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Cartels

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CONTENTS

USA

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Overview of cartel law and enforcement in the United States

Cartel enforcement in the United States is unique. As the DOJ recently noted, "though more than a hundred countries now have anti-cartel laws …, the United States remains the only jurisdiction that has extensive experience utilizing both incarceration, criminal fines, and private damages litigation" to abolish cartels. Under this regime, the DOJ plays the primary role in detecting cartels and establishing their existence under a strict burden of proof, while private parties may flesh out a cartel's full scope and the injury it caused under a reduced standard.

The principal anti-cartel statute is the Sherman Act. It prohibits "[e]very contract, combination …, or conspiracy in restraint of trade or commerce." An agreement may be formed in writing, orally, or even by silence or in the "twinkling of an eye". But mere "parallel conduct" – like "follow the leader" pricing – does not suffice. Nor is mere sharing of competitively sensitive information sufficient to establish liability; an agreement not to compete is required.

As a matter of practice, the DOJ proceeds *criminally* only in cases involving "hard-core" offences – price-fixing, bid-rigging, or market allocation. Absent a plea agreement, the DOJ must prove criminal charges to a jury beyond a reasonable doubt. Non-settling defendants may appeal a guilty verdict to the applicable Court of Appeals as a matter of right. Further appeals to the Supreme Court are discretionary, and rarely heard.

Cartel remedies have teeth. A court may impose up to 10 years in federal prison and $1m in fines on guilty individuals. In practice, sentences are usually shorter. Between 2009 and 2014, the average sentence was 25 months. The longest sentence imposed for a pure Sherman Act violation is five years. That said, the district of New Jersey last year sentenced a Superfund clean-up project manager to 14 years in prison for crimes including bid rigging, tax evasion, fraud and kickbacks, in what the Antitrust Division hailed as "the longest prison sentence ever imposed involving an antitrust crime" (the non-antitrust counts drove the sentence above 10 years).

Complicit corporations may be fined the greater of (i) $100m, or (ii) "double the gain or double the loss" arising from the conspiracy. The $100m figure is the statutory maximum under the Sherman Act; no specific showing is required when the government proceeds under this authorisation. For fines greater than $100m, however, the DOJ acts under the Alternative Fines Act and must establish "double the gain or loss" beyond a reasonable doubt. This requires the DOJ to prove the existence of the conspiracy *and* its effectiveness, a substantially more difficult task.

Before imposing a sentence, courts consult the Federal Sentencing Guidelines to determine

whether the proposed sentence is consistent with the recommended range for the offence. Sentences within the range are "presumptively reasonable" but courts may "depart" from that range (up or down) based on factors stated in the Guidelines, or "vary" the sentence based on factors set forth in the Federal Sentencing Statute, 18 U.S.C. § 3553(c). For *non-settling* corporate defendants, Guideline fines can range from 15% to 80% of the "volume of commerce" affected (though for most defendants, the Guideline fine falls within a narrower band). For settling defendants, fines imposed depend on a variety of factors, including how early a defendant settles (relative to other defendants) and the value of its cooperation. Typically, the first settling defendant (*e.g.*, the second-in behind the amnesty applicant) will negotiate a substantial discount below the minimum Guidelines fine.

In rare cases, the government may seek restitution or disgorgement. For example, in *U.S. v. Keyspan*, the DOJ sought disgorgement because private plaintiffs faced significant hurdles in obtaining damages due to the regulated nature of the industry. The Federal Trade Commission, which lacks criminal enforcement authority, has also sought restitution or disgorgement in a few circumstances, but use of this remedy appears limited. In most cases where the conduct does not rise to a hard-core cartel offence, the government seeks injunctive relief.

Novel forms of rival cooperation or information sharing, or cartel-like activity involving new industries or products, are sometimes challenged civilly by the DOJ or the FTC (often in conjunction with State Attorneys General). For example, in *U.S. v. Apple*, the DOJ alleged that Apple reached an agreement with certain suppliers – e-book publishers – regarding their minimum resale pricing policies. Both vertical and horizontal conduct was alleged. But unlike paradigm cartel cases, the alleged conduct did not directly fix the price the publishers themselves charged. In a civil trial, the court found Apple in violation of the Sherman Act and ordered injunctive relief, a decision the Second Circuit Court of Appeals affirmed.

Cartels can also be challenged by private parties, without regard to whether the government has previously investigated or prosecuted the alleged offenders. Under the Clayton Act, any person "injured in his business or property" by a violation of antitrust laws may file suit and recover treble damages and/or injunctive relief. Recovery for suits invoking federal antitrust laws are limited to *direct* purchasers, although the competition laws of some (not all) states permit recovery by *indirect* purchasers. These cases may be brought on behalf of individual entities injured by the complained-of conduct, or on a class-wide (or "collective") basis. The jury is charged with determining liability and damages under a preponderance of the evidence standard. Either party may appeal the trial court's disposition.

Recent cartel enforcement activity

Cartel enforcement in the United States remains vigorous. In FY 2014, 44 executives and 18 companies were charged with price-fixing, bid-rigging, and fraud offences. Twenty-one individuals were sentenced to serve time in jail. As the DOJ notes, "[t]oday, more individuals involved in cartel activity are being sent to jail and are being jailed for longer periods of time than ever before". In addition, the $1.3bn in fines DOJ collected constituted the highest amount it ever collected in a fiscal year.

The DOJ has also expanded its reach in the last two years. In 2014 the Division secured the first ever extradition on an antitrust charge when an Italian national was extradited from Germany on a charge of rigging bids, fixing prices, and allocating market shares for marine hose sold in the United States and elsewhere. The Division also successfully extradited a

Canadian national charged with a kickback and fraud conspiracy and major fraud against the United States. The DOJ also extended its scope into the arguably borderless online marketplace by charging participants in Amazon's electronic forum with using pricing algorithms to coordinate the prices of art posters.

Despite these actions, most enforcement activity continues to be highly concentrated in a small number of high-profile industries. In 2015, the bulk of cartel charges arose within just three industries: Auto Parts, Financial Services, and real estate investing. Indeed, over the last 10 years, all fines over $50m have come from just seven (often interrelated) industries. Few local cartels, or small cartels, are ever detected or prosecuted.

Of the cases prosecuted, most penalties result from plea agreements, rather than litigated trials. In fact, the DOJ estimates that "[o]ver 90% of the hundreds of defendants charged with criminal cartel offenses during the last 20 years have admitted to the conduct and entered into plea agreements".

The DOJ's success rate at trial, however, is less clear. According to one study, since 1996, only 49% of all criminal antitrust defendants who have gone to trial have been convicted. (*See* J. Warren, D. Burns, and J. Chesley, *To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials*, Antitrust Source (July 2006)). The DOJ's more recent track record has been similar. The DOJ lost the only cases that went to trial in both the Marine Hose and the DRAM conspiracies. In addition, the Second Circuit recently reversed the conviction of three executives in the municipal bonds bid-rigging case because the DOJ failed to prove a single, continuous conspiracy, as required in light of the five-year statute of limitations in criminal cases. Similarly, in the *AU Optronics* cases, three of the five individual defendants were acquitted at trial. On the other hand, the DOJ has also had a number of significant victories. For example, in the *AU Optronics* trial, the DOJ secured a $500m fine from the corporate defendant, tying the record for the largest cartel fine ever imposed.

Key enforcement policy issues

In the United States, government and private enforcement of the Sherman Act go hand in hand. *Public* enforcement is the primary vehicle through which cartels are discovered. *Private* enforcement, typically via "follow-on" litigation, provides a more flexible means to flesh out their scope. In designing antitrust policy, courts, legislators and agencies must be mindful of the complex interplay between the two regimes and the unintended consequences arising from it.

The DOJ recognises this interplay. "Civil damages actions brought by plaintiffs … are a mainstay of cartel deterrence," the DOJ says, but "the success of [such] actions depends on the work of the Antitrust Division." This is because "Historically, civil tools have not been effective in detecting cartels." The Supreme Court's landmark decision in *Twombly v. Bell Atlantic* reinforced this notion, as it effectively eliminated the ability of private parties to file cases, and initiate discovery, based on mere suspicion of cartel activity. Private cases now almost invariably depend on the pre-existence of a federal investigation or prosecution in order to withstand initial pleading practice.

As a result, the success of cartel enforcement depends heavily on whether the DOJ has the necessary tools to carry out its trust-busting mission. As the statistics above suggest, the DOJ seems to have the drill bits necessary to burrow deep within a given industry once it finds the first hint of a rich deposit. What is less clear is how good the DOJ is at prospecting for new finds. Does the DOJ's enforcement activity uncover a large or small

percentage of cartel activity impacting the United States? The answer is unknown. The DOJ has noted that "roughly half" of its cartel investigations can be directly tied to a prior investigation of a related defendant or a related product. Is cartel activity predominantly centralised in these industries, such that one can rightly describe the DOJ's enforcement regime as an unqualified success? Or is cartel activity more randomly dispersed throughout the economy, with many more cartels operating out of sight or just below the surface?

Whatever the answer, the DOJ has been fairly effective at prosecuting cartels once it becomes aware of them. It attributes its success to "an enforcement strategy that couples strong sanctions with incentives for voluntary disclosure and timely cooperation". The DOJ itself refers to this as the "carrot and stick" method of enforcement. Put simply, once caught, there are strong incentives for a cartel member to put all of its cards on the table. As such, the DOJ's leniency program – which rewards earlier-cooperating members, and punishes stragglers – "has a destabilizing effect on potential cartels".

Detecting and prosecuting cartels, however, is distinct from determining all of the damage they have done. Because the DOJ must prove its case beyond a reasonable doubt, it faces difficulty where the conduct is not clear-cut or the charge rests primarily on circumstantial evidence and inference. For example, while the DOJ may believe a cartel operated for ten years, but only has solid evidence regarding five, its charging documents may reflect that limitation.

In addition, because of the statutory scheme, the burden of proof requires the DOJ to prove "double the gain or loss" resulting from the conspiracy beyond a reasonable doubt when it seeks a fine above $100m. Even in plea agreements, the DOJ must state that "had the case gone to trial, the government would have presented evidence to prove that the gain or loss resulting from the charged offense" is sufficient to justify the recommended fine. This is not easy. The task requires more than just proof of the "volume of commerce affected", but proof – not weak inferences – of the magnitude of the pricing effect. Most conspiracies, of course, are built upon a foundation no more solid than infrequent information-sharing, secret meetings, and generalised admissions of guilt. Such evidence does not establish a causal link between unlawful conduct and price inflation. That is a job for an economist. But as the DOJ notes, "You do not catch thieves with an economist." A battle of the experts often results in a draw, not an answer beyond all doubt.

Alleged victims of cartels do not face the same burden. Once liability is established – often based at least in part on the fruits of the DOJ's investigation – courts give plaintiffs' experts substantial leeway in measuring damages, believing that the wrong-doer, not the victim, should bear the risk of an incorrect result. That leeway can itself lead to abuse. Private cases may help establish the true scope or impact of a cartel. But they can also lead to damage awards out of proportion to the harm caused, if any, as many cartels are ineffective. Such cases raise the spectre of disproportionate punishment or over-deterrence, potentially chilling otherwise beneficial, cooperative behaviour among rivals. That said, the DOJ can rest assured that the private antitrust bar will at least ferret out the full scope of the cartel once it has been detected by the DOJ, even if private suits sometimes overshoot the mark.

The interplay between public and private enforcement is a two-way street, and developments in private suits may have a significant impact on public enforcement. For example, the exposure that a cartelist faces in private cases may impact its willingness to come forward or cooperate in a government investigation. If the expected costs of doing so are too high, a potential cooperator may take the chance that the government will never learn of the cartel, or will be unable to prove it beyond a reasonable doubt. In recent years, Congress enacted

the Antitrust Criminal Penalty Enhancement and Reform Act, which limits an amnesty applicant's liability to single, rather than treble, damages to help rebalance these incentives.

Investigatory authority

As noted, public and private enforcers have different incentives and expertise in uncovering and punishing cartel activity. The DOJ's motivation is prevention, detection and penalisation. Private enforcers seek redress. Accordingly, the tools afforded to each are distinct.

For purposes of both prevention and discovery, the DOJ deliberately cultivates "a fear of detection". In addition to the amnesty program, and its "carrot-and-stick" incentives for cooperation, the DOJ has "strengthened its ties with the FBI to partner better on investigations, make more use of FBI covert techniques and financial expertise, and expedite [its] investigations and prosecutions". The FBI is now a "key and long-standing partner in virtually all Antitrust Division cartel investigations".

These agencies wield an array of investigative tools. The primary one is the grand jury, which has the power to investigate possible violations of law, even without a prior showing of probable cause. As the U.S. Supreme Court explained in *Blair v. U.S.*, the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

The grand jury may subpoena documents and testimony from industry participants and targets. It may subpoena telephone records and bank records, without notice to the target. It may also compel testimony from any witness who may have relevant information. Witnesses are not entitled to have counsel present in the grand jury room, and interference with a grand jury investigation can lead to obstruction of justice charges.

An *individual* witness, however, has a constitutional right to refuse to answer questions that might tend to incriminate him or her. The government can overcome this right and compel a cartelist's testimony by granting immunity – not from all prosecution – but from prosecution based on the compelled testimony and information derived therefrom. As the DOJ explains, by granting such limited "use immunity", the witness has "an incentive to be as forthcoming as possible", since "[f]or every new piece of information he supplies, it [will] become more difficult for a prosecutor to demonstrate that a future prosecution of the witness is based entirely on independent evidence". Nonetheless, the decision to grant immunity is complex, typically requiring the importance of the information the witness possesses (given the stage of the DOJ's investigation) to be balanced with his culpability.

In addition to grand jury testimony, the government relies on covert wiretaps. In many cases, a cooperating witness may, at the DOJ's and the FBI's urging, continue to meet with cartel members, permitting the government to secretly record the discussions without obtaining a search warrant and without establishing "probable cause" of a violation. In 2009 a major motion picture, *The Informant*, depicted real-life Lysine conspiracy informant Mark Whitacre, whose stealth recordings of cartel meetings were critical to the prosecution. In other instances, the DOJ can secure a search warrant from a judge or magistrate, permitting it to make audio or video recordings of cartel discussions without the consent of any participant.

In many cases, the DOJ, again with the FBI's assistance, can obtain a search warrant and conduct an unannounced raid on the homes and businesses of suspected cartel members. Warrants are issued without notice to the person whose premises are searched, and are

executed by law enforcement officers who can immediately take possession of the evidence, precluding opportunities for destruction.

Indeed, in many cases, the DOJ will cooperate with competition authorities around the world to coordinate simultaneous dawn raids. For example, on February 14, 2006, the DOJ participated in a series of coordinated and simultaneous dawn raids spanning three continents alongside competition authorities in the European Union, the United Kingdom, Canada, Switzerland, and South Korea that were jointly investigating price-fixing in the air cargo industry. Such coordinated raids have now become routine in international conspiracy cases.

While private litigants do not have access to search warrants or wire taps, and grand jury proceedings are entitled to unparalleled secrecy, private litigants are frequently able to obtain the fruits of the government's investigation through civil discovery. While such discovery may be useless in detecting cartels (because it is typically only available after plaintiffs have established a "plausible" claim), it *is* highly effective in determining a cartel's reach. Follow-on plaintiffs may also issue requests for documents beyond those seized by or produced to the DOJ; may depose suspected cartel members and other industry participants; and may take advantage of a host of other discovery tools. Because the scope of civil discovery is deliberately broad, private plaintiffs can often obtain even more information than the DOJ, allowing motivated private attorneys to flesh out a conspiracy's breadth.

Leniency/amnesty

Perhaps the most important aspect of U.S. enforcement is its amnesty program. As the DOJ notes, this program has "been the single most effective generator of leads, in recent years, to international antitrust conspiracies". The program is essential because harsh criminal (and civil) penalties will "act as a *disincentive* to reporting" unless those that do so are immunised from prosecution. Accordingly, under the program, a company that self-reports and otherwise qualifies, "avoids a criminal conviction, pays no criminal fine, and keeps its cooperating executives out of jail". Critically, amnesty is granted only to the first cartel defector.

While this provides a strong incentive to come forward, the real power of the program is that it brings game theory's "prisoner's dilemma" to a new level. The "prisoners" – members of the cartel – face a "dilemma" because, while the group could be better off if they all refuse to cooperate, if any one of them defects, the remaining members become dramatically worse off. Since each member is presumably aware of the dilemma, incentives to be the first to defect may overcome those to remain silent, destabilising cartels and resulting in a lengthening list of amnesty applicants.

Accordingly, if a corporation's compliance department learns of the possible existence of a cartel, it faces a tough choice. If it does nothing, its risk of liability mounts. If it quietly abandons the conspiracy, other members may panic and seek to win the race to the DOJ. Indeed, in some instances, the DOJ has received amnesty applications from multiple conspirators within hours of each other. As such, a cartelist who thinks there is any chance that the conduct might be discovered faces a strong incentive to spill the beans to the DOJ and begin to cooperate.

A decision to seek leniency is not to be taken lightly, however, and many companies may not take that step. It is difficult to *choose* to damage a hard-won reputation, retain a team of antitrust defence attorneys, and place a bull's eye on the company for direct and indirect customers seeking compensation. In some industries, information-sharing, communications, and competitor coordination may have lasted years, creating the potential for enormous

damages, even if not trebled. If industry communications are common, companies and their employees may also believe that the conduct is not as egregious as cartel authorities may make it seem. Companies – particularly those against whom the evidence is patchy, or who had a minor role in the cartel, or who may have ceased participation in it – might take their chances with the *status quo*. Thus, it is no surprise that the DOJ's enforcement actions tend to be concentrated within a few industries, where the risk of detection is abnormally great.

Moreover, despite the DOJ's efforts to provide transparency and consistency to its amnesty program, there are still significant risks associated with it. One of the biggest risks is that the amnesty applicant will fail to qualify for single damages. In August of 2013, in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, the court held that the cooperating defendants forfeited the single-damage benefit under the Penalty Enhancement Act because they failed to "provide[] satisfactory cooperation to the claimant with respect to the civil action", as the statute requires.

There may be additional risks. Once Pandora's box is open, it is difficult to close the lid. The amnesty applicant has no control over the course of the investigation, or what other conspirators will do to try to minimise their own exposure. Because of the DOJ's first-in policy, the program emphasises speed over careful, deliberate analysis by counsel. This may not permit sufficient opportunity to explore the conspiracy's full scope. In some instances, counsel may initially believe that the conduct was localised, only to learn later that it infected other divisions or products. This should not be surprising. Individuals – worried about a life behind bars – may be less forthcoming than the company's counsel would like. Other cartel members, under pressure from the DOJ, may seek to reduce their own sentences by disclosing additional facts not covered by the amnesty applicant's initial proffer. This creates risk that the amnesty program will not fully deliver on the expectation (reasonable or not) of complete immunity from prosecution. In general, the DOJ recognises this, and has construed its policies liberally to encourage maximum incentives to come forward and cooperate. Nonetheless, the DOJ does make it clear that amnesty applicants "cannot afford to remain blissfully ignorant by limiting the scope of their internal investigation".

Settlements

The DOJ's job is not done with the detection of a cartel based on information provided by a whistleblower or amnesty applicant. It must successfully prosecute the other cartel members. The DOJ does this primarily through plea agreements with the remaining cartel members. The DOJ estimates that "[o]ver 90% of the hundreds of defendants charged with criminal cartel offenses during the last 20 years have admitted to the conduct and entered into plea agreements with the Division".

The DOJ's willingness to negotiate plea agreements serves several important purposes. Most significantly, it exerts significant pressure on each cartelist to cooperate and resolve the charges quickly, lest another cartelist jump the line and secure a better deal. Indeed, unlike in some other jurisdictions, in the U.S. the DOJ permits defendants to enter into plea negotiations at any stage of investigation from its inception. The DOJ will entertain such discussions *seriatim*, and generally will not wait until the investigation's end to decide with whom it will settle and the benefits it will offer in exchange for cooperation.

The DOJ's plea agreement policies are designed to enhance the likelihood of obtaining convictions by seeking ever-increasing penalties for late-cooperating, or non-cooperating, defendants. Several considerations inform the agreement's final contents. The agreement is not effective until approved by the court, and so must be consistent with the statutory

scheme and sentencing procedures. It should also be structured in a way that avoids the perception that the DOJ is bargaining away justice to obtain a conviction. To balance these interests, the DOJ's policy is to charge settling defendants with crimes that are "reasonably related" to the "readily provable" unlawful conduct, and to impose fines consistent with Federal Sentencing Guidelines.

Because the DOJ will typically base charges on conduct it can "readily prove" *without factoring in the cooperation of the settling defendant*, the scope of the charges asserted against early-settling defendants is often less than those asserted against later-settling defendants. As the DOJ has noted, "[i]n order to induce and ensure candid and complete cooperation, if a company's cooperation pursuant to a plea agreement reveals that the suspected conspiracy was broader than had been previously identified, either in terms of the length of the scheme or the products, contracts or commerce affected, then the Division's practice is not to use that self-incriminating information in calculating the defendant's sentence." This means that it is "not uncommon for a second-in corporate defendant to have its fine drastically reduced". And because evidence provided by the second-in may be used against future plea bargainers, later-settling cartel members run the risk of having their fines calculated against a broader volume of commerce. Accordingly, plea agreements entered into early in the process may understate the scope and duration of the conspiracy.

As a further incentive to cooperate, the DOJ provides the employees of early-settling corporate defendants greater immunity from jail. Plea agreements typically resolve all criminal charges against a corporate defendant and its employees, except for specifically identified individuals who are "carved out" of the agreement. The number of so-called "carve-outs" typically increases with each successive plea agreement. For example, in the DOJ's DRAM investigation, the second-in had four individuals carved out of its plea agreement, while the third-in had five carve-outs, and the fourth-in had seven.

The DOJ has recognised the benefits attendant to a transparent and consistent enforcement regime. As it has explained, "prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation", and a "party is more likely to settle if it is able to predict, with a high degree of certainty, how it will be treated if it cooperates, and what the consequences will be if it does not". This view is a testament to the fact that targets of a DOJ cartel investigation often face two stark – but reasonable – choices: either fight or fold. Both options are virtually guaranteed to be expensive, world-changing experiences no matter the ultimate outcome.

The entities that fight benefit by forcing the DOJ to prove liability beyond a reasonable doubt before a jury. Juries can be fickle, and neither side can ever be totally assured of success. If the jury acquits, the defendant escapes with no criminal liability, since the verdict cannot be appealed by the government. The downside of fighting, however, is that the DOJ may earn a conviction, prove substantial effect on United States commerce, and/or prevail in its sentencing recommendation. But there are also significant benefits for cooperation because a defendant's willingness to admit guilt, and the assistance it provides to the government, are factored into the Guidelines' fine. Thus, a non-settling defendant faces a significantly higher Guidelines fine than a comparable settling defendant. In addition, the pleading defendant has the opportunity to participate in discussions surrounding the drafting of the final plea agreement. In doing so, the conspiracy's scope and the defendant's role in it, as well as the identification of victims (and future private plaintiffs), may be watered down.

Nonetheless, at least for some defendants, it is not clear whether the "stick" it faces after losing a trial will be much worse than the "carrot" it may receive for cooperating earlier.

For example, the DOJ takes the position that criminal fines for settling defendants are based on their *own* sales, but fines for non-settling defendants are based on the sales attributable to the conspiracy as a whole. But courts do not always agree. In *AU Optronics*, the DOJ sought fines against a *single* corporate defendant of between $900m and $1.8bn based on the cartel's *overall* sales. But the court imposed a fine of "only" $500m, commensurate with an earlier plea agreement based on a similar-sized cartel member's *own* sales. In addition, the need for proof beyond a reasonable doubt often forces the DOJ to winnow its case voluntarily, notwithstanding suggestions during plea negotiations of the intent to proceed more broadly. Given the DOJ's mixed trial record, employees who fold may end up in prison more often than those who fight.

Private enforcement actions

As noted above, private enforcement of the antitrust laws is a core feature of the American system, and the primary way in which customers recover the overcharges associated with cartel activity. The spectre of large damage awards informs strategic decision making at all stages of the process. Private enforcement – generally in the form of class action litigation, with large sophisticated purchasers frequently "opting out" of the class to prosecute their own suits – are virtually inevitable once a cartel investigation becomes public.

But private cartel litigation in the U.S. faces a number of increasing obstacles. *First*, pleading requirements after the Supreme Court's *Twombly* decision effectively limit private cases to cartels involving an industry or product that the DOJ has either investigated or prosecuted. While a private plaintiff could theoretically bring a suit without the benefit of prior government activity, the lack of pre-litigation investigative tools, and the costs of bringing suit with no assurance of success, impose prohibitive risks. In contrast, once the DOJ has successfully prosecuted one or more defendants, some courts have – rightly or wrongly – granted plaintiffs great leeway in bringing cases that are broader than, and in some cases inconsistent with, the charges set forth in any plea agreement or indictment. For example, in the *Auto Parts* litigation, the court denied the defendants' motions to dismiss, even though the case pled was broader than the charges defined by the DOJ's plea agreements. As the court noted, the fact that defendants did not plead guilty to "wide-ranging conduct does not limit the civil action".

Second, the effectiveness of private litigation may depend on the industry allegedly cartelised. Where purchasers are large, they may have an incentive to bring their own suit for damages. In other cases, however, the victims tend to be small purchasers. As a practical matter, given the expense of antitrust litigation, such cases can only be pursued via class action. The standards for maintaining suit as a class, however, appear to be tightening. In 2011, in *Walmart v. Dukes,* the Supreme Court held that class plaintiffs must demonstrate at class certification that causation can be established for all class members in a class trial. Two years later, in *Comcast v. Behrend*, the Court held that damages must also be established on a class-wide basis. Finally, in 2013, the Supreme Court held in *American Express Co. v. Italian Colors Restaurant* that arbitration clauses that expressly prohibit class actions are enforceable. The extent to which companies avail themselves of this decision by adopting such class-action waivers still remains to be seen. Nonetheless, the success of private enforcement is no longer a foregone conclusion, even on the heels of a government enforcement action.

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