJ's) Antitrust Division generally focuses its criminal enforcement efforts on 'hardcore' cartels involving price-fixing, bid rigging and market allocation. Over the past 20 years, it has obtained most of its largest fines from prosecution of international cartels, which included many foreign-based participants. Recently, however, we have seen more enforcement activity centred on domestic cartel activity, including investigations of the customised promotional products industry, the real estate foreclosure auctions industry, and the insulation contractor industry.

In November 2019, the DOJ announced the formation of the Procurement Collusion Strike Force (PCFS), an interagency partnership focused on deterring, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies, in government procurement, grant and programme funding. The PCFS consists of prosecutors from the Antitrust Division, 13 US Attorneys' Offices, investigators from the Federal Bureau of Investigation (FBI), the Department of Defense Office of Inspector General, the General Services Administration Office of Inspector General, the Department of Justice Office of the Inspector General, and the US Postal Service Office of Inspector General. In its announcement, the DOJ noted that more than one-third of its open investigations relate to public procurement. Formation of the PCSF came on the heels of an investigation into bid rigging for military fuel supply contracts by several South Korean companies, in which five companies pleaded guilty and seven individuals were indicted for antitrust violations and fraud against the US government.

The DOJ has also continued its recent focus on horizontal agreements among employers. The government has pursued investigations of so-called 'no-poach' agreements, pursuant to which employers agree not to solicit or hire the employees of co-conspirators. Such conspiracies are subject to DOJ criminal prosecution when they are 'naked', meaning that they are not ancillary to a lawful procompetitive agreement such as a joint venture. Beyond its criminal enforcement efforts, the DOJ has intervened in several civil no-poach cases in an effort to shape the arguments and legal standards in this area.

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

As mentioned previously, the DOJ's recent enforcement efforts have been more focused on domestic corporations and individuals. That being said, the DOJ has made clear that its cooperation with foreign antitrust enforcement authorities remains


Adam Hemlock

strong. In fiscal year 2019 alone, the DOJ collaborated with at least 18 jurisdictions on cross-border investigations and global cartel enforcement. Among these was the DOJ's investigation into an international conspiracy involving electronic components. In July 2019, NHK Spring Co, a Japanese manufacturer of suspension assemblies used in hard disk drives, agreed to plead guilty and pay a US$28.5 million fine for its role in a global price-fixing conspiracy.

To meet the unique challenges of investigating international conspiracies and cartels, the DOJ has pushed for increased cooperation among government enforcers, including the development of a core set of norms that would establish fundamental due process principles with meaningful review mechanisms. Last year, this push came to fruition through the International Competition Network's (ICN's) adoption of the Framework on Competition Agency Procedures (CAP). The framework procedures, which came into effect in May 2019 with 70 founding competition agencies, are intended to take advantage of existing structures and reduce administrative burdens. One particularly relevant principle in the CAP relates to attorney-client privilege; in this provision, the DOJ seeks to obtain participating agencies' commitment to recognise applicable privileges. For US companies operating in multiple

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jurisdictions abroad, recognition of the attorney-client privilege is obviously an important consideration.

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. Notably, certain provisions of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which protects leniency applicants in private suits, are set to expire on 22 June 2020 unless Congress reauthorises the expiring provisions. The law, which is intended to complement the DOJ's leniency programme, allows leniency applicants to pay single damages, rather than treble

damages, and avoid joint and several liability in civil follow-on suits in exchange for substantial cooperation with private plaintiffs. The imminent expiry and reconsideration of the law has sparked debate among stakeholders across the antitrust field about the efficacy of the statute. The DOJ held a roundtable programme with antitrust practitioners and others to examine and better understand how ACPERA operates in practice, and whether any revisions to the statute are warranted. The DOJ has recognised that the threat of civil litigation, and its impact on ongoing criminal investigations, has increasingly influenced the dilemma of whether to apply for leniency in the United States.

All this being said, it is unlikely that the leniency programme, a repeatedly recognised asset to the DOJ, will disappear even with continued debate over the ACPERA statute and the benefits of leniency. Indeed, the DOJ has confirmed that it continues to receive leniency applications across many industries, and it has voiced its support of reauthorisation. As such, clients should continue to weigh a variety of factors to determine whether to apply for leniency. 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 US, 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 report its conduct to the DOJ. 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.

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 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, that means getting a firm and thorough grasp of the relevant conduct as soon as possible. When responding to a grand jury subpoena, that means 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 been that being responsive and well prepared goes a long way to keep an investigation moving along and maintaining trustworthiness with the DOJ.

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

Although a number of important decisions were rendered over the past year, the DOJ's policy of holding executives accountable for criminal cartel violations remained evident. Not only did we see a number of high-level executives plead guilty to cartel violations, resulting in substantial fines and prison sentences, we also saw the DOJ succeed at trial. In November 2019, a former JPMorgan Chase banker was found guilty of rigging bids and fixing prices in the *Foreign Currency Exchange* case. This was an important victory for prosecutors because three other individuals were acquitted of similar charges in 2018. In December 2019, the DOJ also secured a conviction against the former president and CEO of Bumble Bee Foods for his participation in an antitrust conspiracy to fix the prices of canned tuna. As the DOJ continues to consider criminal enforcement of Sherman Act violations an 'essential tool' to protecting competition and consumers, especially with regard to individual prosecutions, it is important that companies maintain strong antitrust compliance programmes to deter unlawful conduct.

The DOJ has also continued its enforcement in the pharmaceutical industry. In early 2020, the DOJ announced that generic drug manufacturer Sandoz will pay US$195 million to resolve criminal antitrust charges. Sandoz, along with other generic drug manufacturers, was charged with participating in customer allocation, bid rigging and price-fixing conspiracies from 2013 to 2015. As part of the agreement, Sandoz is required to cooperate with the DOJ's ongoing investigation into anticompetitive conduct in the generic drug industry.

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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 and FBI through federal grand juries, which are granted 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

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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. Still, high-profile trials continue to occur, especially against individuals. As previously mentioned, in 2019 the former CEO of Bumble Bee Foods was convicted at trial for his role in a price-fixing conspiracy in the packaged seafood industry. Similarly, a former JPMorgan Chase trader was also convicted at trial for a price-fixing conspiracy in the foreign currency exchange market.

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 US is very high for three main reasons: (1) any jury award of damages is automatically trebled, by law; (2) each defendant in a cartel case is jointly and severally liable for the total damages caused by the conspiracy; and (3) plaintiffs are entitled to attorneys' fees and costs in the event of a judgment in their favour. As a result, settlements can be very large in these cases, often exceeding the size of the criminal fine imposed by the DOJ. Lawsuits filed by state Attorneys General can also add to the cost of private antitrust litigation in the US.

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 Justice 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. Other notable revisions to the DOJ's Justice Manual are the inclusion of the DOJ's processes for recommending indictments, plea agreements, and selecting monitors. Accordingly, vigorous and effective compliance programmes continue to be the best way to prevent cartel problems before they happen, or otherwise to uncover them as soon as possible so that the company can minimise its criminal and civil litigation risk.

Irrespective of changes the DOJ has made, companies have responded to the large fines and massive civil exposure in the US by implementing stronger compliance regimes. With the DOJ having pursued several large international cartel investigations for conduct occurring all around the world, large multinational companies in particular have become more vigilant in implementing worldwide antitrust compliance programmes. This requires implementation of 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 introducing 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 antitrust liability in the US have shown an increased willingness to make the investments necessary to put in place a strong global compliance regime. These efforts should pay dividends in the years to come.

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

Although high-level individuals in the Antitrust Division have stated that the Division's leniency policy is critical to the success of the DOJ's criminal enforcement programme, many stakeholders in the field differ in opinion over the success of the ACPERA statute. Although leniency applicants have increased year-to-year since 2016, some commentators have expressed concern over the civil exposure and avalanche of class actions that inevitably follow the outing of a leniency applicant. How the DOJ and Congress will respond to comments on ACPERA as the statute comes up for renewal will affect the decision of companies to self-report conduct to the DOJ.

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The Inside Track

What was the most interesting case you worked on recently?

Our firm is currently representing one of the largest producers of chicken in the United States, and we are defending various antitrust class action cases brought by chicken purchasers, poultry plant workers and chicken growers. The cases are massive and complex, with over 100 plaintiffs and classes and over 10 defendants. We have taken a lead role in these cases and are working with many other excellent lawyers to defend them. Sales of chicken in the US each year are many billions of dollars, so the theoretical exposure of these cases is meaningful. The cases present interesting and challenging class certification and damage issues.

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 meaningful jail time on certain individuals may not achieve deterrence, where other means of creating incentives for individual and corporate behaviour might be more effective.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Hengeler Mueller, this *Cartels* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Industry focus
Private enforcement
Settlement procedures
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