Efficient Criminal Enforcement—Achieving Faster, Better, Stronger Investigations and Resolutions

Lisa Phelan and Megan Gerking

Today, a criminal cartel investigation by the U.S. Department of Justice Antitrust Division lasts on average between three and five years,[1] often longer if a subject agrees to waive or a court extends the five-year statute of limitations period. In investigations that begin with self-reporting of cartel conduct, the time from the moment a company or individual submits a request for leniency until the grant of a conditional leniency letter by the DOJ has grown substantially in the 25 years since the current iteration of the Corporate Leniency Program was announced.[2] The burden on leniency applicants has also increased with the growing number of jurisdictions in which a company can and should consider self-reporting.

What can be done by the DOJ, defense counsel, leniency applicants, and subjects to more efficiently advance and resolve criminal antitrust investigations? In this article, we explore practical suggestions to make various stages of an investigation and the resolutions process more efficient. A consistent guiding principle is for subject companies and executives—and for the DOJ—to raise issues as they arise and to continue a dialogue in a purposeful and meaningful manner throughout the investigation. At all stages, the key is to focus on the heart of the relevant conduct, while not completely ignoring the possibility that the matter could expand.

The Beginning of a DOJ Criminal Antitrust Investigation: Accelerating Grants of Conditional Leniency

Would-be leniency applicants and their counsel have expressed a concern that the Division's Corporate Leniency Program is becoming less attractive because of increased burdens and expenses associated with qualifying for the Program in the United States. In recent years, complaints by applicants and members of the bar have been particularly acute as they relate to the burdens associated with obtaining conditional leniency.[3]

Lisa Phelan *is Partner at Morrison & Foerster LLP, where she is a member of the firm's Global Antitrust Law Practice and Investigations + White Collar Group. Ms. Phelan spent 32 years at the U.S. Department of Justice, serving for 16 years as Chief of the National Criminal Enforcement and Washington Criminal I Sections.*

Megan Gerking *is of counsel at Morrison & Foerster LLP, where she is a member of the firm's Global Antitrust Law Practice. Ms. Gerking previously served as a trial attorney for the DOJ's Antitrust Division.*

[1] This figure is an estimate based on the authors' experience investigating, prosecuting, and defending criminal violations of the Sherman Act.

[2] U.S. Dep't of Justice, *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* 16 (Jan. 26, 2017) [hereinafter *Questions About Leniency Program*], https://www.justice.gov/atr/page/file/926521/download.

[3] *See* Warren Feldman, David Meister & Steven Sunshine, *DOJ Updates Leniency Program FAQs* (Jan. 27, 2017), https://www.skadden.com/insights/publications/2017/01/doj-updates-leniency-program-faqs (noting that recently updated FAQs make clear that the Division has become less willing to accept anonymous markers without being provided complete information up front); *see also* Brent Snyder, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing (June 8, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf (noting that Gary Spratling, former Antitrust Division DAAG who "oversaw the adoption of the program," suggested that "the enormous cost and disruption to a company's business operations from seeking leniency in multiple jurisdictions may cause companies to think twice about the value of seeking leniency").

The DOJ expects to receive substantial information about cartel conduct from a leniency applicant, prior to granting leniency.[4] In the early years of the Leniency Program's existence, an attorney proffer of conduct that appeared to constitute a criminal violation of the Sherman Act was typically sufficient to obtain a conditional leniency letter.

In more recent years, the scope and nature of the information that the DOJ requires before issuing a conditional leniency letter has grown. An applicant, in typical circumstances, is likely to be required to provide detailed attorney proffers concerning the conduct, relevant documents (including those located outside of the United States, with translations as necessary), and interviews of multiple relevant employees.[5] This process can require substantial time and resources, depending on the nature and scope of the potential conduct. In some instances, the Division has been known to take as long as one year to grant conditional leniency.[6] When an applicant is also seeking leniency from other jurisdictions with similar or greater evidentiary requirements, the totality of requirements for a single applicant can quickly pile up. Easing the burdens on leniency applicants would likely incentivize more applications and accelerate investigations.

Easing the burdens on leniency applicants would likely incentivize more applications and accelerate investigations.

Acting Deputy Assistant Attorney General Richard Powers recently acknowledged the concerns about the increasing burdens of leniency across jurisdictions and proposed some concrete steps that the DOJ can and should take to make the process more efficient. In particular, he stated that when applicants are seeking leniency in multiple jurisdictions, the Division can, where possible, coordinate timelines and deadlines with other jurisdictions, tailor document demands to get the DOJ the "necessary evidence" without avoidable burden, and coordinate timing and location of interviews.[7]

It is unclear in practice if the Division will mitigate the burden on leniency applicants. The Division's Leniency FAQs make clear that applicants must be ready to provide "truthful, continuing, and complete cooperation."[8] In former Assistant Attorney General Bill Baer's words, leniency applicants "must recognize that the policy requires far more than a quick phone call to the division and a promise to cooperate."[9] Current Division leadership has expressed a concern that the Division's resources could be wasted by inadequate and insufficient applications. Acting DAAG Powers recently remarked that the requirements for leniency applicants exist because, "if a com-

---

[4] *See* U.S. Dep't of Justice, Corporate Leniency Policy for Individuals (1994) [hereinafter DOJ Leniency Policy], https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf; *see also* Model Corp. Conditional Leniency Letter ¶ 2 (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926531/download (describing specific cooperation obligations of the leniency applicant, including: providing documents, information, and materials wherever located; and using its best efforts to secure the cooperation of its current directors, officers, and employees).

[5] *See Questions About Leniency Program*, *supra* note 2; Note by the United States, OECD Roundtable on Challenges and Coordination of Leniency Programmes (June 5, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/leniency_united_states.pdf (noting that "Perhaps the greatest disruption to a leniency applicant's legitimate business operations comes from interview demands placed on the applicant's executives and employees").

[6] Further, a leniency applicant's obligations to cooperate with the Antitrust Division does not typically end with the grant of conditional, or formal, leniency. The leniency applicant may be required to continue to provide witnesses for interviews during the investigation or at trial. If the Antitrust Division litigates a case, the applicant must also comply with civil discovery obligations.

[7] Richard Powers, Acting Deputy Assistant Att'y Gen. Richard A. Powers Delivers Remarks at the Organisation for Economic Co-operation and Development (OECD) (June 5, 2018), https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation.

[8] *Questions about Leniency Program*, *supra* note 2.

[9] Bill Baer, Prosecuting Antitrust Crimes: Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download.

pany provides minimal, incomplete, or inexplicably slow cooperation, or does not give us sufficient evidence of an agreement, then we have wasted valuable taxpayer dollars interacting with that applicant. Those scarce resources otherwise could have gone to our independent investigative efforts."[10]

The DOJ Leniency Policy does not clearly describe the timing of when a party can expect to receive conditional, or formal, leniency. And the Division has been reluctant to provide statistics. Former AAG Baer remarked during his tenure that "a company that invests the time and the resources can typically satisfy the initial requirements for conditional leniency within a few months."[11] As former AAG Baer suggests, there could be atypical situations, including circumstances out of the applicant's control, which might prolong this time period. For example, if through its review of documents and witness interviews, the Division learned of additional opportunities for evidence gathering, it may work with the FBI in further evidence-gathering operations, such as recording cartel meetings or telephone calls or conducting other searches and arrests.

Efficiency Enhancing Tips. Counsel to a leniency applicant interested in a speedy decision on leniency should advise a client that an up-front investment of significant resources and time to conduct a comprehensive internal investigation and be able to make substantive proffers quickly to the government may be more cost-effective in the long run. Likewise, quickly producing relevant documents and offering up relevant employees for interviews advances the ball and may result in a conditional leniency letter quickly.

The use of the marker system can create efficiencies on both sides.[12] The Division will typically grant a leniency applicant a marker for a finite period of time (commonly 30 days, which can be extended on a good-faith basis) to hold the applicant's spot at the front of the line while counsel investigates the conduct.[13]

During the interviews, counsel should focus on identifying the presence of any collusive understandings or arrangements with competitors and their scope. Then, potentially relevant documents that support the statements made by the witnesses may be identified through the use of targeted search terms based on the facts and any jargon used by the witnesses (e.g., "gentlemen's agreement"), as well as reviewing documents around relevant time periods (e.g., a date of a meeting with co-conspirators).

If there is collusive conduct, counsel will be better prepared to engage with staff after a thorough initial investigation. And, if there is not conduct that would rise to a criminal violation, counsel may withdraw the request for leniency.

When confronted with complications from applying for leniency in multiple jurisdictions—in particular regarding documents, timelines, interviews, and other factors that the Division can control—counsel should raise these difficulties with the Division. For example, if counsel is receiving requests for interviews of executives from multiple jurisdictions, counsel should consider whether to raise this with the Division and ask for coordinated interviews. Further, if an applicant cannot meet the timing demands set by the Division because of requests across jurisdictions, counsel should raise this concern with staff.

---

[10] Powers, *supra* note 7.

[11] Baer, *supra* note 9.

[12] *Questions About Leniency Program*, *supra* note 2.

[13] *Id.*

The Division, for its part, should continue to pay close attention to the concern of applicants that the burdens of seeking leniency, as well as the long period of uncertainty until a conditional leniency decision is made, could discourage applicants from seeking leniency. It would be in no one's interest if this perception prevented companies that have uncovered cartel conduct from self-reporting to the Division, thereby decreasing the number of cartels detected through the Leniency and the Leniency Plus Programs, to the detriment of consumers.[14]

As a Criminal Antitrust Investigation Goes Public: Effectively Narrowing the Breadth of Subpoenas

When the Division goes public with an investigation, it either works with the FBI to execute search warrants, or issues grand jury subpoenas to companies and individuals who may be involved in, or have information regarding, potential criminal antitrust conduct. In a subpoena, the Division commonly requests information about multiple subject companies and individuals, sales, products, and customers, going back many years. A recipient may initially be in a state of disbelief by the breadth of the requests in the subpoena. The process to respond can take significant time and resources, and potentially cost millions of dollars.

The explosion of new communications technology in recent years makes the consequences of receiving a grand jury subpoena even greater.

The explosion of new communications technology in recent years makes the consequences of receiving a grand jury subpoena even greater. It is common for employees to use multiple communications methods to discuss business, including text messaging, social media, chat rooms, and encrypted messaging applications. In the context of responding to a subpoena, the implication of this is that a company must preserve, collect, review, and produce more data from many more sources, and doing so may be difficult or even impossible. Nevertheless, recent Division prosecutions have highlighted the increasing importance of communications via social media and chat rooms.[15]

Given that these newer forms of electronic communications have been fruitful sources of evidence, the DOJ is not likely to stop insisting on such materials. However, the DOJ should consider

---

[14] The Leniency Plus Program has been a very successful source of new investigations. The policy permits a company or individual who is under investigation in one product to report its involvement in a conspiracy related to a second product. Specifically, in former AAG Thomas Barnett's words, the Division's "practice of rolling one investigation into another is well known in the antitrust community and should strike fear in the heart of cartelists. Through Amnesty Plus, exposure of a single member of a single cartel has the potential to bring a series of cartels tumbling down like a house of cards." Thomas O. Barnett, Seven Steps to Better Cartel Enforcement: Presentation to the 11th Annual Competition Law & Policy Workshop (June 2, 2006), https://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement.

[15] First, in 2017, the Division brought charges against two companies and their top executives for conspiring to fix the prices of customized promotional products sold online. According to the Division, the conspiracy was carried out online, through social media and encrypted messaging applications. *See* Press Release, U.S. Dep't of Justice, Second E-Commerce Company and Its Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy in Customized Promotional Products Industry (Aug. 22, 2017), https://www.justice.gov/opa/pr/second-e-commerce-company-and-its-top-executive-agree-plead-guilty-price-fixing-conspiracy; Press Release, U.S. Dep't of Justice, E-Commerce Company and Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy for Customized Promotional Products: Conspiracy was Conducted Through Social Media and Encrypted Messaging Applications (Aug. 7, 2017), https://www.justice.gov/opa/pr/e-commerce-company-and-top-executive-agree-plead-guilty-price-fixing-conspiracy-customized. Second, in the recent trial against three foreign currency exchange rate traders, the Division introduced evidence at trial that the traders used a chatroom that they referred to as "the Cartel" or "the Mafia" that they purportedly used to share information about their financial positions. *See, e.g.*, Indictment at 8, United States v. Usher, No. 17-cr-00019-RMB (S.D.N.Y. 2017). The conspirators used Facebook, Skype, and WhatsApp to reach and implement their illegal agreements and to attempt to hide their conspiracy. Although the defendants were acquitted in that case, the volume of recorded chat room communications involved was likely massive, requiring significant amounts of time and resources for the companies and prosecutors to review, and demonstrates the importance of such communications to the Division in recent prosecutions. And it may be difficult for companies to access such communications, especially if employees are using personal, rather than work-issued devices, and without the explicit permission of the employees to access these accounts.

that issuing a broad subpoena to a large corporation can have negative consequences for the Division. First, there is potential delay. Because it can take a long time for the recipient to collect, review, and produce documents, data, and other materials, the DOJ may not start to receive documents for months. When it does receive the materials, the DOJ may use search terms and other methods to identify relevant information, but even with such time-saving tools, the volume of materials can significantly slow the pace of the investigation. (The government does not typically have the ability to quickly scale up contract or document-review attorneys as a private law firm would). And, if the subpoena requests turn out to be unnecessarily broad, the DOJ must sift through materials not relevant to its investigation.

Efficiency Enhancing Tips. As initial steps, it is important for a recipient to carefully review the subpoena and immediately preserve and retain any material that might arguably relate to the subject matter of the Division's investigation. Counsel should devote time up front to learning what the government may be interested in, which employees may have relevant information, and the potential sources of information. This initial process should include internal interviews with a few top employees and the review of some documents, if possible. Similar to the leniency application process, the focus of the interviews and document review should be on identifying any collusive agreements or understandings with competitors and their scope, including who at the company may be involved or have knowledge of the agreements. In addition, counsel should ensure that they understand the scope of relevant communications methods to facilitate more productive conversations with the Division and to avoid any surprises later in the investigation.

Once counsel has completed a swift, initial investigation into the scope of the potential conduct, counsel should reach out promptly to the DOJ to discuss the parameters and focus of the investigation, as well as the subpoena response. Counsel should plan to reach out to the DOJ in advance of the subpoena return date to demonstrate that the recipient is taking the subpoena seriously and its willingness to respond, as well as to ask for an extension on the return date, which is likely to be necessary. It may also be a good time to offer to set up a call to discuss potential custodians and the subpoena response.

Both parties should be willing to negotiate up front a narrower set of material and issues that the company or individual should begin to collect, review, and produce relatively quickly. For example, the Division may be willing to limit the initial response to a subset of custodians. Providing an organization chart can help steer the discussion regarding potential custodians to those persons who are most likely to have material that is responsive to the subpoena. Counsel may consider offering to provide certain high-value materials up front that it can produce quickly to the DOJ. These materials may be based on what counsel has learned during the initial investigation and on the DOJ's description of its priorities and focus. This could include potentially incriminating emails and other supporting documents. The Division typically is willing to defer certain types of materials (e.g., bidding history files and sales data) until later in the investigation.

After the company reviews that first set of materials, counsel will be in a better position to know whether there is "fire" along with the smoke suggesting collusive conduct that the Division has identified. At that point, counsel is in a better position to evaluate whether additional searching is necessary and where additional resources should be focused. This information will be valuable for counsel in further negotiations with staff and could lead toward a swifter resolution than if the company tried to simply respond to the subpoena as drafted. Staging the submissions can also benefit the DOJ because it will receive rolling document productions without a potentially delayed and ultimately cumbersome document "dump."

Closing In on the Relevant Scope of the Investigation: Encouraging Productive Reverse Proffers

Reverse proffers are sessions during which the DOJ staff describes evidence it possesses that it believes reflects cartel conduct involving a counsel's corporate or individual client. In a cooperative setting, a reverse proffer can serve as a valuable and time-saving tool for counsel to a subject or target of a grand jury investigation, and for the DOJ. The DOJ utilizes reverse proffers to encourage or convince someone to cooperate with the investigation or to plead guilty.

A reverse proffer can provide counsel with a glimpse into the quality and quantity of evidence that the DOJ has obtained that is relevant to counsel's client. Depending on the timing of the reverse proffer, counsel can use the information from the DOJ to start or further its investigation of the facts or to weigh the information in its consideration of whether a client should enter a plea agreement. If counsel becomes aware early that the DOJ may be misunderstanding or missing certain facts, the record can be fleshed out or corrected quickly. Also, a reverse proffer can be helpful to the DOJ because staff can use it to point counsel in a particular direction that may produce additional evidence regarding a specific conspiracy. If a company or individual perceives that the DOJ may be looking to build a case against a "bigger fish," the information given in the reverse proffer may show the way to achieve more lenient treatment from DOJ by providing evidence against others in the conspiracy. Or, counsel can show the DOJ at an early point why its suspicions involving the client are unfounded.

There is little-to-no-downside for counsel to participate in a reverse proffer.

The DOJ faces risks when it decides to proffer evidence to counsel. Counsel could evaluate the evidence, conclude it is not strong, and recommend to the client to not cooperate or to fight any charges that the DOJ brings against counsel's client. Because of the potential downside for the Division, staff may be hesitant to reveal the full scope of evidence, and instead provide circumspect or limited information.

There are no formal Division policies regarding reverse proffers or requirements that either side reveal anything to the other. This means that individual DOJ staff attorneys will determine whether and when to offer a reverse proffer and the scope of information to provide. The result is that there can be significant variations across criminal offices within the Division.

Efficiency Enhancing Tips. In any case where a counsel's client is taking a cooperative posture with the Division, counsel should reach out to the DOJ to ask for relevant information that could aid their internal investigation. There is little-to-no-downside for counsel to participate in a reverse proffer. It is a good way to learn information about the DOJ's case, and it can help counsel to conduct a more focused investigation, ultimately saving the client time and money. It also enables defense counsel to identify the most relevant exculpatory evidence, if such evidence exists. If counsel has taken the information provided by the DOJ and used it to try to start or further their investigation and is not coming up with information suggesting that there is collusive conduct, counsel should consider proffering the information that the company counsel has or has not found and asking the DOJ for additional evidence that could further help focus the internal investigation.

Likewise, the DOJ staff should consider offering incrementally more information and guidance where it believes company counsel is proceeding in good faith toward discovery of relevant information. Barring reasons for not disclosing evidence to a cooperating party (e.g., the DOJ is concerned that providing evidence to counsel could result in a loss of evidence collection opportunities), the DOJ staff would most often advance its investigation more quickly if it provides counsel useful information that could focus and help further the company's internal investigation.

Letting time pass before counsel communicates with the Division—taking a "no news is good news" approach—is not only inefficient but means valuable time and cooperation opportunities may be lost. If months have passed and counsel has not furthered their own investigation and not

sought more guidance from Division staff, a company should not expect to receive significant cooperation credit.

On the government side, the DOJ should consider establishing more consistent policies regarding reverse proffer practice, so that there is a consistent approach across offices. These approaches by both sides will lead to quicker understanding of areas of disagreement, and, if possible, quicker resolutions, which are in the interest of all parties.

Plea Resolutions: Considerations for Fast-Tracking Negotiations with the Division

One of the first questions that a company often asks upon receiving a subpoena, or being a subject of a dawn raid or visit from the FBI, is often "how soon can we put this behind us?" Investigations are time-consuming, take resources away from the business, and companies may have disclosure obligations to investors. Promptly resolving outstanding questions of potential criminal liability can be a top priority for a corporate target.

Even when a company is willing to plead guilty to an antitrust offense, the Division might not be so quick to agree to a resolution. First, it is generally in the Division's interest to continue its investigation until it is certain that it has identified the entire scope of the conduct. Charging the entire scope of the conduct serves the greater goals of criminal deterrence and retribution. A greater scope also means the Division may be able to prepare a plea agreement that incorporates multiple conspiracies and a more significant volume of commerce.

Companies also face risk in entering a swift plea agreement. It is possible that the company, and the Division, may not yet have uncovered all illegal conduct in which the company engaged. For example, Hitachi Automotive Systems entered into two separate plea agreements for its conduct related to collusion on the sale of automotive parts, the first in 2013 and the second in 2016.[16] The plea agreements cover different products and alleged conspiracies.[17] Thus, the Division and a subject company need to balance the desire to collect all evidence associated with potential conspiratorial conduct with the desire to wrap up the investigation quickly.

Plea negotiations can often stall for months over determination of the appropriate volume of commerce—the key to reaching a penalty decision.[18] There can be disagreement regarding the conduct that should be or should not be included in the plea or on the approach used to calculate the affected volume of commerce.

One potential solution for speeding up plea negotiations is to allow companies to contest the volume of commerce calculation. The Division frequently requires an agreement on the amount of

---

[16] Plea Agreement, United States v. Hitachi Automotive Sys., Ltd., 16-cr-00078-MRB (S.D. Ohio 2016); Plea Agreement, United States v. Hitachi Automotive Sys., Ltd., 13-cr-20707-GCS-PJK (E.D. Mich. 2013).

[17] *See supra* note 16.

[18] The determination of the volume of commerce attributable to an individual participant in the conspiracy drives the criminal fine level for companies, as it also does for the jail term for individual executives participating in a cartel. Under the Sentencing Guidelines, the amount of volume of commerce attributed to a corporate offender can increase the offense level significantly. *See* U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (U.S. Sentencing Comm'n 2018). Depending on the volume of commerce, the offense level can be adjusted upward from two to sixteen offense levels. 18 U.S.C. § 3571(c)(1)–(2), (d); 15 U.S.C. § 1; U.S. Sentencing Guidelines Manual § 2R1.1(d) (U.S. Sentencing Comm'n 2018). The Division can seek 20% of the volume of affected commerce as a base fine up to $100 million, consistent with the Sentencing Guidelines. If the volume of the affected commerce would yield a fine larger than the statutory maximum, the Division could seek a greater fine up to twice the gain derived or twice the loss caused by the cartel, under the Alternative Fine Statute. 18 U.S.C. § 3571(d). The DOJ has obtained fines in excess of $100 million in many recent cases. *See* U.S. Dep't of Justice, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (Oct. 25, 2018), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

the criminal fine. In practice, this means that the Division and the pleading party must agree on the amount of commerce affected by the conspiracy, in addition to any aggravating factors and cooperation credit.[19] The Division should consider allowing parties to litigate the penalty in guilty pleas, as U.S. Attorney's Offices do in other white collar and financial crime cases. A plea agreement could be entered with the DOJ more quickly than to continue negotiating the volume of commerce.

Rather than moving toward practices that might shorten plea negotiations, the Division recently took a move in the other direction. A new Division practice could further prolong future resolutions in cases where the government is a victim.[20] Specifically, the Division recently used its authority under Clayton Act Section 4A to obtain treble civil damages from defendants involved in a criminal bid-rigging conspiracy.[21] The Division entered coordinated and simultaneous criminal plea agreements and civil settlements with three South Korean fuel supply companies. Historically, where the government has been a victim of an antitrust crime, the Civil Division has investigated the conduct, typically well after the criminal cases have been resolved. It has done so by bringing False Claims Act charges.[22] The Korean Fuel Supply cases represented the first time that the Division brought an action under Clayton Act Section 4A in many years.[23]

The Korean Fuel Supply cases represented the first time that the Division brought an action under Clayton Act Section 4A in many years.

Seeking dual resolutions in cases where there is clear evidence of wrongdoing may not substantially delay a global settlement. However, not every case will be straightforward, and damages can be notoriously difficult and time-consuming to calculate. Because there are different legal frameworks for determining the criminal fines and civil damages, attempts to resolve criminal charges and civil claims together could delay a resolution until these different types of issues have been settled. It may not always be apparent that the government has been "injured" by the conduct in question, much less by what amount. From a criminal enforcement perspective, this delay of the criminal resolution to determine civil damages could affect the timetable for obtaining critical cooperation. That delay could in turn slow efforts to advance and expand the ongoing criminal investigation of other subjects.

Efficiency Enhancing Tips. Throughout the process of responding to the subpoena and giving and receiving proffers with Division staff, a company with a goal of settling any criminal liability should engage in a continuing dialogue about what a resolution would look like. After a recipient of a subpoena has produced all materials and the company's relevant employees have been

---

[19] U.S. Sentencing Guidelines Manual, *supra* note 18, § 8C2.5.

[20] Clayton Act Section 4A, 15 U.S.C. § 15a, permits the government to recover treble civil damages when it is injured as the result of a violation of the antitrust laws. The statute was originally passed in 1955 in response to a Supreme Court decision ruling that the government was not entitled to pursue civil damages for antitrust violations, but could only seek criminal fines. That version of Section 4A only permitted the recovery of single damages. Section 4A was amended in 1990 to provide for treble damages, consistent with the treble damages afforded to private antitrust plaintiffs as well as to the government under the False Claims Act. However, since 1990, only three Section 4A cases had been filed prior to the Korean fuel supply settlements, resulting in less than $10 million in recovered damages. *See infra* note 21.

[21] *See* Press Release, U.S. Dep't of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids.

[22] For example, in 2004, the DOJ entered into conditional plea agreements with Gosselin Group N.V. for its involvement in a conspiracy to rig bids submitted to the U.S. Department of Defense (DOD), increasing the prices that DOD paid to ship goods to and from Europe. See Information, United States v. Gosselin World Wide Moving N.V. & the Pasha Group, CR-03-551-A (E.D. Va. Feb. 18, 2004). After the criminal proceedings were resolved in 2006, the Civil Division intervened in qui tam actions filed against the companies. *See* United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390 (4th Cir. 2013).

[23] *See* Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

interviewed, counsel interested in obtaining a plea agreement should move staff toward an offer of resolution terms and resolve any remaining questions as quickly as possible.

However, counsel should evaluate the results and scope of their own internal investigation and consider whether the Division could possibly expand the investigation later on. Counsel should not expect the Division to be willing to close off the possibility of a future enforcement action involving an unrelated conspiracy in a plea. If there is potentially additional problematic conduct that counsel is aware of, consider whether to disclose that in advance of any plea negotiations.

The Division may also want to be cautious in its use of its Clayton Act Section 4A authority. Consistent reliance on it could ultimately slow investigations. Parties facing a dual criminal and civil investigation should ask the multiple DOJ staffs to coordinate requests and share materials produced by companies to reduce the burden on subjects. The Division should consider setting consistent timelines for resolving criminal matters once a subpoena recipient certifies that all responsive materials have been submitted. Delay creates problems for both sides, as witnesses' memories fade and evidence becomes stale. It is in the interest of all to resolve criminal investigations more efficiently, barring a need to expand the scope.

Conclusion

In sum, there are many inflection points in a criminal antitrust investigation where both the Division and outside counsel could take productive steps and approaches to make the investigation and negotiation processes more efficient. Taking these steps can lead to a quicker assessment of whether there is a common understanding of the scope of the facts and, ultimately, a speedier agreed-upon resolution.

In a cooperative setting, counsel should proactively engage and communicate with the Division on issues that arise in the investigation. The Division should consider how it can more effectively balance the need to collect evidence, fairly assess facts, and bring the best deterrent resolution with the need to be efficient, conserve resources, and bring swift justice.

As the saying goes, justice delayed can be justice denied, and cartel cases, which are frequently large and complex, necessarily take more time than many other types of criminal cases. However, it would be in the interest of all to look for ways to expedite and advance these investigations and resolutions more quickly, so that companies and executives can get back to business, and the DOJ can move on to the next matter. ●