

The International Comparative Legal Guide to:

# Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



Published by Global Legal Group with contributions from:

Advokatfirmaet Selmer DA

Allende & Brea

Allens Arthur Robinson

Andreas Neocleous & Co. LLC

Balcar Polanský Eversheds s.r.o.

bpv Braun Haškovcová s.r.o.

Brigard & Urrutia Abogados S.A.

Camilleri Preziosi

Cleary Gottlieb Steen & Hamilton LLP

Crowell & Moring

ELIG, Attorneys-at-Law

Elvinger Hoss & Prussen

Grau García Hernández & Mónaco

J Sagar Associates, Advocates and Solicitors

Kim & Chang

Liniya Prava

LMR Attorneys Ltd.

Loze, Grunte & Cers

Luiga Mody Hääl Borenus

Magalhães, Nery e Dias Advocacia

Marques Mendes & Associados

Meitar Liquornik Geva & Leshem Brandwein

Nagashima Ohno & Tsunematsu

Nysingh advocaten-notarissen N.V.

Odvetniki Šelih & Partnerji

Pachiu & Associates

Penkov, Markov & Partners

PI Partners

Plesner

Preslmayr Rechtsanwälte OG

SAI Consultores, S.C.

Schellenberg Wittmer

Setterwalls

SJ Berwin LLP

Sutkiene, Pilkauskas & Partners

Szecskey Attorneys at Law

Webber Wentzel

Wilson Harle

WKB Wierciński Kwiecieński Baehr

# USA

Michael Lazerwitz



Adam Miller



## Cleary Gottlieb Steen & Hamilton 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?

Section 1 of the Sherman Act, 15 U.S.C § 1, criminalises agreements in restraint of trade. Both corporations and individuals are subject to criminal prosecution for cartel conduct including price fixing, bid rigging, and horizontal market allocation. The same conduct can also be separately subject to state enforcement actions and private actions for civil damages.

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

Section 1 provides, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”. While this broad language could be read to apply to a staggering range of business conduct that arguably “restrains” trade, it is tempered by well-developed case law and prosecutorial practice. As applied, U.S. criminal cartel enforcement focuses on so-called “hardcore” antitrust offences: price fixing; bid rigging; and market allocation among competitors.

#### 1.3 Who enforces the cartel prohibition?

The Antitrust Division of the United States Department of Justice (“DOJ”) is primarily responsible for conducting investigations and prosecuting companies and individuals for cartel violations. For the most part, cartel investigations are conducted according to the same rules as all other criminal prosecutions. DOJ must convene a grand jury to issue subpoenas for testimony and documents, but has a large degree of discretion as to how best to collect uncompelled evidence. In order to secure a conviction, DOJ must either prove its case in federal court or negotiate a plea agreement with the accused.

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

It is Antitrust Division policy to open an investigation only where there is credible evidence or suspicion of a significant “hardcore” violation of the antitrust laws. Whether the evidence or suspicion is credible is a matter of prosecutorial discretion, rather than the subject of a strict legal standard. Similarly, the significance of a potential

violation is largely a subjective determination based on such considerations as the volume of commerce affected, the geographic area affected, the potential for expansion of the investigation into other industries and the deterrent impact and visibility of the investigation. After conducting an investigation, DOJ will decide to pursue charges only if it believes that it has admissible evidence that will probably be sufficient to obtain a conviction.

DOJ conducts its investigations in conjunction with a federal grand jury. Federal law makes the grand jury proceeding secret. Accordingly, the target(s) of a grand jury investigation will learn about the existence of a case only when a subpoena or search warrant is served.

During the course of its investigation, DOJ will present its evidence to the grand jury, which can decide to bring formal charges, in the form of an indictment, based on a finding of probable cause to believe the defendant committed the alleged offence. The indictment will describe the charges alleged, but will ordinarily not describe the government’s evidence in detail.

To secure a conviction on the indictment, DOJ must prove its case to a jury beyond a reasonable doubt. Of course, defendants have the opportunity fully to present exculpatory evidence during the trial. After conviction, the judge determines the sentence.

Nonetheless, very few cartel cases are ever tried. Instead, most convictions are the result of plea agreements negotiated between the defendants and DOJ. Individual and corporate defendants are typically afforded ample opportunity to cooperate and negotiate with DOJ officials after receiving a grand jury subpoena.

#### 1.5 Are there any sector-specific offences or exemptions?

There are a number of industry-specific exemptions from the application of U.S. antitrust laws. For example, there are statutory exemptions that may apply to industries such as international shipping, communications, energy, agricultural cooperatives, organised labour, insurance, and sports leagues. There is also a statutory exemption that allows otherwise competing companies to coordinate their export sales in certain specific circumstances.

These exemptions are narrowly interpreted and generally disfavoured. Companies should exercise great caution and seek legal advice before engaging in any coordinated conduct that may restrict competition based on a belief that an exemption may apply.

There are also several judicially created exemptions and immunities from the antitrust laws. For example, the Noerr-Pennington doctrine, which is based on the constitutional right to petition the government, protects companies from allegations that their lobbying or litigation activities harm competition. Another

example of a judicially created exemption is the state action immunity doctrine, which can protect companies whose alleged anticompetitive conduct is the result of state regulation.

**1.6 Is cartel conduct outside USA covered by the prohibition?**

Regardless of where it occurs, cartel conduct that has substantial effects in the United States is prohibited under U.S. law and can result in criminal prosecutions and civil damages judgments. DOJ officials have repeatedly stressed that the prosecution of international cartels is among the Antitrust Division’s highest priorities. In that regard, DOJ has successfully prosecuted companies and individuals from countries around the world. Individuals from Japan, Korea, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom have served jail time in the United States for cartel violations.

Investigations of non-U.S. conduct do, however, pose at least two significant complications. First, it can be difficult for DOJ to obtain access to evidence that is physically located outside the United States. Second, it can be difficult to establish the jurisdiction necessary to prosecute non-U.S. individuals.

DOJ has a number of tools available to help it overcome the first obstacle. Perhaps most importantly, companies have frequently sought to take advantage of DOJ’s leniency policy. In exchange for amnesty from prosecution, DOJ expects leniency applicants to provide evidence of wrongdoing wherever it is physically located. DOJ also has cooperation agreements with antitrust regulators in Australia, Canada, the European Union, Germany, Brazil, Israel, Japan, and Mexico. Cooperation with these agencies has led to international coordination of the timing of dawn raids, searches, service of grand jury subpoenas, drop in interviews, and assistance in obtaining evidence from outside the United States.

DOJ has also been aggressive in asserting jurisdiction over non-U.S. individuals. It has coordinated closely with U.S. immigration authorities to implement border watches for suspected cartel offenders and material witnesses. These border watches can lead to the detention, questioning and potential prosecution of suspected offenders who try to enter the United States.

DOJ has also targeted suspects while they travel outside the U.S. by issuing INTERPOL Red Notices. These notices are in effect a request that international law enforcement agencies arrest the suspected cartel offender to allow DOJ an opportunity to seek extradition to the United States. DOJ uses Red Notices specifically to target non-U.S. cartel participants who might otherwise simply avoid the United States.

DOJ broke new ground in international cooperation and the prosecution of non-U.S. individual in December 2007 when it reached plea agreements with three British nationals that anticipated criminal prosecutions in the U.K. and in effect allowed the defendants to serve the agreed jail sentences in the U.K. The three defendants have since also pleaded guilty in the U.K. and been sentenced to prison by the U.K. courts.

**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

Investigatory power	Civil / administrative	Criminal
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	Yes	Yes*
■ Right to retain original documents	Yes	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 Specific or unusual features of the investigatory powers referred to in the summary table.**

The primary investigatory tool is the grand jury subpoena, which can compel the production of documents or testimony before the grand jury. DOJ has broad discretion in issuing subpoenas on behalf of the grand jury.

In order to conduct unannounced searches of businesses or residences, seize or image computer hardware, or secure premises, DOJ must get a search warrant issued by a federal judge or magistrate judge. The search warrant must describe the documents or things that DOJ expects to find. Before a search warrant is issued, DOJ must convince the judge or magistrate that there is probable cause to believe that the property to be seized is evidence of the commission of a crime.

Technically, DOJ cannot compel an individual to participate in an interview in connection with a criminal investigation. It can, however, issue a subpoena requiring the individual to testify before the grand jury. DOJ can also overcome an individual’s Fifth Amendment right against compelled self-incrimination by granting the witness “use immunity”. Use immunity protects the witness from prosecution based on his own testimony before the grand jury, but does not prevent a prosecution based on independently developed evidence.

In addition to its criminal investigations, DOJ can conduct civil investigations and issue Civil Investigative Demands that can function as subpoenas for documents and testimony. In general, DOJ does not use its civil investigative powers in cases involving “hardcore” cartel conduct, which as a matter of policy it treats as criminal conduct.

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

DOJ cartel investigations can involve surveillance of suspected cartel activities. There have been several well-publicised cases in which a cooperating witness has helped DOJ tape telephone calls or videotape meetings among cartel participants. When there is a cooperating witness who consents to monitoring, no court approval is needed.

Even without a cooperating witness, DOJ can apply for a court

order allowing it to videotape, tap phones, or otherwise intercept oral communications. As with search warrants for documents and things, DOJ must convince a court that the surveillance may provide evidence of criminal violations of the antitrust laws. No court order is needed to observe a person's movements in public.

Finally, as mentioned above, DOJ uses border watches to detect individuals' entry into the U.S. and INTERPOL Red Notices to track suspects' international movements.

#### 2.4 Are there any other significant powers of investigation?

One of DOJ's most important and effective investigative techniques is its leniency programme, which is described in detail below.

DOJ has also aggressively sought the extradition of individuals who have been indicted for antitrust offences. Until recently, extradition from any country was highly unlikely because most extradition treaties require the conduct in question to be criminal in the country from which extradition is sought. As additional countries treat hardcore cartel offences as a crime, the likelihood of extradition for antitrust offences will certainly increase.

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

Lawyers from DOJ and agents from the Federal Bureau of Investigation ("FBI") will jointly execute search warrants, conduct drop in interviews, and perform unannounced searches. On occasion other law enforcement agencies may be involved as well. They will not wait for legal advisors to arrive before executing searches for documents and other evidence, but cannot continue to question individuals after the witness requests to have a lawyer present.

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

Communications involving in-house lawyers are protected by the rules of privilege to the same extent as communications with outside counsel. In general, communications between lawyers and their clients for the purposes of giving or receiving legal advice are protected from discovery by DOJ and civil plaintiffs. If, however, the lawyer's services are used in furtherance of a crime or fraud an exception to the general rule may apply and the communications may be discoverable.

#### 2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The Fifth Amendment to the U.S. Constitution protects individuals from being compelled to give testimony that would incriminate them in a crime. Individuals who are targets of cartel investigations can invoke this right in interviews and to resist grand jury subpoenas for testimony. If a witness invokes his Fifth Amendment right and refuses to testify before the grand jury, DOJ can overcome his objection by granting use immunity. With a grant of use immunity, the witness can no longer invoke a Fifth Amendment right because his testimony cannot be used directly to incriminate him.

The Fifth Amendment right against compelled self-incrimination does not apply to companies and does not prevent the discovery of documents and things.

#### 2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Obstruction of justice is a separate crime that is separately punishable with fines and jail time. Obstruction charges can result from the destruction of documents and other evidence or other attempts to mislead prosecutors and cover up wrongdoing.

Since 2000, DOJ has prosecuted eleven corporations and twenty-three individuals for obstruction offences in connection with cartel investigations.

### 3 Sanctions on Companies and Individuals

#### 3.1 What are the sanctions for companies?

The maximum fine under the Sherman Act (as amended) for a corporation found guilty of cartel conduct is \$100 million. An alternative sentencing statute, however, allows for fines up to twice the gain derived from the criminal conduct or twice the loss suffered by the victims. DOJ has successfully used this alternative sentencing provision to obtain fourteen fines in excess of \$100 million, with the largest ever fine of \$500 million levied against F. Hoffman Laroche, Ltd. in 1999 for its participation in the vitamins cartel.

Conviction can also result in debarment from participation in contracts with the U.S. government. For companies that do business with government, this can be a substantial additional financial penalty.

#### 3.2 What are the sanctions for individuals?

Individuals face fines of up to \$1 million and prison sentences of up to 10 years. There is also an alternative sentencing statute that applies to individuals that similarly allows fines up to twice the gain to the individual or twice the loss suffered by the victims. In general, however, sanctions for individual cartel participants have focused on jail time rather than large fines.

#### 3.3 What are the applicable limitation periods?

The limitations period for criminal violations of the Sherman Act is five years. In order to sustain a conviction, DOJ must bring charges against a defendant before the end of the limitations period. Determining precisely when the limitations period ends for a given conspirator can be a complicated question. In general, the period runs from the last overt act in furtherance of the conspiracy.

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

It is common for companies to advance the legal costs of employees that are subject to cartel investigations. Whether the employee has an obligation to return the advanced funds upon conviction depends on the company's articles and bylaws and the corporate law applicable to the company. Unlike other parts of the Department of Justice, the Antitrust Division has not publicly expressed scepticism about the quality of a company's cooperation because of a decision to advance the legal costs of employees.

Sanctions against individuals do include fines, but principally focus on jail time. Under 18 U.S.C. § 3572 a company may not pay the criminal fines of its employees unless expressly permitted to do so under state law.

## 4 Leniency for Companies

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

DOJ has widely publicised its leniency programme, which automatically provides complete amnesty from prosecution for the first company to report anticompetitive conduct if all other programme requirements are met. Under DOJ's leniency policy (available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>), there are two types of leniency, with slightly differing requirements depending on whether DOJ already has an ongoing investigation.

Type A leniency is available before an investigation has begun. To qualify for Type A leniency, a company must meet several requirements: (1) DOJ must not have received information about the reported illegal activity from any other source; (2) the company must have taken prompt and effective action to end its participation in the criminal activity upon its discovery; (3) the company must report the conduct with candor and provide full, continuing and complete cooperation throughout the investigation; (4) the confession must be a corporate act rather the isolated confession of a few individuals; (5) where possible, the corporation must make restitution to injured parties; and (6) the company must not have coerced others into participating in the conduct, and must not have been the leader in or originator of the illegal activity.

If the requirements for Type A leniency are not met, a company can still qualify for Type B leniency, even if there is an existing investigation. To qualify for Type B leniency: (1) the company must be the first to come forward and qualify for leniency; (2) DOJ must not yet have evidence against the company that is likely to result in a conviction; (3) upon discovery of the activity, the company must have taken prompt and effective action to terminate its part in the activity; (4) the company must report the conduct with candor and provide full, continuing and complete cooperation throughout the investigation; (5) the confession must be a corporate act rather the isolated confession of a few individuals; (6) where possible, the corporation must make restitution to injured parties; and (7) a grant of leniency must not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, when the corporation comes forward, whether the company coerced others into participating in the conduct, and whether the company was the leader in or originator of the illegal activity.

If the company qualifies for Type A leniency, all current officers, directors and employees who admit their wrongdoing and cooperate with the investigation will also receive amnesty from prosecution. If the company qualifies for Type B leniency, individuals who admit their wrongdoing and cooperate with the investigation will be considered for amnesty on the same terms as if they had approached DOJ individually (as described below). As a matter of practice, however, DOJ generally grants leniency to employees of Type B applicants in the same manner that it does for employees of Type A applicants. While not required to do so by the Corporate Leniency Policy, DOJ can also agree to include former officers, directors and employees that cooperate in the grant of leniency to the company.

Legislation passed in 2004 provides an additional incentive for a company to seek amnesty. Under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), a company that receives amnesty from DOJ and cooperates with plaintiffs in civil actions for damages against other members of the cartel faces reduced exposure to civil damages. Ordinarily, civil plaintiffs in antitrust cases can recover three times their actual damages. Under ACPERA, a company with amnesty is only liable for actual damages.

Only one company has ever had its amnesty revoked. DOJ revoked its amnesty agreement with Stolt-Nielsen in a dispute over whether the company had ended its participation in the illegal activities promptly after they came to the attention of the company's general counsel and board of directors. After the grand jury indicted Stolt-Nielsen, the company recently convinced the district court to enforce the amnesty agreement and dismiss the indictment.

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

DOJ policy includes a marker system that allows a company to secure its place as the first company to cooperate even if it has not completed its internal investigation and is not yet ready to provide all relevant evidence. DOJ will then set a deadline for the company to complete its investigation, report its findings to DOJ and perfect its amnesty application. A 30-day period for an initial marker is common, although the length of the period will vary depending on the circumstances. There is no requirement that the evidence presented be sufficient on its own to sustain convictions against the other conspirators. Instead, a company need only report that it has uncovered information or evidence suggesting a possible criminal antitrust violation.

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

Initial applications can be made orally, although the required cooperation will include the production of relevant documents and interviews of witnesses with knowledge of the illegal activities. A written summary of incriminating evidence is not required.

### 4.4 To what extent will a leniency application be treated confidentially and for how long?

As a matter of policy, DOJ keeps confidential the identity of the leniency applicant and any information it provides. DOJ will not disclose the identity of an amnesty applicant unless it is previously disclosed elsewhere or the applicant agrees to the disclosure.

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

The leniency applicant must continue to fully cooperate through the entire course of the investigation and prosecution of the co-conspirators.

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

Yes. DOJ actively promotes the availability of "amnesty plus," which allows companies that are already the subject of a cartel investigation to get a reduced fine in the existing investigation by applying for amnesty in a new product area or industry. Companies that fail to take advantage of DOJ's Amnesty Plus programme risk facing "Penalty Plus". The Penalty Plus policy applies to companies that are the target of an ongoing investigation and that fail to report illegal antitrust activity in other product areas or industries. Under the Penalty Plus policy, DOJ may ask the sentencing court to consider the company's failure to report to be an aggravating factor and to impose a more severe penalty than the company would otherwise receive.

## 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.

Individuals can report cartel conduct independently of their employer and receive leniency for their cooperation. Under DOJ's Leniency Policy for Individuals (available at <http://www.usdoj.gov/atr/public/guidelines/0092.htm>), individuals can automatically receive complete amnesty for reported conduct if: (1) DOJ has not already received information about the illegal activity from any other source; (2) the individual reports his wrongdoing with candor and provides full, continuing, and complete cooperation throughout the investigation; and (3) the individual did not coerce another party to participate in the activity and was not a ringleader of the illegal activity.

If the individual does not meet these requirements, informal immunity may still be available on a case-by-case basis. There are no financial incentives available for individual whistleblowers.

If an individual comes forward after his employer has sought amnesty under the Corporate Leniency Policy, his application for leniency will be considered solely under the terms of the Corporate Leniency Policy.

## 6 Plea Bargaining Arrangements

- 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

Nearly all convictions of both companies and individuals for antitrust offences are the result of negotiated plea agreements between the defendants and DOJ. Once an investigation becomes public (either through the service of grand jury subpoenas or the execution of search warrants), DOJ will typically be in periodic contact with the defendants' lawyers. At any point in the life of the investigation a defendant can seek to negotiate an agreement to resolve the potential charges against it. In order to do so, the defendant will have to agree to admit to the charges in court (enter a guilty plea) and cooperate with prosecutors if the investigation is going to continue.

In exchange, the defendant will get varying amounts of credit for its cooperation depending on how far DOJ's investigation has progressed at the time of the negotiation. DOJ has emphasised that the second company to cooperate can earn significant credit, even though there is no clearly defined reduction in fine for the second company to cooperate.

Instead, penalty negotiations begin with a calculation of a fine under the Federal Sentencing Guidelines ("the Guidelines"). All aspects of the Guidelines calculation, including the amount of commerce affected, are subject to negotiation. If the negotiations bear fruit, the defendant and DOJ will enter a written agreement that typically includes a commitment from DOJ as to the sentence that it will recommend.

Regardless of what is agreed between the defendant and DOJ, a federal judge must approve the plea agreement. The judge is free to reject the plea agreement. In those instances, the DOJ or defendant might seek to revise the original plea agreement. In practice, however, judges typically impose the agreed sentence.

## 7 Appeal Process

- 7.1 What is the appeal process?

Criminal antitrust convictions are subject to the same appeals process as all other federal criminal cases. An appeal challenging a conviction to the relevant federal circuit court of appeals is available as a matter of right. Further appeal to the United States Supreme Court is at the discretion of the Court. In general, appeals must be based on procedural or legal errors by the trial judge, rather than on the factual conclusions reached by the jury.

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

In the absence of a plea agreement or civil settlement, criminal sanctions (i.e., fines and jail time) can only be imposed after a jury trial in open court. The opportunity to cross-examine witnesses at trial is a constitutionally protected right. There is no cross-examination of witnesses on appeal after conviction.

## 8 Damages Actions

- 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Follow-on litigation for civil damages is an inevitable result of a DOJ cartel investigation. Under Section 4 of the Clayton Act, 15 U.S.C. § 15, injured parties can bring suit against cartel members and collect three times the amount of damage actually inflicted by the anticompetitive conduct.

Each individual cartel defendant can also be held jointly and severally liable for the damages of the entire cartel, with no right of contribution. This means that any single firm can be made to pay treble damages on behalf of all co-defendants. Successful plaintiffs can also recover their reasonable attorney's fees.

Defendants often find themselves facing potential exposure to multiple claimants. Each link in a company's distribution chain - direct purchasers, retailers, and consumers - can sue as a class for damages under antitrust laws in the United States. Additionally, large purchasers and state attorneys general often sue individually outside of a class to maximise their recovery from defendants. If the company is listed on a U.S. stock exchange, there may also be shareholder litigation based on the impact of the antitrust litigation on the share price and the company's failure to disclose the conspiracy.

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

Yes, there is well-developed precedent and an active plaintiffs' bar to pursue claims on behalf of classes of injured purchasers. Both federal direct purchaser claims and state law indirect purchaser claims are typically brought on behalf of a class of all similarly situated purchasers.

- 8.3 What are the applicable limitation periods?

The limitations period for private federal damages actions is four years. Claims under specific state antitrust statutes vary, and in some instances may be longer. Determining precisely when the

limitations period ends for a given conspirator can be a complicated question. In general, the period runs from the last overt act in furtherance of the conspiracy.

There are, however, a number of doctrines available to extend the limitations period. Perhaps the most frequently invoked is “fraudulent concealment” in which the plaintiff argues that had no notice of its claim because the defendants acted to deceive the alleged victims of the conspiracy.

---

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

---

Successful plaintiffs can recover their reasonable attorney’s fees.

---

#### 8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

---

Yes. Private damages cases regularly result in negotiated settlements. Damages in civil cases can quickly eclipse criminal fines. Even for small price effects, calculating damages across all of an industry’s sales over a period of years to the entire U.S. and then trebling that amount can result in judgments or settlements of hundreds of millions of dollars or more. For example, after paying a total of \$875 million in criminal fines, in 1999 seven manufacturers involved in the vitamins cartel settled the follow-on class action lawsuit for \$1.2 billion. More recently, Visa and MasterCard settled a class action antitrust lawsuit for \$3.4 billion in damages and injunctive relief valued between \$25 to \$87 billion.

---

## 9 Miscellaneous

---



---

### 9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

---

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increased the statutory penalties for corporations and individuals. The maximum corporate fine under the Sherman Act was increased from \$10 million to \$100 million. The maximum fine for individuals increased from \$350,000 to \$1,000,000 and the maximum jail sentence increased from three years to ten years.

---

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

---

Perhaps more so than anywhere else in the world, there is active public and private cartel enforcement in the U.S. DOJ has successfully used its leniency policy to generate cases. As of the end of 2007, there were roughly 135 pending grand jury investigations, including more than 50 investigations of suspected international cartel activity, many of which were the result of amnesty applications. At the same time, an active private plaintiffs’ bar has also investigated and brought its own cases, some of which have served to spark DOJ investigations. State governments also enforce their own antitrust laws, or may seek to apply general principles of fraud or unfair business practices to cartel conduct. The result of this myriad enforcement activity is an increasing likelihood of exposure of illicit cartel conduct. Coupled with the potentially profound financial and reputational damage that can result once illegal conduct is exposed, effective antitrust compliance policies are of growing value to companies wherever in the world they are located.

**Michael Lazerwitz**

Cleary Gottlieb Steen & Hamilton LLP  
2000 Pennsylvania Ave NW  
Washington, DC 20006  
USA

*Tel:* +1 202 974 1500  
*Fax:* +1 202 974 1999  
*Email:* mlazerwitz@cgsh.com  
*URL:* www.cgsh.com

Michael R. Lazerwitz is a partner at Cleary Gottlieb Steen & Hamilton LLP based in the Washington, D.C. office. His practice includes a range of commercial, governmental enforcement, and criminal litigation. In the enforcement context, Mr. Lazerwitz has conducted internal corporate investigations and represented companies and individuals in criminal antitrust investigations and prosecutions brought by the Department of Justice and foreign competition authorities.

Mr. Lazerwitz served for more than three years as an Assistant to the Solicitor General, U.S. Department of Justice, where he represented the United States and various federal agencies before the U.S. Supreme Court. Before serving in the Solicitor General's office, Mr. Lazerwitz was a prosecutor with the U.S. Attorney's Office for the Eastern District of Pennsylvania. He was a law clerk to Chief Justice Warren Berger of the U.S. Supreme Court and to Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit.

**Adam Miller**

Cleary Gottlieb Steen & Hamilton LLP  
2000 Pennsylvania Ave NW  
Washington, DC 20006  
USA

*Tel:* +1 202 974 1500  
*Fax:* +1 202 974 1999  
*Email:* amiller@cgsh.com  
*URL:* www.cgsh.com

Adam J. Miller is an associate at Cleary Gottlieb Steen & Hamilton LLP based in the Washington, D.C. office. Mr. Miller's practice includes representing corporations and individuals that find themselves subject to government investigations or civil litigation alleging violations of federal antitrust and securities laws. He has advised clients on the conduct of internal investigations of antitrust compliance, as well as participated in independent investigations into potential corporate wrongdoing. Mr. Miller has represented clients through all stages of criminal cartel investigations, from responding to initial grand jury subpoenas to cooperation with the antitrust authorities and ultimately to a negotiated plea agreement.

## CLEARY GOTTLIEB

Cleary Gottlieb's antitrust/competition practice is one of the largest and most established in the world, comprising 27 partners and approximately 130 counsel and associates based in Brussels, Paris, London, Moscow, Frankfurt, Cologne, Rome, Milan and Washington D.C. With leading lawyers practicing in most of the firm's offices, the breadth and depth of Cleary Gottlieb's competition/antitrust practice is unmatched. Given the growing cooperation among regulators in Europe and the U.S., competition/antitrust lawyers from the firm's different offices work closely together to meet the needs of companies with global interests. The firm advises on all aspects of U.S., EU and major European national competition laws, including merger control, monopolisation/dominance, and restrictive practices. Its lawyers appear regularly before the U.S. Department of Justice, Federal Trade Commission, European Commission, national competition authorities and courts of law.