

The International Comparative Legal Guide to: **Enforcement of Competition Law 2009**

A practical insight to cross-border enforcement regulation



Published by Global Legal Group with contributions from:

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1 National Competition Bodies

- 1.1 Which authorities are charged with enforcing competition laws in the USA? If more than one, please describe the division of responsibilities between the different authorities.**

The Antitrust Division of the Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC) are the primary authorities responsible for enforcing national competition laws in the United States.

The Antitrust Division has both civil and criminal enforcement authority and may launch investigations and pursue litigation in federal court.

The FTC is an independent regulatory agency with five Commissioners. The FTC may seek legal remedies for civil violations of the antitrust laws either in federal court or before an administrative law judge (ALJ) at the agency. The FTC does not have criminal enforcement authority but may refer potential criminal matters to the Antitrust Division.

The FTC and Antitrust Division share overlapping jurisdiction for civil enforcement and have developed informal clearance procedures, based largely on the industry sector at issue, to determine which authority will pursue a potential civil violation.

In addition to the federal authorities, state attorneys general may bring proceedings in state or federal court to enforce their own state's competition laws, or under certain circumstances federal competition laws. The federal authorities, however, tend to play a leading role with respect to competition law matters that have a significant multi-national dimension.

- 1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.**

Aside from the authorities discussed in question 1.1, other federal agencies also may have jurisdiction to enforce competition laws, or otherwise regulate competition, within their industries. For example, the Federal Energy Regulatory Commission may prohibit anticompetitive manipulation of energy markets. Other federal agencies with authority to take action against certain anticompetitive acts and/or mergers include the Federal Communications Commission, the Surface Transportation Board, and the Office of the Comptroller of the Currency.

- 1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in the USA?**

Information concerning why an antitrust authority chooses to conduct a particular investigation is not typically disclosed. The Antitrust Division focuses its criminal enforcement on so-called "hard core" violations such as price fixing, bid-rigging, or market allocations. With respect to civil enforcement, both the Antitrust Division and FTC tend to target sectors of the economy where consumer spending is high and the agency believes enforcement will have the greatest benefit for consumers. Investigations may stem from customer, supplier, and/or competitor complaints or based on materials the authorities receive during investigations or through press reports.

2 Substantive Competition Law Provisions

- 2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.**

The Sherman Act, the Clayton Act, the Robinson-Patman Act, and the FTC Act are the principal competition laws in the U.S. Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies that unreasonably restrain trade. Section 2 targets the conduct of single firms, making monopolisation or attempts to monopolise illegal. Criminal enforcement is confined, as a matter of Antitrust Division policy, to violations of Section 1.

The Clayton Act provides further prohibitions on specific anti-competitive practices that may substantially lessen competition. Section 3 includes specific prohibitions on tying and exclusive dealing agreements. Section 7 prohibits mergers or acquisitions that may substantially lessen competition, or create a monopoly, while Section 8 prohibits persons from serving as officers or directors of two or more substantially competing corporations.

The Robinson-Patman Act is a complex statute, which, at its core, prohibits sellers from engaging in price discrimination by selling essentially the same product to different buyers at different prices, if the price discrimination harms competition.

Section 5 of the FTC Act gives the FTC general authority to prevent unfair methods of competition and allows the Commission to use an administrative hearing process, rather than a federal court proceeding, to stop parties from engaging in unfair methods of competition.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are no competition laws applicable only to specific sectors. However, as described in question 1.2 above, the agencies that regulate specific sectors may have jurisdiction to enforce competition laws, or regulate competition, as part of their activities. Section 5 of the FTC Act exempts certain industries — including banks, certain savings and loan institutions, and some common carriers and air carriers — from the statute's reach.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The FTC may issue a formal advisory opinion to parties requesting one, where the parties' proposed action involves substantial or novel questions of fact or law or where publication of Commission advice would be of significant interest. The FTC will not undertake enforcement action where a party has acted in a good faith reliance on the Commission's opinion, but may revoke the opinion when the public interest so requires. The FTC also issues staff opinions where the criteria for Commission review are not met. Though it rarely does so, the FTC may rescind staff opinions and pursue an enforcement proceeding.

The Antitrust Division does not issue formal advisory opinions, but offers a business review process, which is initiated by a written request. Business review letters set out the Division's current enforcement position with respect to a party's proposed course of action, but do not bind the Division.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

There is no formal procedure for filing a complaint with the FTC or Antitrust Division, though both authorities encourage and rely upon complaints from individuals. They accept complaints by mail, email, or over the phone and provide guidance for submitting complaints on their websites. Complaints can be made regardless of whether an investigation already is underway.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

The FTC and Antitrust Division do not release this information. Either agency may begin an investigation on its own initiative or based on third-party complaints, information learned in the press, or information revealed during the course of another investigation. A substantial number of criminal investigations begin as a result of applications to the Division's corporate leniency programme.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

There are no set procedural methods or specific timelines for FTC investigations, which can range from months to several years in duration. Often investigations begin with informal inquiries to a party, followed by compulsory process (discussed in question 4.2) if the Commission decides to pursue the investigation. During the investigation, the targeted party typically meets with the investigating staff and senior officials. If the investigation matures into a complaint, the FTC issues an administrative complaint and tries the case before an administrative law judge (ALJ) at the agency, whose initial determination presumptively must be entered within one year of the end of the administrative proceedings. The ALJ's decision is then subject to an appeals process explained in Section 11.

The Antitrust Division's civil investigation process is similar to that of the FTC, and can last from months to years. The Division may make informal requests for information, as well as use compulsory process to compel disclosure of information. After gathering information, the Division may decide to initiate an enforcement action in federal court or close the investigation.

The Antitrust Division may initiate a criminal investigation upon approval from the Department of Justice's Director of Criminal Enforcement after submitting a memorandum explaining its grounds for an investigation, which may include public information or information brought to the Division by a leniency applicant as described in Section 8. The Division may make informal inquiries of the parties or convene a grand jury to further investigate possible violations. Once the decision is made to convene a grand jury, the Division can issue grand jury subpoenas or may obtain a search warrant from a court to obtain further information. The grand jury considers both testimony of witnesses and documents produced, and ultimately decides whether the government has sufficient evidence of an antitrust violation to return an indictment. It may take months or years for the Division to file formal charges following initiation of an investigation. A party under investigation may agree to a plea during the grand jury investigation, following the return of an indictment, or during trial.

State's attorneys general follow the same general process described above for investigations. States often work in conjunction with each other and with the national competition authorities in investigations and filing complaints.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Both the FTC and the Antitrust Division can initiate compulsory process as part of an investigation. The FTC may proceed with an investigation by executing compulsory process requests in the form of subpoenas or civil investigative demands (CIDs) which can require the submission of written answers and/or oral testimony. Though compulsory process requests are not self-enforcing, the FTC may obtain a court order to compel the recipient's compliance.

In a civil investigation, the Antitrust Division may also issue CIDs requiring production of documents for inspection, written answers to interrogatories, or oral testimony. The recipient of a CID from the Antitrust Division may refuse to comply, forcing the Division to petition a court to enforce the CID.

Criminal investigations rely on grand jury subpoenas and sometimes court-issued search warrants to obtain information. Generally a search warrant is executed by agents from the Federal Bureau of Investigation (FBI), although officials of the Antitrust Division may participate. A search warrant permits a search of physical locations and seizure of documents and things whereas a grand jury subpoena compels a targeted party, or other individual, to provide testimony and frequently to produce documents and/or data. Failure to comply with a grand jury subpoena may lead to criminal prosecution for obstruction of justice.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The competition authorities have no intrinsic authority to enter the premises during a criminal investigation. However, the Antitrust Division can obtain a search warrant from a court where it can demonstrate probable cause to believe that a search of the subject premises will lead to the discovery of evidence of a criminal violation.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

Representatives from the Antitrust Division or FBI agents may seek to interview individuals during the course of a search. However, individuals are not required to consent to such an interview; a search warrant only gives agents permission to search the premises and seize evidence, not to compel interviews.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

Original documents may be seized in the course of a search if the documents were located on the property described in the search warrant and are within the scope of the warrant. An officer present for the search must prepare an inventory of all property seized. A searched party may move a court for return of the seized property. Generally, the Antitrust Division will provide a copy of any seized documents to the party. Originals are returned once an investigation is closed or a case is decided.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

Electronic documents or data that can be accessed at the premises being searched may be seized by downloading a copy when executing the search warrant.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Antitrust Division has the ability to petition a court to use wiretaps in criminal antitrust investigations. The Division must demonstrate probable cause to believe that communications regarding violations of the Sherman Act are being carried out on the device the Division seeks to tap.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

In neither civil nor criminal investigations does a party have any right to hear the allegations against it until a case is initiated in court or in an administrative proceeding. However, in the event of plea negotiations in a criminal case, the government will typically reveal some general information about its case. Additionally, when a search warrant is executed a copy of the warrant must be provided to the person or party from whom property is seized. The warrant will state in general terms the probable cause supporting its issuance, so the party may garner some information that way.

4.9 How are the rights of the defence respected throughout the investigation?

The Fifth Amendment of the U.S. Constitution provides a privilege against making self-incriminating statements. This privilege can be invoked to avoid testifying in either civil or criminal matters, provided the individual would be exposed to criminal liability based on his or her testimony. The privilege only applies to individuals, not corporations. An individual can invoke the privilege whether he is responding as an individual witness or a corporate representative. Testimony may still be compelled if a court orders that the witness receives immunity for any crimes as to which he may incriminate himself. Although a person who is compelled to testify based on immunity may not have his own statements used against him, he still may face prosecution for the same crime he testifies about based on other evidence.

4.10 What rights do complainants have during an investigation?

Under the policies of the FTC and the Antitrust Division, complainants have a right to confidential treatment of their competitively sensitive information during the course of the investigation. A complainant subpoenaed in the course of a civil investigation also has the same rights as any other party to resist the subpoena, forcing the competition authority to obtain a court order to compel compliance.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties generally do not have rights regarding an investigation, other than confidentiality rights and rights applicable when compulsory process is used to seek information from them directly.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The competition authorities do not have intrinsic authority to implement interim measures. However, both the Sherman and Clayton Acts provide federal courts with express authority to issue an injunction against anticompetitive conduct prior to the final determination of a violation. Injunctions are a form of equitable relief requiring a party to refrain from, or undertake, certain actions specified in the order. Failure to adhere to an injunction may result in civil or criminal fines or penalties.

6 Time Limits

- 6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?**

Criminal antitrust actions are subject to a general five-year statute of limitations, applicable to most criminal claims brought by the United States, although the government can prosecute an entire conspiracy if it can show that the conspiracy continued into the limitations period, even if it began earlier. A four-year statute of limitations applies to civil actions for violations of the Clayton Act. The civil statute of limitations may be extended if the defendant has "fraudulently concealed" its violation. There is effectively no statute of limitations for government prosecution of antitrust merger violations, as under the "time of suit" doctrine the legality of the transaction is to be determined at the time a suit is brought, not at the time when the transaction was carried out.

7 Co-operation

- 7.1 Does the competition authority in the USA belong to a supra-national competition network? If so, please provide details**

The U.S. agencies participate in a variety of supra-national competition networks. The United States also has bilateral competition cooperation agreements with several jurisdictions, including Australia, Brazil, Canada, Germany, the European Communities, Israel, Japan, and Mexico. These agreements allow the agencies to coordinate their investigations, but they do not supersede U.S. laws that prohibit the sharing of confidential information absent the consent of the provider.

Informal cooperation with non-U.S. competition agencies occurs frequently on both a bilateral and multilateral basis. Where national laws prevent the sharing of confidential information, the parties frequently waive the confidentiality protections for the limited purpose of allowing other competition agencies to access the information. The U.S. agencies participate in the Competition Committee of the Organization for Economic Cooperation and Development and International Competition Network, as well as other regional organisations.

Finally, the U.S. has signed various mutual legal assistance treaties, which are not specific to competition law, providing for broad cooperation between the U.S. and non-U.S. governments in criminal matters, including the sharing of confidential information.

- 7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?**

To the extent information is provided in accordance with any local law regarding the confidentiality of information, the U.S. agencies will utilise any information relevant to their investigation, whatever the source.

8 Leniency

- 8.1 Does the competition authority in the USA operate a leniency programme? If so, please provide details.**

The Antitrust Division has adopted both Corporate and Individual leniency policies, under which successful applicants can avoid federal criminal prosecution for the reported activity provided they cooperate fully with the Division's investigation. Under the Corporate Leniency Policy, all employees of the applicant who cooperate with the leniency application receive immunity as well. These policies have been a key driver of Antitrust Division criminal enforcement, particularly in the cartel area, in recent years — with numerous high-profile prosecutions initiated as a direct result of leniency applications.

In the U.S., only one company may receive leniency per conspiracy, which makes timing of the approach to the Antitrust Division especially important. In this regard, the Antitrust Division has developed a widely publicised "marker" system, which allows a firm to come forward and secure its place in line for leniency while continuing to investigate the particular details of its involvement in the unlawful activity.

Leniency does not extend to liability for civil antitrust damages resulting from unlawful conduct. However, to the extent that it also cooperates with civil plaintiffs, an amnesty applicant also may qualify for a "de-trebling" of antitrust damage awards.

9 Decisions and Penalties

- 9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?**

While the Antitrust Division must bring all enforcement actions in federal courts, the FTC can prosecute antitrust violations through its own administrative proceedings as well as file civil suits in federal court seeking injunctive relief. Like the Antitrust Division, state attorneys general must also bring all actions to enforce federal competition laws in federal court, but may bring actions to enforce state competition laws in state court.

- 9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?**

In civil matters, the FTC can seek an order from the district court requiring companies to cease unfair methods of competition or practices. The FTC can then ask the court to impose civil penalties for noncompliance with the order or a final agency rule. The Antitrust Division can bring a civil suit in court to recover damages.

Criminal sanctions for Sherman Act violations include up to ten years jail time for individuals and fines up to \$100 million for each violation for a corporation. Corporate criminal penalties may be further incurred beyond the \$100 million statutory maximum to an amount equal to "double the gain or loss" resulting from cartel activities.

- 9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?**

Although they may not impose these sanctions on their own, the FTC and Antitrust Division may seek district court orders imposing

sanctions on those who fail to comply with agency investigations. Sanctions may include penalties for contempt of court and obstruction of justice.

10 Commitments

10.1 Is the competition authority in the USA empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Both the FTC and Antitrust Division have authority to negotiate consent decrees that impose restrictions on a company's future business conduct. Typically consent decrees provide that the decree expires after a specified duration. States also have authority to negotiate a consent decree to impose behavioural remedies, and often do so jointly with the national authorities.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The FTC and Antitrust Division have discretion in negotiating consent decrees. Under FTC procedures, when the parties reach an agreement, the consent decree, along with other related materials are published and public comments are solicited for thirty days, at which time the FTC may issue a final order in the same form as the consent decree, modify the consent decree, or withdraw acceptance of the consent decree entirely.

Antitrust Division consent decrees must be submitted to a federal court for approval and must comply with the Antitrust Procedures and Penalties Act (the "Tunney Act"). The Tunney Act requires publication of the consent decree and a "competitive impact statement" that includes a description of the proposed consent, the remedies available to private parties, and the alternatives considered. Public comments are solicited generally for a sixty-day period, after which a court considers whether the agreement is in the public interest.

The procedures and requirements for consent decrees negotiated by states vary. Such settlements must typically, though not always, be approved by a court in the state.

10.3 What impact do such commitments have on the investigation?

FTC or Antitrust Division acceptance of a final consent decree typically ends the investigation. Similarly, a consent typically ends a state's investigation. Either the antitrust authorities or the parties may seek to modify or terminate a consent decree if there are material changes in the relevant circumstances.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Parties have limited opportunity for appellate relief during an investigation. The recipient of a grand jury subpoena in a criminal case may move a federal district court to quash a subpoena issued

to it — but not a third party — on the grounds that compliance would be unreasonable or oppressive. In a civil investigation, the recipient of an FTC CID can petition the Commission to limit or quash the CID. If a party fails to comply with a CID, the FTC may initiate enforcement proceedings in court, at which time the recipient can object to issuance of the CID. The recipient of an Antitrust Division CID can request an order modifying or setting aside the CID directly from a federal district court. The Antitrust Division must go to federal court to enforce the CID.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

The Antitrust Division and state attorneys general do not have unilateral authority to impose fines or decisions of violation; rather, they must bring action in court to adjudicate alleged violations.

A defendant found in violation following trial has a right to appeal the final decisions or remedies imposed to the federal circuit court of appeals and ultimately, the Supreme Court.

For FTC actions before an administrative law judge (ALJ) at the Commission, the only remedy available is injunctive relief. Following the initial decision of the ALJ, the parties may appeal to the Commission and then to a federal circuit court of appeals.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Because the Antitrust Division and state attorneys general must bring an action in a federal court to enforce federal competition laws, the federal courts are involved in adjudicating alleged violations of competition laws and imposing remedies if violations are found. Federal circuit courts also are involved in adjudicating appeals from final decisions of the FTC for civil actions first brought before that body.

Additionally, federal district courts are involved in the investigatory process by issuing search warrants and grand jury subpoenas. Federal district courts also may be asked to enforce civil investigative demands or other compulsory process requests.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

In all criminal competition cases and some civil competition cases, the Antitrust Division, the FTC, and/or state attorneys general are involved as the plaintiffs bringing an action. When not the plaintiff, the U.S. agencies or state attorneys general may still be involved by filing briefs as a "friend of the court" (*amicus curiae*), attempting to influence the court's determination. More rarely international competition authorities will seek to participate in a competition action before a United States court as *amicus curiae*.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

Third parties may pursue civil claims in federal and state courts to seek damages and/or an injunction to stop the anticompetitive behaviour. Private litigation often follows an investigation by the competition authorities into the same industry or conduct.

Claims can be brought either by an individual party or as a class action on behalf of a group of similarly situated individuals. Treble damages -- three times the amount of the injury — are generally available for successful claims. Under federal anti-trust law, only direct purchasers (those who bought directly from a conspirator) have standing to seek civil damages. However, indirect purchasers have the ability to assert damage claims for anti-trust violations under various state laws.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

Private litigation concerning anti-trust violations is commonplace in the United States with thousands of actions brought in state and federal court each year. While many cases are settled by the parties, private litigants have had success in demonstrating a violation of the competition law such that monetary compensation is awarded.

14 Miscellaneous

14.1 Is anti-competitive conduct outside the USA covered by the national competition rules?

Under the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), anti-competitive conduct occurring outside of the United States is actionable under the U.S. anti-trust laws so long as such conduct has a “direct substantial and reasonably foreseeable effect” on U.S. domestic commerce, U.S. import commerce, or the export business of a U.S.-based exporter. While the presence of such an effect would be sufficient to confer jurisdiction for a U.S. government anti-trust investigation or prosecution, application of the FTAIA to private enforcement rights is more complex. In the typical case, recovery will be limited to injuries incurred in U.S. domestic commerce or resulting from U.S. import transactions. Recovery for damages sustained outside of U.S. commerce, such as purchases of U.S. exports or purchases in entirely non-U.S. transactions, will be far more difficult to obtain.

14.2 Please set out the approach adopted by the national competition authority and national courts in the USA in relation to legal professional privilege.

Both the FTC and the Antitrust Division recognise the basic law of privilege. The attorney-client privilege arises whenever a communication is made between an attorney and a client for the purpose of giving or obtaining legal advice. The related “attorney work product” doctrine applies to materials prepared in anticipation of litigation by an attorney or her agent, and the client or her agent. These privileges apply equally to in-house and outside counsel.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to the USA in relation to matters not covered by the above questions.

Under the U.S. anti-trust regime, potential penalties for anti-competitive conduct can be severe, including both potential incarceration and substantial fines for criminal violations, and “joint and several” treble damages liability to civil plaintiffs. In light of the timing issues that arise under the Antitrust Division’s Corporate Leniency Policy, and the often complex interaction between criminal and civil anti-trust actions in the U.S., it is crucial that knowledgeable counsel be engaged at the earliest possible moment that a firm learns that it may have exposure for anti-competitive conduct even arguably affecting U.S. commerce.

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