International
Comparative
Legal Guides

Competition Litigation 2021

A practical cross-border insight into competition litigation work

13th Edition

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The United States has both federal and state competition laws.

Under the federal antitrust laws, the government, through the Department of Justice (DOJ), brings criminal claims. The DOJ, the Federal Trade Commission (FTC), and private plaintiffs can bring civil claims. State antitrust laws vary.

Federal antitrust law governs both joint and unilateral behaviour.

It prohibits multi-firm conduct and "contract[s], combination[s], or conspirac[ies]" that unreasonably restrain trade. Classic examples of multi-firm behaviour likely to "unreasonably" restrain trade include price-fixing, bid-rigging, and market-allocation schemes. Other conduct, like exclusive dealing, non-compete agreements, non-solicitation provisions, resale price maintenance, and other vertical and horizontal restraints are subject to scrutiny under the federal antitrust laws.

The federal antitrust laws forbid a single firm from monopolisation, attempted monopolisation, or conspiracy or combination to monopolise. Possessing a dominant or even a monopoly market share is not by itself illegal, but firms violate the U.S. competition laws when they obtain, maintain, or exercise monopoly power in an anticompetitive manner. Examples of potentially problematic single-firm conduct include tying, bundling, and refusals to deal.

The federal antitrust laws also govern mergers and acquisitions where the effect may be to substantially lessen competition. The DOJ and FTC can sue to stop mergers if they determine the combination will substantially lessen competition.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Sherman Antitrust Act is the principal competition law in the United States. Section I of the Sherman Act governs multi-firm conduct. Section II applies to single-firm conduct and monopolisation.

Sections 4 and 16 of the Clayton Act grant private parties who have been injured under the competition laws the right to bring civil claims against the violators for damages and injunctive relief, respectively. 15 U.S.C. §§ 15, 26.

Section 7 of the Clayton Act (15 U.S.C. § 18) governs mergers, acquisitions, and joint ventures and prohibits such transactions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly". Section 7 is primarily enforced by the DOJ and the FTC, though states attorneys general and private parties may enforce it under Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 15(c), 26.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for U.S. competition claims is derived from federal (national) and state (regional) law. Except for indirect purchaser claims, most antitrust claims are brought under federal law.

International law is typically not invoked for substantive competition claims. The U.S. Supreme Court recently held that a federal court determining foreign law should accord respectful consideration to a foreign government's interpretation, but that a U.S. court is not bound to accord conclusive effect to the foreign government's statements. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 585 U.S. __, (2018).

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts for competition law.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

The government may bring civil or criminal actions against violators of the antitrust laws. In addition, private plaintiffs

who have been injured in their "business or property by reason of anything forbidden in the antitrust laws" have a right to sue under the Clayton Act. 15 U.S.C. §§ 15(a).

The Supreme Court has limited standing for monetary damages under the federal statutes to those plaintiffs who are "direct purchasers" or are competitors directly injured. *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982). In addition, the harm must be caused by the competition-reducing aspects of the challenged conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). One caveat to this general limitation is that several states have passed statutes allowing for indirect purchasers to have standing to sue under state antitrust laws.

Representative plaintiffs may bring claims on behalf of themselves and similarly situated entities. A case can only proceed as a class action if it meets the prerequisites set forth in Federal Rule of Civil Procedure 23(a):

"*(1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); (4) the representative parties will fairly and adequately protect the interests of the class ("adequate representation");*"

and one of the sections of 23(b):

"*(1) prosecuting separate actions by or against individual class members would create a risk of:*

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members, not parties, to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Rules 23(b)(1) and (2) class actions do not permit "opt-outs", while 23(b)(3) class actions do proceed on an "opt-out" basis.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Courts must have both subject-matter and personal jurisdiction to decide competition law claims.

Subject-matter jurisdiction: Federal district courts have subject-matter jurisdiction over cases arising under federal statutes (called federal question jurisdiction). Federal district courts also can decide state antitrust law claims when they are brought with federal claims and arise from the same nucleus of operative facts giving rise to the federal claim. In addition, federal district courts have subject-matter jurisdiction over controversies arising between citizens of different states when the amount at issue exceeds $75,000 (diversity jurisdiction). As such, federal courts can decide state law competition claims where the litigants are from different states and the alleged damages exceed $75,000. The Class Action Fairness Act also establishes subject-matter jurisdiction for certain class actions where the amount in controversy exceeds $5 million, the class comprises at least 100 plaintiffs, and there is at least minimal diversity between the parties (i.e., at least one plaintiff class member is diverse from at least one defendant). 28 U.S.C. § 1332(d).

When claims concern conduct that occurred outside of the United States, to establish jurisdiction the plaintiff must show that the foreign conduct imposed a "direct, substantial, and reasonably foreseeable effect" that caused the plaintiff's injury. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

Personal jurisdiction and venue: Under the Clayton Act, a plaintiff may initiate a suit in any district "in which the defendant resides or is found or has an agent". 15 U.S.C. § 15. A corporation may be sued in any judicial district where it is an "inhabitant" or in any district where it may be "found" or "transacts business". 15 U.S.C. § 22. Additionally, 28 U.S.C. §1391(c) grants all federal district courts personal jurisdiction over "alien" (non-U.S.) defendants.

Even where a U.S. court has jurisdiction to decide a competition claim, however, it may not exercise that jurisdiction on comity grounds.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The availability of treble damages, attorneys' fees and costs unquestionably attracts plaintiffs to bring claims. Antitrust suits are most commonly initiated by plaintiffs and the government, though defendants may occasionally initiate suit under the Declaratory Judgment Act.

1.8 Is the judicial process adversarial or inquisitorial?

The U.S. judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available.

2.2 What interim remedies are available and under what conditions will a court grant them?

Under the Clayton Act, plaintiffs can seek preliminary injunctions "against threatened loss or damage by a violation of the antitrust laws". 15 U.S.C. § 26. For preliminary injunctions, a showing of actual injury is not required, but plaintiffs must show that "irreparable harm" is likely – money damages are not enough. In addition, a plaintiff seeking a preliminary injunction must show: (i) a likelihood of success on the merits; (ii) that the threatened injury outweighs the harm that the injunction may create for the defendant; and (iii) that the injunction is in the public interest.

With the exception of merger disputes and the enforcement of non-compete agreements, interim remedies are not typically sought in U.S. antitrust cases because the alleged harms, if proven, can generally be remedied through monetary damages and a permanent injunction at the case's conclusion.

In the merger context, the federal government can seek a "hold separate" order, requiring the acquirer to keep the assets separate and distinct until the case has been decided. When the FTC, but not the DOJ, seeks a preliminary injunction to stop a merger, at least some courts have interpreted the threshold for the injunction to be lower, "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest". 15 U.S.C. § 53(b). *See*, e.g., *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

In criminal cases, final remedies include prison sentences for individuals and criminal fines for individuals or corporations. To impose such penalties, the government must prove the individual or corporation's guilt beyond a reasonable doubt.

In civil cases, final remedies include damages, injunctions, and other forms of equitable relief. Civil plaintiffs must first prove liability by a preponderance of the evidence, but once liability is established the amount of damages need not be proven with precision. For injunctive relief, a plaintiff must show:

> "*(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.*"

eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006). Injunctive relief can take many forms, but most often, the court orders the defendant to cease the anticompetitive conduct.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Money damages for direct purchasers are based on the amount of overcharge caused by the anticompetitive behaviour. Competitors typically seek lost profits or the loss of value to their businesses. Damage awards are almost always the subject of expert opinion and testimony, though the final determination is left to the jury (or judge, in a bench trial).

Trebled damages are automatic for any judgment under the U.S. antitrust laws. Each violator is held "jointly and severally liable" for all damages, meaning that any one defendant can be made to pay the entire judgment. Conversely, defendants are precluded from seeking contribution from other defendants in the damages payment.

Damages awarded by a judge or jury are publically available. However, most antitrust cases settle before a judgment is reached and those settlements, which can be very large, are not made readily public unless the case is a class action. Class action settlements must be approved by the courts and therefore are publicised. In addition, the DOJ publishes the criminal fines it levies.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

No. Defendants found liable in civil cases do not receive a deduction from private judgments for fines they may have paid to the federal government. However, if a firm has obtained amnesty from the federal government through its leniency programme, that defendant's civil damages will be limited to single damages (rather than the ordinary trebled damages) under the Antitrust Criminal Penalty Enhancement and Reform Act.

4 Evidence

4.1 What is the standard of proof?

In criminal cases, the government must prove guilt "beyond a reasonable doubt".

In civil cases, the standard is lower. The plaintiff must show through a "preponderance of evidence" or, that it is more likely than not, that the defendant violated the antitrust laws, as alleged.

4.2 Who bears the evidential burden of proof?

In criminal cases, the government bears the burden of proof.

In civil cases, the party bringing the claim (whether the government or private plaintiffs) bears the ultimate burden of proof. However, in some circumstances, certain burdens shift to defendants to show the procompetitive benefits of their behaviour once the plaintiff makes a *prima facie* case of a violation.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

While not technically an evidential presumption, once a plaintiff establishes liability, impact and causation, it is common for a plaintiff to argue that the amount of damages need not be proven with precision. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 ("[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act on probable and inferential as well as (upon) direct and positive proof'") (internal citation omitted).

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Yes, there are limits to the forms of evidence that can be presented. In federal trials, admissibility is governed by the Federal Rules of Evidence. The threshold test for admissibility is relevance. Evidence is relevant if it has the tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. In addition, the evidence must pass certain requirements for indicia of reliability. Certain evidence, though relevant, may be excluded if the court determines that its introduction would be more prejudicial than probative.

Expert evidence is accepted by the courts and is offered in nearly every antitrust case. Expert evidence is generally offered on liability, and as appropriate, class certification and damages. Federal Rule of Evidence 702 governs what testimony an expert may present, and it allows experts to testify to their opinions if: (a) the expert's specialised knowledge will help the trier of fact understand or determine a fact at issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is based on reliable principles and methods; and (d) the expert reliably applied the principles and methods to the facts of the case.

Parties often challenge the admissibility of expert testimony, arguing that the expert fails to meet one or more of the Rule 702 criteria. Such challenges are known as Daubert challenges, named after the Supreme Court case *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court interpreted Rule 702 and directed judges to act as "gate keepers" and prevent the courts from becoming a forum for "junk science". In the class certification context, the Supreme Court has also required that the expert evidence must fit the theory of liability in the underlying complaint. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The rules on disclosure differ depending on whether the case is criminal or civil. Generally, documents can only be obtained by consent or under Freedom of Information Act requests to the government before proceedings have begun. There are a few U.S. jurisdictions that permit pre-filing discovery, but those are relatively rare. After the initiation of a criminal or civil case, both parties have access to additional tools to gather information and documents, both formally and informally, from the other party and third parties.

In criminal cases, the *Brady* doctrine requires the government to turn over all exculpatory evidence to the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). Federal Rule of Criminal Procedure 16 also provides a vehicle for defendants to request additional discovery. But, seeking that discovery opens the defendant up to reciprocal discovery requests. Fed. R. Crim. P. 16(b)(1)(A). Both the government and the defendant can also use subpoenas to gather information from third parties in criminal cases. Fed. R. Crim. P. 17.

After the initiation of a civil case, both parties have access to broad discovery from each other and third parties. Both may request and "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case". Fed. R. Civ. P. 26(b)(1). Parties can use requests for production of documents (Fed. R. Civ. P. 34), interrogatories (Fed. R. Civ. P. 33), requests for admissions (Fed. R. Civ. P. 36), and depositions (Fed. R. Civ. P. 30–31) to elicit documents, testimony, and other information from the other party. The parties can elicit documents and testimony from third parties using subpoenas under Fed. R. Civ. P. 45. Though there are limits on the burden the parties may place on each other and third parties, antitrust discovery is typically broad, wide anging, time consuming and very expensive.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, if a person is a party or a party's employee, their presence can be compelled so long as the place for testimony is within the state where the person resides, transacts business, is employed, or if the person is commanded to appear at trial and would not incur substantial expense to do so. Similarly, third-party witnesses can be forced to appear at trial or for deposition pursuant to Fed. R. Civ. P. 45(c), provided the place for testimony is within 100 miles of where the witness resides, is employed, or regularly transacts business.

Cross-examination of witnesses is standard practice and parties have a right to ask questions of witnesses called by the opposing party. During cross-examination, counsel may ask the witness leading questions. Fed. R. Evid. 611(c).

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. A final judgment of guilt in a criminal antitrust case or decree in a civil proceeding brought by or on behalf of the United States under the antitrust laws constitutes "*prima facie* evidence against such defendant" in follow-on civil actions based on the same acts and applicable law. 15 U.S.C. § 16(a).

However, "consent judgments or decrees" and pleas of *nolo contendre* (no contest, but no admission) do not have a preclusive effect if entered before any testimony has been taken. *Id.*

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Courts enter protective orders to protect commercially sensitive business information. These orders are usually heavily negotiated between the parties and set forth the manner in which the parties designate information as confidential, who may receive such information, and how it may be used. During discovery, the information so designated is usually only available to persons designated by the parties.

However, if the parties wish to file confidential material with the courts, they generally do so "under seal" to avoid public disclosure. To file under seal, parties must move the court to permit sealed filings and explain the justification for keeping records sealed. Since U.S. courts have a presumption of openness, such requests may sometimes be denied. For example, in class actions, courts may require parties to open certain records so that the public can adequately consider the sufficiency of settlements. *See*, e.g., *Shane Grp. Inc. et al. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299 (6th Cir. 2016).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Yes. A government entity can offer its views on a private case by: (i) filing an *amicus curiae* ("friend of the court") brief setting forth its interest and perspective on the case; (ii) moving to intervene in the case as a party; or (iii) filing a statement of interest. Recently, the DOJ's antitrust division has expanded its *amicus* programme and has filed more statements of interest in pending civil antitrust cases than had been its previous practice. *See*, e.g., DOJ, *No-Poach Approach*, Antitrust Division Spring Update 2019, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

Most often in practice, the government moves to intervene for the limited purpose of protecting an ongoing criminal investigation from civil discovery by seeking a stay in the private case. Additionally, when antitrust cases are heard by the U.S. Supreme Court, the Court frequently asks the Solicitor General (the executive officer who represents the federal government before the Court) to submit its views through an *amicus curiae* brief.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

No. The U.S. antitrust laws do not have a justification or public interest defence. However, the U.S. Courts and Congress have developed a number of immunities for conduct that might otherwise violate the antitrust laws. For example, labour unions, certain farming co-ops, some sports leagues, and other such groups have been given legislative and judicial immunity for behaviour that may otherwise violate the antitrust laws as written.

In addition, courts apply "Noerr-Pennington" immunity to legislative or judicial activity (such as lobbying the government or filing a lawsuit) alleged to have harmed competition, as long as that activity is not a "sham".

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Under federal antitrust law, there is no "pass on defence" and indirect purchasers do not have legal standing to bring claims for money damages. *Apple Inc. v. Pepper*, 587 U.S. ___, 139 S. Ct. 1514 (2019) (affirming the rule that only direct purchasers can bring claims on the facts presented, but leaving open the possibility that the court may soon revisit this principle). However, some states (about half) permit indirect purchaser damages claims under state law. In some of those states, defendants can be subject to up to 200% (*before trebling*) of the damage caused. Although indirect purchasers do not have standing to pursue money damages, they may seek injunctive relief from the court.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, defendants can join other cartel participants as co-defendants. They may do so if the other participant is jointly liable for claims arising out of the same transactions or occurrences. Fed. R. Civ. P. 20.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Yes. For federal civil antitrust claims, the statute of limitations is four years. 15 U.S.C. § 15b. For federal criminal antitrust claims, the statute of limitations is five years. 18 U.S.C. § 3282.

The statute of limitations begins to run at the time of the "accrual of the cause of action". The accrual period begins when the plaintiff suffers injury to her business or property. However, many private antitrust suits are brought challenging conduct that occurred more than four years prior because the statute of limitations can be deferred or "tolled".

The most common ground for tolling the statute of limitations is the fraudulent concealment doctrine, which can arise if a defendant conceals its conduct such that a diligent plaintiff could not have discovered its injury and filed suit within the limitations period. If established, fraudulent concealment tolls the statute of limitations until the time that the plaintiff knew or should have known of the conduct giving rise to the claim.

In addition, the Clayton Act tolls the statute of limitations on any claim that is subject of "any civil or criminal proceeding… instituted by the United States", during the suit's pendency and for one year after.

A class action can also toll the limitations period on any claim. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (holding that the filing of a class action "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status"); see also *China Agritech Inc. v. Resh*, ___ U.S. ___, 138 S. Ct. 1800, 1811 (2018) (holding that class action tolling does not apply to out-of-time successive class actions).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Antitrust cases can be lengthy. The time from filing to final judgment varies by venue and judge, but even relatively simple cases usually take at least two years. In complicated cases, such as class actions, it can often take five years (or more) to complete discovery, class proceedings, summary judgment, and trial.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

No. As a general matter, private parties may settle and dismiss claims without court approval, but please see question 7.2 below.

Claims brought by the government, however, do require court review and approval of the consent judgment terms under the Tunney Act. 15 U.S.C. § 16.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Yes, in class actions, the class representative can, and often does, settle claims on behalf of the class. But, unlike individual private settlements, class settlements must be considered and approved by the court, and class members must be given an opportunity to object or, in certain cases, opt out of the settlement. Fed. R. Civ. P. 23(e).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes. Pursuant to Fed. R. Civ. P. 54(d), a prevailing party can typically recover its costs other than attorneys' fees, whether plaintiff or defendant. Additionally, a successful antitrust plaintiff can recover its attorneys' fees. Under the Clayton Act, such an award is mandatory when the plaintiff receives trebled damages. 15 U.S.C. §15(a).

Successful defendants typically cannot recover attorneys' fees, except if an action is found to be "frivolous, unreasonable, without foundation, or in bad faith". 15 U.S.C. § 4304.

8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, contingency fees are permitted.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Yes. This type of funding is permitted but not often disclosed, so it is difficult to tell how frequently it is used. However, some courts will permit discovery on how litigation is funded and the Northern District of California has imposed a standing order for all judges mandating the disclosure of people or entities who "fund[ ] the prosecution of any claim or counterclaim" in proposed class, collective, or representative actions. N.D. Cal., Standing Order for all Judges of the Northern District of California, ¶ 19 (Nov. 1, 2018).

9 Appeal

9.1 Can decisions of the court be appealed?

Yes. Final decisions in federal civil and criminal litigation, including antitrust litigation, are subject to appeal as a matter of right. 28 U.S.C. § 1291. Most state courts also allow appeals of final decisions as a matter of right.

Generally, the appeals courts have discretion to hear certain other Interlocutory Appeals when requested by a party or wait to consider the issue until a final judgment is reached in the case. 28 U.S.C. § 1292(b).

For non-final class certification decisions, the losing party can seek discretionary review from the Courts of Appeals under Rule 23(f).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, the DOJ offers leniency to corporations and individuals who report their cartel activity and cooperate in the DOJ's investigation of the cartel. Leniency is offered to the first corporate or individual conspirator to confess participation in an antitrust crime, cooperate, and meet other conditions required by the DOJ's leniency policies. Companies that are not first, but cooperate early, can receive reduced sentences.

Neither successful nor unsuccessful leniency applicants are immune from civil claims. However, under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004) (ACPERA), successful leniency applicants have their damages limited in civil claims to single damages, rather than the ordinary trebled damages under the Clayton Act. In addition, successful leniency applicants are not subject to joint-and-several liability as they ordinarily would be under the Clayton Act. To receive such protections in civil litigations, the successful leniency applicant must also cooperate with the plaintiff(s) as required by ACPERA.

In 2017, the DOJ published updated guidance on the leniency programme. Important changes included more limited protection for former employees and employees found to be most culpable. The update also emphasised the "Penalty Plus" policy, under which the DOJ may seek enhanced sentences if the applicant fails to disclose additional antitrust offences that the government later discovers. The revisions suggest a tightening of the leniency programme and a more restrictive approach by the DOJ going forward.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

No, this is not permitted.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The Directive is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The Directive is not applicable.

11.3 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

The Directive is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Reforms generally occur through judicial decisions and are difficult to predict. However, U.S. antitrust regulators have suggested that they may ask the courts to reconsider the rule that indirect purchasers cannot bring claims for money damages under the Federal Antitrust statutes. The Supreme Court recently had an opportunity to reconsider the rule and affirmed under the facts presented that only direct purchasers may bring antitrust claims for money damages. *Apple Inc. v. Pepper*, 587 U.S. ___, 139 S. Ct. 1514 (2019). It remains to be seen whether a different set of facts might result in adjustments to this rule. Under the current rule, distinguishing which purchasers are "direct purchasers", with standing to sue, can be a difficult fact question in litigation.

Other changes to antitrust practice may take place at the agency level, through policy changes at the FTC or DOJ, or via Congressional action.

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