GCR KNOW HOW MARKET REVIEW: CARTELS 2024

United States

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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 has historically focused its criminal enforcement efforts on hard-core cartels (price-fixing, bid rigging, and market allocation). Until several years ago, it had secured most of its largest fines from the prosecution of international cartels. Over the past few years, however, we have seen more enforcement with respect to domestic cartels, including investigations in the pharmaceutical, healthcare, construction, aerospace, technology and agriculture sectors. Fines resulting from US cartel enforcement remain low. However, compared to the previous year, cartel fines increased from US$1.5 million in 2022 to US$264.2 million in 2023.

The DOJ has continued to focus on collusion among employers, prosecuting 'no-poach' and wage-fixing agreements. To date, the DOJ has secured victories at the motion to dismiss stage in its no-poach and wage-fixing prosecutions, further to the DOJ's view that employment-related cartel behaviour should be treated no differently than cartel conduct affecting goods and services. The DOJ also obtained its first guilty plea in United States v Hee, a wage-fixing and no-poach case, in October 2022. However, the DOJ has yet to obtain a conviction in no-poach and wage-fixing cases at trial, losing trials in United States v DaVita and United States v Jindal. In 2023, the DOJ experienced multiple setbacks in its enforcement of labour markets, failing in both United States v Manahe et al, and United States v Patel to secure criminal convictions. In the DOJ's last remaining criminal no-poach case of the year, United States v Surgical Care Affiliates, LLC, et al, the court granted the DOJ's motion to dismiss the case. This voluntary dismissal by the DOJ appears to indicate an awareness of the challenges that it faces when seeking convictions on no-poach and wage fixing conduct.

Bid-rigging in government procurement has also been subject to the DOJ's scrutiny. This past year, the DOJ obtained its first guilty plea and sentence in United States v J & J Korea Inc, an investigation concerning bid-rigging of repair and maintenance subcontract work at US military hospitals in South Korea. Leading this investigation was the Procurement Collusion Strike Force (PCSF), a DOJ-led inter-agency partnership focused on deterring, detecting, investigating and prosecuting antitrust crimes in government programme funding. The PCSF has secured guilty pleas and indictments in construction and government contracting cases across the country, including in Alaska, California, Connecticut, Florida, Georgia, Montana, Michigan, Minnesota and Texas. In 2020, the PCSF team was expanded to include a global team to combat antitrust crimes and schemes at the international level.

In 2022, the DOJ announced an intention to seek and pursue potential criminal prosecutions based on violations of Section 2 of the Sherman Act, which outlaws monopolisation, attempted monopolisation, and conspiracy to monopolise. This presented a material shift in cartel enforcement policy, which has been focused on conspiracies to fix prices, rig bids, and allocate markets. In United States v Martinez, 12 individuals were indicted in November 2022 for conspiring to fix prices and monopolise the transmigrante forwarding services under Section 1 and Section 2 respectively. The trial is set for August 2024 and if this case proceeds, it will be the first criminal Section 2 case since the 1970s. In September 2022, the DOJ in United States v Zito, charged Nathan Zito, an owner of a paving and asphalt company, with a standalone violation of Section 2, claiming he attempted to monopolise the market for highway crack-sealing services in Montana and Wyoming. Practitioners in this space are waiting to see whether the DOJ is successful in prosecuting a monopolist on a standalone basis, without other antitrust or other criminal behaviour.

What do recent investigations in your jurisdiction teach us?

Last year saw the return of dawn raids. In October 2023, the DOJ along with the European Commission (EC), UK Competition and Markets Authority (CMA), and Turkish Competition Authority (TCA) worked together to conduct parallel raids at companies that supply chemicals used in the construction industry. These raids serve as a reminder that corporations must be prepared for dawn raids, and that competition authorities around the world remain in a cooperative posture and will look for ways to collaborate and coordinate investigations.

Over the course of 2022, the DOJ continued to push the boundaries of criminal enforcement and pursue cases with challenging facts. Defendants have responded to the DOJ's more aggressive approach by taking their chances at trial and often succeeding.

Last year, the DOJ, despite many losses, reaffirmed its commitment to aggressive enforcement in the labour market context. In United States v Manahe et al, the DOJ failed for a third time to secure a criminal conviction in a Section 1 no-poach case. The DOJ indicted the four executives for allegedly entering a no-poach agreement and fixing wages paid to home health caretakers. The defendants subsequently moved to dismiss the indictment but were unsuccessful. However, following a two-week trial, the jury acquitted all four defendants. Although the alleged agreement was reduced to writing, the defendants never reduced the wages of the home health aides to the pre-agreed rate nor signed the alleged agreement. In light of these facts, the jury was not convinced that the defendants agreed to fix wages and not solicit each other's employees.

In Patel, the DOJ experienced its fourth defeat in the sphere of Section 1 no-poach cases. Six executives were charged with one count of conspiracy in restraint of trade in violation of Section 1. The DOJ alleged in the indictment that each executive entered into a no-poach agreement regarding the employment of aerospace engineers. The court denied the DOJ's motion in limine that sought to prohibit the defendants from offering testimony regarding the procompetitive benefits of the alleged agreement. In denying the motion, the court reasoned that such evidence could be used to rebut whether the defendants joined the alleged conspiracy; whether the conspiracy existed; and whether the defendants had the requisite intent to join the conspiracy. At trial, the court rejected the DOJ's argument that all no-poach agreements were per se illegal market allocation agreements, and held that no reasonable juror could find the defendants guilty of a no-poach scheme beyond a reasonable doubt.

In its last remaining criminal no-poach case of the year, Surgical Care Affiliates, LLC, et al, the DOJ indicted the defendants but subsequently moved to dismiss the charges. The court agreed with the DOJ, granting its motion to dismiss the case with prejudice.

Despite its four losses and one voluntary dismissal in no-poach actions, the DOJ will likely continue to investigate businesses and individuals criminally for wage-fixing and no-poach agreements. Assistant Attorney General Jonathan Kanter stated in September of last year, after the four losses, that the DOJ is "just as committed as ever to, when appropriate, using . . . congressionally given authority to prosecute criminal violations of the Sherman Act in labour markets." Further echoing that sentiment, in December 2023, at a meeting with the Women's White Collar Defense Association, Deputy Assistant Attorney General Doha Mekki stated that the DOJ "look[s] forward to charging more no-poach and wage-fixing cases." However, to be successful in the future, the DOJ may need to select cases with more compelling facts and stronger evidence of harm to labour markets in order to be successful at trial.

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

The leniency programme continues to be an important element of the DOJ's enforcement efforts, and a substantial means of detecting cartel activity, although its strength and efficacy has been the subject of much discussion in the past several years. 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. 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.

A prospective leniency applicant must first and foremost consider the strength of the DOJ's case against the company. 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 self-report 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. Only one company can enjoy leniency in the US, and the benefits to "second-in"cooperators are far less substantial than those for the "first-in" leniency applicant.

In April 2022, the DOJ added a condition to its leniency policy to provide that the leniency applicant must, "upon its discovery of illegal activity, promptly report[] it to the Antitrust Division". This was a development from previous practice, as companies that have waited too long after learning of the cartel conduct in question will now not qualify for leniency. The DOJ also amended its FAQs to clarify the new promptness requirement. According to the FAQs, the DOJ will measure promptness from the earliest date on which an authorised representative of the applicant for legal matters – the board of directors, its counsel (either inside or outside) or a compliance officer – was first informed of the conduct at issue. An organisation will not be eligible for leniency if an authorised representative learns of potential illegal activity and refrains from investigating further. Similarly, an organisation that confirms its involvement in illegal activity and then chooses not to self-report until later learning that the DOJ has opened an investigation will not be eligible for leniency. Note that the DOJ concedes that "an organization may still be eligible for leniency if it conducts a preliminary internal investigation in a timely fashion" to be certain that a crime occurred. Ultimately, it is the applicant's burden to prove that its self-reporting was prompt, and the DOJ's determination will be "based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant". The new promptness requirement associated with leniency eligibility for reporting a violation makes it more important than ever that corporate counsel promptly investigate potential cartel behaviour. The days of a wait-and-see approach to applying for leniency appear to be long gone.

The DOJ also added a requirement that a leniency applicant must remediate the harm caused by the violation and improve its compliance programme once a violation occurs. Further, the DOJ revised its guidance for Type B leniency applications so that it would no longer presumptively protect current directors, officers and employees. Type B leniency applications differ from Type A leniency applications in that, to qualify for Type A leniency, an applicant must report the illegal activity before the Antitrust Division has received information about it from any other source. A company may still qualify for Type B leniency if it discloses the illegal activity before the Antitrust Division has evidence that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the company, and granting leniency to the applicant would not be unfair to others. The DOJ's revisions to potentially broaden liability for individuals in Type B leniency applications have impacted the calculus for prospective leniency applicants. A company must now consider that self-reporting could reasonably lead to prosecution of its own employees, including senior executives, who played a role in the unlawful agreement for which the company is seeking leniency.

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

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

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

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

In 2023 the DOJ continued to focus on cartel conduct affecting labour markets. Despite unsuccessfully securing convictions in the criminal no-poach context this past year, the DOJ continues to advance its theory that wage-fixing and non-solicitation cases are per se violations of Section 1 of the Sherman Act. This past year, the DOJ also secured its largest fine for domestic cartel conduct to date through the use of deferred prosecution agreements (DPAs). Additionally, the DOJ remained active this year in enforcing the rigging of bids and auctions in the procurement context.

The possibilities of a large criminal fine, an award of restitution as well as potential jail time for defendants have significantly increased the exposure that individuals and corporations face in no-poach cases. However, due to the DOJ's losses in the no-poach context this year in Manahe and Patel and the DOJ's own voluntary dismissal of the criminal no-poach case Surgical Care Affiliates, the law has shifted in favour of the defence side.

While the DOJ has had challenges in its labour market prosecutions, it has had more success in other sectors. Two manufacturers of generic pharmaceuticals, Teva Pharmaceuticals and Glenmark Pharmaceuticals faced allegations of price-fixing, bid-rigging, and market allocation schemes involving the supply of several generic medicines. Teva and Glenmark are now subject to a DPA, requiring each to pay US$250 million and US$30 million, respectively in criminal penalties and compliance monitoring, with Teva also donating US$50 million of drugs to humanitarian organisations. Both DPAs require each company to divest key business lines involved in the alleged price-fixing conspiracy. Deputy Assistant Attorney General Manish Kumar announced at the International Competition Network's 22nd Annual Conference that the DOJ hopes to use divestures as a remedy in other contexts in the future, not only with respect to generic pharmaceuticals.

The DOJ has also been successful in prosecuting misconduct in the government procurement space. On 12 September 2023, the DOJ, led by its PCSF unit, obtained its first guilty plea and sentence in J & J Korea Inc. J & J Korea and one of its co-conspirators rigged bids to ensure that J & J would win repair and maintenance subcontract work at US military hospitals in South Korea. This scheme led to the US Department of Defense (DOD) overpaying J & J US$3.6 million. The Korean subcontractor was sentenced to pay approximately, US$9 million in criminal fines and restitution for defrauding the DOD. J & J Korea Inc demonstrates that the PCSF unit is prosecuting schemes abroad that affect the US's domestic market. Manish Kumar stated that this sentence "demonstrates the importance of protecting U.S. taxpayer dollars both at home and abroad" and that the "Procurement Collusion Strike Force partners will continue to aggressively pursue bid-rigging and other collusion that targets the United States, even when criminals execute their schemes overseas."

At the close of the year, also in the government procurement context, a grand jury returned an indictment charging two executives with conspiracy to bid-rig and allocate territories in connection to forest-fighting services. The US Forest service engages in a competitive bidding process for forest-fighting service contracts. The DOJ alleged that the defendants coordinated bids to "squeeze" and "drown" competitors; accepted payment for fuel trucks at collusive rates; and attempted to conceal their conduct. This investigation was led by the DOJ's PCSF unit, inclusive of FBI agents, who intercepted judicially authorised phone calls between the defendants. A defining feature of PCSF investigations is the partnerships across agencies, including multiple US Attorneys' Offices and law enforcement agencies. These partnerships across enforcement agencies has expanded the tools available for the DOJ's investigations, which now not only includes the grand jury process, but also search warrants, consensually recorded communications, wiretaps and undercover agents. These partnerships will continue to prove crucial to the DOJ's investigations of government procurement in the future.

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

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

At trial, the DOJ bears the burden of proving to a jury, beyond a reasonable doubt, that a violation has occurred. In the past, it was 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. If a defendant is tried and convicted, it may be able to appeal that decision to the applicable Court of Appeals.

Though the DOJ has pushed for trial in suits against corporate defendants in the labour market context, it has been unsuccessful in advancing its position. The agency suffered a big blow in April 2023 when US District Judge Victor A Bolden threw out Patel, a high-profile no-poach criminal case, under Federal Rule of Criminal Procedure Rule 29 before it could even reach the jury. The federal judge held that as a matter of law, this case does not involve a market allocation scheme under the per se rule and no reasonable juror could convict based on the evidence. The judge's ruling makes this the first acquittal under Rule 29 for antitrust charges in more than 20 years. Even more notable was Judge Bolden's reluctance to adopt the DOJ's theory that all wage-fixing and non-solicitation agreements are per se violations of Section 1 of the Sherman Act. In Patel, Judge Bolden imposed a higher bar: that the DOJ cannot simply show that a no-poach agreement existed to succeed at trial, but must prove that the defendants making the alleged no-poach agreements intended to end meaningful competition in the relevant labour market. This ruling, like others, in the labour context will stand as an obstacle to the DOJ's efforts to prosecute no-poach conduct criminally.

How is private cartel enforcement developing in your jurisdiction?

Private cartel-related cases tend to take the form of class action litigation brought on behalf of consumers or entities that purchased the affected products, and private cases by larger purchasers. Because civil cases, especially large class actions, can take years to resolve, private cartel litigation can remain 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; 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.

Further, companies face additional costs associated with discovery and expert representation. Lawsuits by state attorneys general may add to the costs of private antitrust litigation in the US. In the follow-on civil litigation 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 fines imposed by the DOJ.

What developments do you see in antitrust compliance?

In July 2019, the DOJ announced a new policy to incentivise corporate antitrust compliance programmes. The DOJ will now consider (and potentially provide credit for) robust 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 prosecutors' evaluation of corporate compliance programmes at the charging and sentencing stages. In June 2020, the DOJ further clarified its new policy, explaining that there is no one-size-fits-all model for corporate compliance programmes. Instead, the DOJ will focus broadly on the programme's design, whether it was implemented in good faith and whether it actually works in practice. These open-ended considerations are viewed with other factors, such as the size of the company, to evaluate the compliance programme. Notably, the DOJ may credit a compliance programme even if it failed to detect a violation.

In light of the DOJ's update of its leniency programme to include a promptness requirement as a condition for eligibility, it is more important than ever to detect possible cartel violations as soon as they arise. In another policy update in April 2022, the DOJ made clear that the leniency applicant must now endeavour "to improve its compliance program to mitigate the risk of engaging in future illegal activity".

A compliance programme should also ensure that records associated with conduct related to a potential leniency application are properly collected and preserved. Businesses, even those located in foreign jurisdictions, must now ensure that they preserve, collect and produce all relevant records that could assist with a leniency application. In a January 2023 update, the DOJ made clear that when a foreign jurisdiction's privacy or 'blocking statutes' prohibit the processing or transfer of protected records, the applicant now bears the burden of establishing the existence of any restriction on production and identifying reasonable alternatives to provide these records to the Antitrust Division. The applicant must work diligently to identify all available legal bases to provide such records to the division. With the rise of cloud-based platforms, there are new hurdles associated with collecting data. Businesses need to be aware of who the relevant custodians are and where they are located. Data associated with a particular custodian can be available through a cloud in the US or abroad and may be subject to the data privacy laws of several jurisdictions. Businesses must be aware of applicable data privacy laws and ensure that data transfer agreements are in place before removing data from foreign jurisdictions.

Additionally, given the widespread use of embedded attachments, having a strong understanding of your business's technology infrastructure is crucial. Due to developments in data collection, there are now tools that can detect and collect documents embedded in links. However, those collecting company data need to be cognisant of version control issues and the creation of family relationships amongst documents with attachments.

Further, last June, Deputy Assistant Attorney General Manish Kumar stated that the DOJ is "laser-focused on increasing the risk that cartel conduct will be detected — not only to maintain the incentives for a wrongdoer to seek leniency, but also to make sure that antitrust risk is front and centre when companies are deciding where to invest in compliance." In October 2023, Deputy Attorney General Lisa Monaco announced that the DOJ will be offering leniency to companies that self-report misconduct they inherit through corporate transactions. To benefit from this safe harbour, the company must identify and report the entity's misconduct within six months of the closing date of the transaction, regardless of whether the misconduct was discovered pre or post-acquisition. Extending this safe harbour allows compliant companies to avoid successor liability by engaging in pre-transaction due diligence and self-reporting misconduct in a timely fashion.

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

As noted above, despite several setbacks, the DOJ will continue to pursue its detection of cartels in the labour market context. The DOJ will endeavour to learn from its mistakes in its no-poach trials of 2023, and use its best efforts to secure its first no-poach victory in the future. Clients should continue to audit their labour-related agreements to ensure they are complaint with the agencies' positions on wage-fixing, no-poach and non-compete agreements.

Looking ahead to the new year, a new focus for enforcement agencies will be scrutinising pricing tools and artificial intelligence (AI). DOJ Assistant Attorney General Jonathan Kanter emphasised the DOJ's commitment to "building the technical and substantive infrastructure to address artificial intelligence and their complex digital tools." As AI develops in the next few

years and continues to reshape and disrupt economies, enforcers will have to grapple with the issue of how to hold companies or individuals liable for anticompetitive conduct unknowingly engaged in and attributable to AI.

In October 2023, President Biden issued an executive order in support of the FTC's decision to play an increasing role in rulemaking with regards to competition issues in AI. Soon after, the FTC approved a resolution permitting the use of compulsory processes in non-public investigations that involve AI.

In November of last year, the DOJ filed a statement of interest (SOI) in an action involving the use of third-party pricing algorithms. The DOJ laid out its views in the SOI, arguing that price fixing via algorithm software is per se illegal under antitrust laws. Clients that use big data and algorithms or third-party software to inform pricing and other competitive decisions should look carefully at whether such use may constitute improper horizontal coordination.

For the 2026 FIFA World Cup, the US, Mexico, and Canada are launching a joint initiative across their enforcement agencies to detect collusive schemes to prevent businesses from exploiting the economic opportunities created by the World Cup. This group will focus on outreach, prevention and deterrence. They will raise awareness of potential illegal conduct to FIFA, local sports federations and club owners. The aim of this group is to make the bidding process more competitive to get the best terms and conditions. Some examples of sectors that the initiative will focus on in detecting cartels include: hospitality, food & beverage, publicity and construction. Companies that plan to do business in connection with this global event need to be mindful of complying with applicable law in the US and elsewhere.

How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

At the start of the pandemic in the United States, the DOJ issued a strong warning, stating that it planned to hold market participants accountable for violating 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.

On 17 February 2022, the DOJ announced an initiative to protect Americans from supply chain disruptions caused by the covid-19 pandemic. Assistant Attorney General Kanter commented that the Antitrust Division would not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions. As part of the initiative, the DOJ prioritised investigations where competitors may be profiting from exploiting these challenges. The DOJ also took action to investigate collusion in industries particularly affected by supply chain disruptions, such as agriculture and healthcare. The DOJ also formed a working group focused on global supply chain disruption with 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.

On 28 February 2022, the DOJ and FMC (the Federal Maritime Commission) reaffirmed their commitment to strengthening cooperation between the agencies and enforcing the antitrust laws. US Attorney General Merrick Garland and FMC chairman Daniel Maffei announced two steps that the agencies would take to build upon their MOU: the DOJ committed to providing attorneys and economists from the Antitrust Division to assist the FMC in enforcing violations of the Shipping Act and FMC regulations; and the FMC committed to providing the division with support and industry expertise in civil and criminal antitrust investigations. This collaboration came to fruition in March 2022, when the DOJ launched an investigation into collusion in the market for ocean freight transportation. The DOJ's investigation has come after shippers, retailers, manufacturers and agricultural interests have complained over the sudden increases in fees that emerged during the pandemic in an industry where over 80 per cent of the volume is now controlled by three alliances. The FTC has also investigated supply chain disruptions related to the covid-19 pandemic: in November 2021, the agency ordered nine retailers, including Walmart and Amazon, to provide detailed information concerning the causes behind ongoing supply chain disruptions and the effect of those disruptions on consumers. The FTC accepted public comments related to these disruptions in 2022, but ultimately did not bring suit.

Enforcement agencies have also been focused on detecting pandemic-related fraud. In May 2021, US Attorney General Merrick Garland, created the Covid-19 Fraud Enforcement Task Group. The task force combines resources of the DOJ in partnership with other government agencies to identify and prosecute covid-19 related fraud and recoup stolen funds to taxpayers. In September 2022, the DOJ launched three interagency Covid Fraud Strike Forces to conduct cross-country covid fraud enforcement sweeps. These initiatives have had great success. Last year, Deputy Attorney General Lisa Monaco announced at a roundtable discussion with senior DOJ officials and their investigative partners that the coordinated effort resulted in 718 enforcement actions, inclusive of criminal and civil charges, forfeitures, guilty pleas and sentencing, totalling over US$836 million in covid-19 related fraud. Last year, two additional strike forces were launched to join efforts in bringing justice to those who were defrauded during the pandemic. Enforcement in this area will continue to be a priority; Monaco stated last August that "[w]e will continue to prosecute those who have committed pandemic relief fraud, at home and abroad. We will also continue to aggressively deploy our forfeiture and restitution tools in every case to recover stolen funds."

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 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 prosecution of some foreign nationals who may have engaged in the 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 may be more effective.

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Adam regularly represents clients in criminal antitrust investigations by the US Department of Justice and has served as lead coordinating counsel for clients under investigation in multiple jurisdictions by other international governmental agencies.

Adam also defends clients in cartel class action lawsuits across the United States, as well as private antitrust litigation, including disputes regarding exclusivity, bundling and tying, joint ventures and group boycotts. Additionally, he has substantial experience counselling in the antitrust and IP area, including regarding the antitrust legality of patent pools, standard setting activities and technology transactions among competitors. Adam is an adjunct professor at Columbia Law School, where he teaches a course on international antitrust cartels.

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