Chapter 30

USA


Charles F. (Rick) Rule


Joseph J. Bial

Paul, Weiss, Rifkind, Wharton & Garrison LLP

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Corporations and individuals may face both civil and criminal penalties under the United States federal antitrust laws, which prohibit economic agreements that unreasonably restrain free trade. Section 1 of the Sherman Act prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations", while Section 4 of the Clayton Act enables private parties (including state and local governments) to bring civil actions for damages because of Sherman Act violations.

1.2 What are the specific substantive provisions for the cartel prohibition?

In order to prove a criminal violation under Section 1, the government must demonstrate the following four elements: (1) an agreement or concerted action (2) between two or more potential competitors (3) in an unreasonable restraint of trade (4) in or affecting interstate commerce or commerce with foreign nations.

Agreement or Concerted Action. An agreement, defined as an understanding or meeting of the minds between competitors, is the "essence" of a Sherman Act violation. The agreement *does not* need to be express or involve overt actions; tacit understandings are sufficient. Evidence used to prove this element of the offence may include direct evidence such as testimony from participants or other witnesses and communications with competitors, or circumstantial evidence such as identical bidding behaviour.

Between Competitors. The parties must do business in the same product and geographic market in order to qualify as competitors.

Unreasonable Restraint of Trade. Courts have found certain types of agreements to be illegal per se because of the harmful effect these arrangements have on competition. These agreements include, but are not limited to, price fixing, bid-rigging, and market division. If an agreement is *per se* illegal, the defendant is foreclosed from arguing either against the agreement's alleged adverse effects on competition or for the agreement's procompetitive justifications. With very few exceptions, *per se* violations are the subject of criminal investigations and prosecutions. Other agreements, such as joint ventures and participation in standard-setting organisations, are not per se illegal but subject to the rule of reason doctrine that focuses on whether the conduct on balance unreasonably restrains competition. Conduct is unreasonable if its restraint on trade is greater than its procompetitive effects. Because of difficulty in proving that conduct is unreasonable, DOJ rarely prosecutes rule of reason violations criminally.

Effect on Interstate and/or Foreign Commerce. Only agreements that take place in or affect interstate or foreign commerce are subject to federal antitrust laws. The interstate commerce test is met if products or services related to the agreement move across the borders of any state within the United States. The foreign commerce requirement is described in question 1.6.

In a criminal prosecution, the government must prove all four of the above elements beyond a reasonable doubt. The government also must prove that either the agreement itself or an act in furtherance of the agreement, occurred within the federal district where the criminal indictment is returned for trial. In a civil case, each element must be proven by a preponderance of the evidence.

1.3 Who enforces the cartel prohibition?

The Antitrust Division of the Department of Justice (the "Division") is the sole enforcer of the antitrust laws with respect to the cartel prohibition, having exclusive criminal enforcement powers. The FTC, state attorneys general, and private plaintiffs (as well as the Division) can seek treble damages in a civil action for injuries resulting from a cartel violation but cannot seek civil fines for the cartel violation.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

When the Division learns of a potential antitrust violation, its first step usually is to convene a grand jury, an investigatory body described in question 2.2. Through the grand jury, the Division can gather relevant documentary and testimonial evidence.

Once the Division has gathered sufficient evidence of the potential antitrust violation, it may present this evidence to the grand jury. The grand jury then determines whether to issue an indictment charging the defendant and initiating formal criminal proceedings. Following the indictment, the defendant must appear before a federal court to enter a plea of guilty or not guilty on the charges. If the defendant decides to plead not guilty, the case will proceed to trial where the defendant has the right to be tried by a jury. If the defendant is found guilty, the judge will issue a sentence according to the United States Federal Sentencing Guidelines ("Guidelines").

In many cases, defendants may enter into negotiated pleas with the Division that waive their right to the grand jury. In those cases, the Division does not have to seek an indictment from the grand jury but rather can file an information charging the defendant. Plea bargaining is explained in question 6.1.

1.5 Are there any sector-specific offences or exemptions?

The federal antitrust laws do not identify sector-specific offences, although exemptions do apply to certain types of activities. For example, the Merchant Marine Act exempts ocean shipping carrier companies from antitrust prosecution, while the McCarran-Ferguson Act largely exempts insurance companies. Other exempted groups include agricultural commodities producers who wish to form processing and marketing cooperatives, states and certain state-supervised entities under the Parker Immunity doctrine, joint lobbying or litigation efforts between competitors under the Noerr-Pennington doctrine, and Major League Baseball.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Foreign Trade Antitrust Improvements Act ("FTAIA") limits the reach of the antitrust laws with regard to foreign commerce. Under the FTAIA, which does not apply to interstate or import commerce, only foreign conduct that has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce with foreign nations may be prosecuted. However, U.S. courts have not settled the meaning of "direct, substantial, and reasonably foreseeable". There also remains some question as to whether the FTAIA applies with the same force to criminal actions as to civil actions.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes*
Carry out compulsory interviews with individuals	Yes	Yes*
Carry out an unannounced search of business premises	No	Yes*
Carry out an unannounced search of residential premises	No	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	No	Yes*
■ Right to retain original documents	No	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

Documentary Evidence and Compulsory Interviews. In a criminal case, the Division must convene a grand jury, an independent body vested with the power to issue subpoenas, to compel the production of documentary (*subpoena duces tecum*) or testimonial (*subpoena ad testificandum*) evidence. If a witness refuses to testify, that witness can be held in contempt and subjected to fines as well as imprisonment.

Searches of Premises. The Division must obtain a search warrant from a judge before conducting a search of company or residential premises or seizing documentary evidence. To obtain a search warrant, the Division must submit an affidavit stating facts that show probable cause that a crime has been committed, that evidence of the crime exists, and that the relevant evidence is on the premises to be searched. However, the government may take possession of documentary evidence even without a search warrant if the party being searched voluntarily hands over the evidence. The Division also can conduct, without a search warrant, surprise visits to individuals that are not represented by counsel.

Informal Witness Interviews. The Division can interview an individual informally at any time if the individual is not represented by counsel. Usually these interviews will occur either at the company's premises (such as in the course of executing a search warrant) or at the employee's home. The locus of the interview could impact who questions the witness. While both Division attorneys and agents from the Federal Bureau of Investigation ("FBI") may conduct an interview at an employee's home, it is Division policy that attorneys not be present on company premises while agents execute a search warrant.

Companies should develop procedures to protect employees from negative consequences of a government search. In a search and seizure, the company should contact legal counsel immediately. Employees should remain calm and vigilant, taking note of any items collected during the search. Additionally, individuals have the right to remain silent during informal interviews and should not answer any questions without an attorney present. These conversations have as much weight as formal interviews, and any false statement made during an informal interview is subject to prosecution.

2.3 Are there general surveillance powers (e.g. bugging)?

While the Division mainly relies on the grand jury process to collect evidence, it can work in conjunction with the Federal Bureau of Investigation ("FBI") to utilise electronic surveillance such as wiretaps. The Division also may monitor and/or access electronic data, including text messages, instant message communications, and social media (e.g., Twitter and Facebook). Companies should be cognizant of the content of these communications, as the Division may use them as evidence in antitrust investigations. Given the increasing prevalence of these electronic platforms—as well as the sometimes blurred line between personal and professional use—companies should consider implementing policies governing employee use of electronic communications, especially regarding interactions with competitors.

2.4 Are there any other significant powers of investigation?

Cooperating parties seeking plea agreements or amnesty not only provide documents and testimony in excess of what the Division can obtain through the grand jury, but also may consent to wiretaps and other electronic surveillance. Recent "headline" antitrust investigations demonstrate that cooperating parties can

be particularly devastating tools for building an antitrust case against an alleged violator. For example, in the lysine price-fixing conspiracy that DOJ prosecuted during the 1990s, Mark Whitaker, a cooperating executive at Archer Daniels' Midland (ADM) and the subject of the movie *The Informant*, collected hours of video footage and audio tapes capturing price-fixing meetings between five companies. Whitaker's footage provided direct evidence that helped obtain guilty verdicts and fines totalling over $90 million against ADM, its executives, and four foreign corporations. The Lysine case demonstrates the ease with which cooperating witnesses can gather incriminating information as well as the power of such direct evidence in obtaining criminal sanctions.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

FBI agents will execute searches of residential and company property, usually at the same time as or just prior to service of the subpoena. This timing minimises the opportunity to destroy evidence while also incentivising targeted companies to seek leniency. The agents do not have to wait for counsel to arrive, but may wait if specifically requested. Also, the agents are limited in their search by the warrant itself, which must describe the exact location to be searched as well as identify with particularity the evidence to be seized.

2.6 Is in-house legal advice protected by the rules of privilege?

The attorney-client privilege protects communications between in-house counsel and company employees for the purpose of seeking or providing legal advice. Companies should be aware that not all communications involving in-house legal counsel are privileged—only those with *the purpose of seeking legal advice* are covered. Communications strictly about business are not protected. Therefore, an email is not considered privileged simply because an attorney is copied; the communication must contain or seek legal advice. Companies should also be aware of the distinction between "legal advice", which is protected, and "business advice", which is not. For example, an employee requesting a lawyer's opinion about the legal issues posed by a merger likely would be covered by attorney-client privilege, while a conversation about the financial soundness of the merger would be considered unprotected business advice.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Privileged Documents. If either party believes that privileged documents (e.g., documents containing legal advice) have been seized during a search, the Division must put procedures in place to ensure that attorneys and agents working on the case do not access those documents.

Privilege Against Self-Incrimination. An individual called to testify before the grand jury has the right to invoke the Fifth Amendment's privilege against self-incrimination and confer with counsel outside the jury room. However, grand jury proceedings themselves are conducted in secret, and witnesses have no right to counsel inside the jury room. Generally, the government will not seek the testimony of an individual who states an intention to invoke the privilege before the grand jury because, to compel the testimony, the government would be required to provide that individual with immunity. This privilege does not apply to documentary evidence.

Jurisdictional Limitations. A company outside the United States is only obligated to reply to a subpoena if the government has served an agent of the company located in the United States.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In criminal investigations, the government will bring obstruction of justice charges against individuals who attempt to impede enforcement efforts by destroying evidence or providing false information to the government. The Division has pursued a number of obstruction cases in recent years, suggesting increased enforcement on this issue. Individuals also should note that, while the Division has had little success extraditing foreign nationals for antitrust violations (as explained further in question 9.2), obstruction of justice is prosecutable in nearly every jurisdiction, and thus could serve as a basis for extradition.

In civil cases, similar practices may include fines, jury instructions to make an adverse inference against the defendant, or other sanctions the court deems appropriate.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under the Sherman Act, corporations that commit antitrust violations are subject to fines of up to $100 million. In the alternative, the DOJ may seek to impose penalties based on the unlawful gains or losses occasioned by anticompetitive activity. Federal law provides for fines of up to twice the gross amount the antitrust co-conspirators gained through the violation or twice the gross amount that the victims lost through the violation, whichever is greater. These alternative fines can—and often do—exceed the $100 million ceiling the Sherman Act establishes, although the government is required to prove the amount of gain or loss in these cases beyond a reasonable doubt.

The courts assess antitrust-violation fines based on the formula and guidance set forth in the Guidelines. The court begins the analysis by calculating 20% of the total volume of commerce affected by the antitrust violation, which is then taken as the base fine. Note, the Guidelines do not define "volume of commerce affected", nor do they specify how to calculate the figure. Consequently, the court has significant flexibility in determining the appropriate base fine.

The court next assigns the corporate defendant a "culpability score" reflecting the circumstances involved in the particular case. The Guidelines outline various factors that may bear on the culpability determination, including the company's criminal history, the role that high-level personnel played in the conspiracy, the company's efforts to develop an effective compliance programme, and the extent of the company's cooperation. The culpability score correlates to minimum and maximum multipliers, which are then applied to the base fine to calculate a fine range. This range is merely advisory, however, and the court may upwardly or downwardly depart from the suggested range in setting the final fine.

The DOJ, for its part, typically seeks a sanction that falls within the range the Guidelines suggest. In special circumstances, the DOJ may recommend a downward departure from the Guidelines range in recognition of a defendant's cooperation or assistance. The DOJ also can, and usually does, seek discounted fines against defendants who cooperate immediately following the leniency applicant (e.g., a company that was second to report its antitrust violation). Like

the Guidelines ranges themselves, however, the DOJ's role in the sentencing process is only advisory, and the courts retain broad discretion in making the final determination as to the size of the penalty.

In recent years, the Division also has emphasised probationary periods for companies convicted of antitrust violations. If the Division believes a company has an ineffective compliance programme or is continuing to employ culpable individuals, then it could argue court-supervised probation is necessary to prevent recidivism. This probation could include a court-appointed monitor.

In addition to these criminal fines, corporate defendants may be ordered to pay restitution to the victims of the conspiracy. Defendants with federal contracts may be subject to prosecution under companion criminal statutes, such as those prohibiting mail fraud or wire fraud; and any company may be disbarred from future participation in government contract work.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The Sherman Act provides for criminal penalties of up to $1 million and 10 years' imprisonment for individuals who commit an antitrust violation. Individuals also are subject to the alternative fine regime by which the DOJ may seek to impose monetary penalties of up to twice the losses or wrongful gains resulting from the conspiracy. Like corporate defendant penalties, fines against individuals are based in part on the volume of commerce affected by the unlawful activity, with typical individual fines falling between one and five percent of this figure. Individual sanctions are not multiplied by a culpability score, but the Guidelines provide that these fines should in all cases exceed a $20,000 minimum.

The volume of affected commerce also guides the court's determination regarding sentences of imprisonment. Antitrust violations increasingly are punished on an individual level using jail time: between 2010 and 2014, an average of 29 individuals per year were sentenced to prison, and average prison sentences increased from 20 months between 2000 and 2009 to 25 months between 2010 and 2014. The DOJ may recommend terms below the suggested Guidelines ranges for defendants who provide substantial assistance to the government's investigative efforts, however, and also may make such recommendations pursuant to plea agreements.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Criminal fines in antitrust cases can be reduced to the extent necessary "to avoid substantially jeopardizing the continued viability of the organization". The Guidelines clarify that a defendant will be eligible for a reduction only if the court finds the company would be unable to pay the minimum recommended fine, even if allowed the benefit of an instalment schedule. Additionally, the court may reduce the size of a criminal fine to ensure the defendant company can pay restitution to the victims of the conspiracy.

3.4 What are the applicable limitation periods?

Criminal antitrust actions are subject to a five-year statute of limitations. In cases involving prolonged conspiratorial activity, the statutory period begins to run after the termination of the conspiracy; that is, the point at which the purpose of the antitrust conspiracy has been achieved or abandoned.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Companies may pay for the legal costs current and former employees incur during antitrust investigations. They generally are prohibited from paying the financial penalties imposed on their employees, however, pursuant to state laws forbidding indemnification in cases involving wilful violations of the criminal law.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In theory, an employer could hold a rogue employee liable for the costs associated with an antitrust violation; however, this scenario is unlikely under U.S. law. Vicarious liability allows plaintiffs to sue employers who benefit from their employees' misconduct, even if the misconduct in question was not at the employer's request. For this reason, a company seeking to hold its employee liable for antitrust sanctions or legal fees would be unlikely to succeed unless it could prove that the company was not involved in the violation, that it derived no benefit from the violation, and that the employee was not acting within the scope of his employment.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Division operates a Leniency Programme for both individuals and companies. The Leniency Programme underlies many of the Division's cartel investigations, with DOJ officials stating "self-reporting under our leniency programme remains at high levels … increasingly, non-US companies are reporting anticompetitive behaviour".

The Corporate Leniency Policy establishes two types of leniency, Type A and Type B, which incentivise companies to report antitrust violations through reduced sanctions. Critically, the Division will grant only one corporate leniency application per cartel conspiracy; thus, the programme may result in situations in which co-conspirators race to turn themselves into the government. Both Type A and Type B leniency require that applicants confess fully to their participation in the conspiracy, take steps to terminate such participation, and agree to cooperate fully with the DOJ's investigative and enforcement efforts going forward. Successful applicants are awarded prosecutorial benefits, which vary depending on the form of leniency.

Type A leniency may be available under the following six conditions. The company must have: (i) voluntarily come forward before the DOJ became aware of any illegal conduct; (ii) taken steps to terminate its participation in the illegal activity immediately upon its discovery of the conspiracy; (iii) confessed fully and committed to providing complete, ongoing assistance to the Department's investigative efforts; (iv) come forward as an entity, rather than through isolated confessions of executives; (v) made restitution to victims of the conspiracy where possible; and (vi) not originated, led, or coerced others to participate in the illegal activity. A grant of Type A leniency confers automatic amnesty upon the company and its cooperating employees.

Type B leniency allows companies to apply for amnesty after the DOJ has become aware of illegal activity. The DOJ will grant this type of application only if it lacks the evidence to obtain a successful conviction against the applicant and it determines that leniency would not be unfair given the timing of the confession,

the applicant's role in the conspiracy, and the nature of the illegal conduct. Additionally, companies must satisfy requirements (ii) through (v) of the above paragraph to qualify for the programme. If the DOJ grants the application, the company's employees will be considered for immunity from prosecution.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Because the leniency programme is only available on a "first in" basis, the marker system can play a critical role in determining which amnesty applications will be granted. A company that confesses to an antitrust violation before its co-conspirators come forward can reserve its place as first in line for leniency by securing a marker for its application. To do so, the company must contact the DOJ with information about the antitrust violation and its potential role therein; the marker then will allow the company a finite period of time—typically, 30 days—to conduct a preliminary internal investigation into the nature of its role in the conspiracy.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Companies may apply orally for leniency, and the DOJ does not specify that applications take any particular form. However, the DOJ may require applicants to turn over any documents relevant to their illegal activity.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Division protects the confidentiality of all information provided through leniency applications, and will disclose the contents of an application only with the applicant's consent, upon prior disclosure by the applicant, or pursuant to a court order. These protections apply even against foreign antitrust agencies seeking information on applicants to the DOJ. The information in leniency applications may, however, be subject to discovery in criminal litigation. Additionally, federal law provides for broad discovery in civil cases that could cover documents, even if used as part of a leniency application.

Leniency applicants also can make the strategic decision to disclose incriminating documents to private litigants pursuant to incentives established by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). ACPERA provides that successful leniency applicants may limit their civil liability by cooperating with plaintiffs in private suits related to the government's enforcement actions. To satisfy the statutory requirements, a company seeking relief generally must begin to cooperate early in the government's investigation, and also must produce to the private plaintiffs a substantially larger body of documents than would be required under typical discovery rules. Companies that provide satisfactory cooperation are subject to only single damages without joint and several liability in the civil actions.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

A company that seeks leniency is obligated to cooperate with the government's enforcement efforts until the DOJ's investigation has concluded. These obligations are set forth in a conditional leniency agreement the DOJ can revoke at any time during the investigation. Upon the conclusion of the investigation, the DOJ will provide the company with a letter indicating that the leniency application has been granted.

Whether a company has satisfied its leniency obligations will depend in part on the number of individuals the company makes available and the information they provide. The DOJ has attempted to revoke a conditional leniency agreement only once based on a company's alleged failure to promptly terminate its involvement in the illegal activity, but this attempt failed before the courts. As a result, the DOJ amended the terms of its standard conditional leniency agreements to provide that if the Department does revoke a company's conditional leniency agreement, the company cannot appeal the decision prior to the conclusion of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The DOJ has policies that provide for both additional rewards for certain cooperating companies and harsher sanctions for companies that fail to comply fully with the DOJ in its investigations. Under the "amnesty plus" programme, a company that cooperates with the DOJ in one investigation may be eligible for special benefits if it also reports information about an additional antitrust violation occurring in a separate industry. A company that obtains amnesty plus status will not be fined in connection with the second conspiracy, nor will the DOJ prosecute any cooperating employees, officers, or directors for the offence. The Division also may seek reduced sanctions for the first offence.

Conversely, a company that cooperates with an investigation may be subject to the "penalty plus" policy if the DOJ discovers that the company has failed to disclose information about separate antitrust activity. The DOJ treats such nondisclosure as an aggravating factor and therefore may seek greater sanctions against the company at sentencing.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The DOJ has instituted programmes that allow individuals to contact the government in their individual capacities to report antitrust violations. Under current DOJ policy, an employee whistleblower may be eligible for amnesty if he reports antitrust activity of which the government was unaware and provides full cooperation with the DOJ. The employee cannot have originated or led the conspiracy in question, and he will not be granted amnesty if he coerced others into participating in the illegal activity. Additionally, federal law prohibits companies from retaliating against employees who report corporate wrongdoing to the authorities.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Division frequently engages in plea bargaining rather than pursuing a matter to a contested trial. In a typical plea bargaining

agreement, the defendant pleads guilty to the antitrust violation and agrees to cooperate fully in the investigation. In return, the Division generally recommends a punishment less severe than the minimum of the range given by the Sentencing Guidelines. The district court does not have to follow either the Division's recommendation or the Sentencing Guidelines, but usually selects a sentence below the minimum of the Guidelines range for each offence.

Following a memo the DOJ issued in September 2015 (often referred to as the "Yates Memo" in reference to its author, Deputy Attorney General Sally Yates), the Division has placed a greater emphasis on accountability for individual defendants. Among other things, the memo instructed Division attorneys to include a provision in plea agreements that requires a company to provide information about all culpable individuals. The memo was consistent with the Division's position that, because it is seldom able to stop a crime before it starts, it must rely on deterrence, which entails seeking large criminal fines for corporations and significant jail time for executives.

7 Appeal Process

7.1 What is the appeal process?

To initiate a criminal prosecution outside of a plea agreement, the government must convince a grand jury to issue an indictment against the defendant. After receiving the indictment, the government must proceed to trial promptly and prove each element of the antitrust violation beyond a reasonable doubt to a jury of the defendant's peers. During this trial, the defendant has the right to confront its accusers and cross-examine them. While an individual defendant cannot be compelled to testify at trial, he or she can waive this right and take the stand in his or her own defence.

If the defendant is acquitted at trial, the U.S. Constitution's bar against double jeopardy precludes the government from trying the defendant again or appealing the acquittal. On the other hand, if the defendant is found guilty, he or she does have the right to appeal.

The appeal process in antitrust cases is the same as in any federal proceeding. In a criminal proceeding, the defendant must file a notice of appeal with the district clerk within 14 days of either the entry of judgment or the filing of the government's notice of appeal. However, a defendant subject to a plea agreement typically will have waived the right to appeal for any reason other than ineffective assistance of counsel or prosecutorial misconduct. While the government may not appeal a criminal verdict, it may appeal any sentence within 30 days.

To initiate a civil case, a plaintiff must file a complaint and prove in court by a preponderance of the evidence all the elements of the alleged violation. While the parties have a right to a jury trial in civil case, the parties also can elect to have a bench trial.

In a civil proceeding, either party may appeal a district court's judgment within 30 days, except that, if the United States is a party, it has 60 days to appeal.

A losing party at the appellate level may ask the Supreme Court to review the case by filing a petition for a writ of certiorari. The Court rarely grants writs of certiorari and only does so when at least four justices agree to hear the case.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The district court exercises discretion in deciding whether to stay a judgment. An appeal does not stay a judgment automatically. If the district court does stay the judgment, it may take measures to ensure the company can pay the fine after an unsuccessful appeal, such as requiring the company to post a bond. As a practical matter, a district court is unlikely to stay a fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The appeal process does not allow for the cross-examination of witnesses, which occurs during the trial period described in question 7.1. Instead, appellate courts review the district court record, which generally consists of the parties' papers and exhibits, any transcripts of proceedings, and the district clerk's official docket entries. Appellate courts review the district court's factual findings for clear error and legal conclusions *de novo*.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Section 4 of the Clayton Act allows a private party to bring a civil suit for any injury that results from an antitrust violation. The party generally receives three times the amount of the damages sustained as well as costs and attorney fees, except against the following defendants: (1) a leniency applicant or co-operator in a preceding DOJ investigation; (2) a joint venture engaged in research, development, and production, or a standards development organisation that has given prior notification to the DOJ and the FTC; and (3) an export trading company that has received a certificate review from the Department of Commerce. Section 16 of the Clayton Act also allows a private party to sue for injunctive relief against any threatened loss or damage that an antitrust violation would cause. In contrast to Section 4, a party bringing suit under Section 16 does not have to show actual injury to receive an injunction but only that a threat of injury exists.

Defendants in civil cases not only are jointly and severally liable but also have no right of contribution. Therefore, private parties can pursue a single defendant for the totality of damages from a cartel violation, and the defendant will have no recourse against the other members of the cartel.

In addition to private parties, the United States may bring a civil suit for antitrust injuries and receive an injunction or three times its damages along with costs if it prevails. A state attorney general also may bring an action for Sherman Act violations as *parens patriae* on behalf of natural persons within the state and receive an injunction or triple damages and costs, including attorney fees.

The position is easier for "follow on" actions than it is for "stand alone" actions, given that a judgment in a criminal antitrust proceeding constitutes *prima facie* evidence of a violation in the subsequent civil proceeding. However, civil plaintiffs generally cannot rely on evidence used in the criminal proceeding, but rather must obtain it independently.

8.2 Do your procedural rules allow for class-action or representative claims?

As in other areas of law, private parties may bring class actions in antitrust if they satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. A putative class must meet the standard numerosity, commonality, typicality, and adequacy of representation requirements under Rule 23(a). Moreover, a court

must find the conditions set forth in Rule 23(b) are satisfied as well. These conditions include that a class action is a fair and efficient way of resolving the antitrust dispute and the questions of law or fact common to the class members predominate over any questions unique to individual members. Because of the predominance requirement, antitrust class actions generally are based on price-fixing violations, courts rarely certify classes of plaintiffs asserting claims of price discrimination.

8.3 What are the applicable limitation periods?

A civil action must be commenced within four years of the time when the action accrued. An action accrues whenever a plaintiff is injured by a violation of the antitrust laws. Thus, when anticompetitive conduct consists of multiple acts over time, each act has its own four-year statute of limitations. For a conspiracy, each independent act that injures the plaintiff restarts the statute of limitations.

This limitation is subject to tolling under certain equitable doctrines, such as fraudulent concealment, duress and estoppel. In addition, the civil statutory period may be tolled pursuant to government enforcement actions or class action proceedings.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

A "passing on" defence generally is not available to an antitrust defendant in a civil case. Succeeding in such a defence requires showing the plaintiff (1) raised its price fully to compensate for the overcharge, (2) experienced no reduction in sales or profit margin, and (3) would not have raised his price absent the overcharge and/or maintained the higher price after the overcharge was discontinued. Such a showing usually requires a pre-existing cost-plus contract under which an indirect purchaser would suffer the entirety of the harm.

Indirect purchasers also are unable to use a passing on theory under the Illinois Brick doctrine. However, many states have rejected the Illinois Brick doctrine and allow suits by indirect purchasers under state law.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Private plaintiffs, the United States, and state attorneys general acting as *parens patriae* all can recover reasonable costs. The relevant provisions for private plaintiffs and state attorneys general specify that costs include reasonable attorney fees. They also allow for pre- and post-judgment interest, although no private plaintiff has pleaded facts sufficient to obtain pre-judgment interest. Prevailing defendants, on the other hand, must bear their own attorneys' fees and are unable to obtain reimbursement from losing plaintiffs except under very special circumstances.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The DOJ is very active in pursuing cartel cases, initiating dozens of investigations each year. In recent years, it has focused in particular on the electronics and automotive industries. Because indictments and investigations regularly become public, civil actions typically follow.

Most cases are settled, and some are settled for substantial amounts. Among the few that go to trial, jury verdicts in favour of plaintiffs are common, although they are overturned sometimes on legal grounds.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

To serve a summons in a criminal action under the federal rules, the DOJ must deliver a copy of that summons to an officer or agent of the company, as well as mail a copy of that summons to the company's last known U.S. address. Given these requirements, the Division has difficulty effecting service on foreign corporations suspected of antitrust violations. This difficulty is relevant given the large number of foreign corporations involved in many of the Division's cartel investigations. Nonetheless, there is an attempt to amend the rules to allow service beyond what the federal rules currently allow.

In civil cases, parties still are feeling the impact of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*. The decision, which heightened pleading requirements for civil actions, and its resulting case law illustrate the safeguards courts have developed that make it more difficult for private plaintiffs to maintain complaints alleging damages resulting from antitrust violations. Following *Twombly*, plaintiffs had to allege facts that supported a plausible claim for relief, rather than just a possible or conceivable claim.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

As highlighted by the investigations in the electronics and automotive industries, the Division focuses on foreign corporations committing cartel violations that affect the United States. In fact, of those defendants that pay large fines, less than 10% are U.S. companies, illustrating the vast majority of targets in cartel investigations are foreign companies and their employees. This focus has led the Division to indict numerous foreign nationals for cartel conduct. While some individuals will surrender themselves voluntarily to the United States, other individuals choose to remain abroad and outside of the Division's jurisdictional reach.

To date, however, the Division has extradited successfully only one individual charged with violating the antitrust laws. This disconnect stems from the fact that while the Division criminally prosecutes individual cartel participants, criminal penalties for individuals remain rare in other jurisdictions. These jurisdictions either do not have laws that criminally punish individuals for cartel conduct or choose not to enforce such laws. Because many extradition agreements contain dual-criminality provisions as well as exceptions for the signatories' own citizens, the Division typically cannot apprehend or prosecute indicted foreign nationals that remain abroad.

These foreign nationals must be wary of any international travel, however. Following the indictment, the Division can issue a notification through Interpol requesting that any jurisdiction apprehend the individual while the Division effects extradition. An Italian national indicted in connection with the marine hose cartel was detained in Germany and extradited to stand trial in the United States. Given the Division's emphasis on holding individuals accountable, foreign nationals accused of antitrust violations should consider the impact that such charges could have on their personal and professional lives.

Acknowledgment

The authors thank Eric R. Sega for his assistance in preparing for this chapter.

Charles F. (Rick) Rule
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, D.C. 20006-1047
USA

Tel: +1 202 223 7320
Email: rrule@paulweiss.com
URL: www.paulweiss.com

A partner and co-chair of the Antitrust Group, Rick Rule provides antitrust advice to major international corporations on "bet-the-company" matters, including M&A, criminal and civil investigations by the FTC and DOJ, and trial and appellate litigations. Over the last 30 years, Rick has advised on a number of the highest-profile antitrust matters, including representing Exxon in its merger with Mobil, leading the team for Microsoft that settled its antitrust case with the DOJ, and representing US Airways in its merger with American Airlines.

Rick began his career in the Antitrust Division of the DOJ, becoming, in 1986, the youngest person ever confirmed as the head of the Division. Rick left the DOJ in 1989 and has since been a partner and head of antitrust practices at several leading New York and D.C. firms. Rick received a J.D. from the University of Chicago Law School and a B.A. from Vanderbilt University.

Joseph J. Bial
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, D.C. 20006-1047
USA

Tel: +1 202 223 7318
Email: jbial@paulweiss.com
URL: www.paulweiss.com

Joseph Bial regularly represents clients across a wide array of industries in high-profile antitrust and commercial litigation in federal district and appellate courts, as well as before state and federal regulatory agencies. Joe also has a particular expertise and extensive experience handling antitrust, international cartel and anti-monopoly cases in the United States and Asia, as well as in defending civil actions following grand jury and government investigations.

Joe has been an Adjunct Professor at George Mason School of Law and at the University of Alaska College of Business and Public Policy. Prior to Paul, Weiss, Joe worked as an economist at the White House Office of Management and Budget and has also testified as an economic expert and consulted as an economist.

Mr. Bial received his JD from the University of Chicago Law School, his Ph.D. in Economics from the University of Arizona and his undergraduate degree from Miami University.

Paul, Weiss, Rifkind, Wharton & Garrison LLP is a firm of more than 900 lawyers with diverse backgrounds, personalities, ideas and interests who collaboratively provide innovative solutions to our clients' most critical and complex legal and business challenges. We represent the largest publicly and privately held corporations and investors in the world as well as clients in need of pro bono assistance. Our firm is headquartered in New York City with offices in Washington, D.C., Wilmington, London, Tokyo, Hong Kong, Beijing and Toronto.

We have long maintained a commitment to diversity and public service and our efforts to recruit and retain a diverse workforce have been recognised through rankings at the top of surveys addressing the hiring and retention of minority lawyers. Paul, Weiss is known for an unwavering dedication to representing those in need. From helping individuals facing injustice to championing a precedent-setting Supreme Court decision, our lawyers' *pro bono* work has contributed to significant outcomes that have improved the lives of many in our community and our nation.