New York State Bar Association: International Section
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Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

I. The Hypothetical — The Solar Panels Conspiracy

A. The conspiracy

1. You are approached by the in-house General Counsel of Sun Energy, a company headquartered in Tokyo. Sun Energy manufactures components for solar electricity systems, including solar panels that capture sunlight for conversion into electricity.

2. The GC informs you that she has discovered that Sun Energy is part of what appears to be a broad conspiracy to rig the bids to supply solar panels, which are made in response to RFPs by both project owners (typically government bodies who self-manage their own solar electric projects) and by private project managers (engaged by some government bodies or commercial enterprises to handle project bidding and overall management).

3. She believes the conspiracy started in 2010 at a meeting in Seoul, and included meetings among the participants in at least South Korea and Tokyo, and perhaps also in Singapore and Europe.

4. She tells you that the other participants are two manufacturers of large solar panels: Rays ‘R US, a US company, and Broad Lights, a Singapore company.

B. The Solar Panel market

1. Solar panels absorb sunlight as a source of energy to generate electricity. The panels are used with a photovoltaic (PV) module, a connected assembly of (typically) photovoltaic solar cells, which come in various sizes. Solar panels and PV modules offer an array of a system features that generate and supply solar electricity in government, commercial and residential applications.

2. The size and complexity of a solar panel depends on the voltage amount of electricity that the system needs to generate.

3. Although many companies manufacture relatively simple panels suitable for small business and residential residential use, only four companies have the expertise and production techniques and capacity needed to produce solar panels for the very high electricity voltage level systems suitable for governments and large commercial enterprises.

4. Direct purchasers of solar panels for high voltage systems are: (a) project owners, consisting of government bodies and, occasionally, large commercial enterprises who self-manage projects; and (b) general contractors engaged by government and commercial project owners.

5. Project owners are also indirect purchasers of panels where they engage general contractors who themselves purchase the solar panels directly from manufacturers.

6. Panels for very high voltage systems are sold worldwide.

7. Broad Lights is the world's largest solar panel manufacturer. Sun Energy is number 3, and Rays 'R US is number 4. Each company also makes (or outsources) the PV modules that connect to the panels.

8. The No. 2 company is Bavarian Panel Works, headquartered in Germany.

9. Taking high voltage panels as its own market, together Broad Lights (40%), Sun Energy (20%), and Rays 'R US (15%) control 75% of the market.

10. Bavarian Panel Works has the remaining 25%, virtually all of which comes from projects throughout Europe.

C. The conspirators

1. Sun Energy is headquartered in Japan. Sun Energy manufactures solar panels both for sale as components and for use within Sun Energy's own systems.

2. Broad Lights, a Singapore firm, is the largest manufacturer of solar panels. Broad Lights also sells panels as components and for use in its own systems. Broad Lights regularly collected information on the solar panel market for the purpose of monitoring and enforcing adherence to the bid rigging scheme.

3. Rays 'R US is headquartered in the US. It too sells panels as components and for use in its own systems.

4. All three companies have the ability to bid to supply solar panels anywhere in the world.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

5. Since 2010, Broad Lights, Sun Energy and Rays 'R US have bid on and supplied solar panels for projects throughout Africa, Asia, the Far East and South East Asia, North and South America, and Australia--New Zealand.

6. Prior to 2015, Broad Lights bid on and supplied panels for several projects in Europe. Since then, none of the three conspirators has serviced the European market.

D. US: DOJ's Antitrust Division routinely prosecutes agreements to submit fictitious (non-competitive) bids, to rotate the winning bidder, or to otherwise allocate bids—regardless of whether the bidders are buyers or sellers.

1. "A conspiracy to submit collusive, non-competitive, rigged bids is a per se violation of the statute." *United States v. Brighton Building & Maintenance Co*., 598 F.2d 1101, 1106 (7th Cir.) (citing authorities), cert. denied, 444 U.S. 840 (1979).

2. An agreement that "restricted each company's ability to compete for the other's billboard sites . . . clearly allocated markets between two billboard companies . . . [and was] a classic per se antitrust violation." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991).

3. "[B]id rigging is a form of horizontal price fixing . . . [and] is, therefore, a per se violation of the Sherman Act." *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018).

E. Japan : Under the Antimonopoly Law of Japan (Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)), a cartel (e.g., price-fixing, production limitation, and/or market/customer allocation and bid-riggings) is prohibited as an unreasonable restraint of trade, i.e., an agreement or mutual understanding among competitors to eliminate or restrict competition among them that substantially restrains competition in a particular field of trade (Article 3, Latter Part). Having said, the Japanese First Trade Commistion's ("JFTC's") approach toward the cartel is per-se illegal approach.

1. The JFTC is the sole enforcement agency established by the Antimonopoly Law. In contrast to the United States, there is no enforcement agency in Japan that shares the power and responsibility to enforce the Antimonopoly Law with the JFTC.

2. There two types of investigation by JFTC, i.e., administrative investigation and criminal investigation.

a. After the administrative investigation, the JFTC determines whether it issues a cease and desist order and/or an administrative payment order.

b. If the JFTC, as a result of the criminal investigation, determines that the alleged conduct constitutes a cartel and the criminal sanctions are appropriate therefor, it files a criminal accusation with the Public Prosecutors' Office.

c. Criminal sanctions under the Antimonopoly Law will be imposed on a corporation and/or individuals through the criminal procedures under the applicable laws in the same way for other criminal cases.

3. Singapore: Bid-rigging, whichever form it takes (e.g.,. cover quotes, refraining from bidding, price-fixing, etc) is an anti-competitive agreement by object, prohibited under the Competition Act.

a. As a "by object" infringement, implementation does not need to be established by the Competition and Consumer Commission Of Singapore (CCCS), the statutory body which enforces the Competition Act in Singapore.

b. Whether the anti-competitive agreement is between buyers or sellers does not make a difference. However, "vertical" bid-rigging, *i.e*. an agreement between the entity calling the tender and one bidder would not fall under the current prohibition.

c. Only administrative investigation in Singapore, the CCCS being both the investigator and adjudicator.

d. Fines: up to 10% of the Singapore turnover of the parties up to 3 years. Directions can also be imposed.

e. No criminal actions.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

II. [Scenario A] The Conspiracy Is Thus Far Undetected.

A. Sun Energy's GC informs you that, to her knowledge, no government agency knows about the bid rigging conspiracy. Several major direct purchasers (general contractors) however, are suspicious, and executives at Sun Energy are nervous.

B. The next major RFP—for a huge project in Brazil—is due in two weeks, and a meeting to select the winning company and set bid prices for the other two is scheduled for Sao Paulo in a week. What should Sun Energy do?

C. The US Antitrust Division has a long-standing leniency policy, with conditions that the company must meet for the leniency grant.

1. The first company or individual that self-reports a per se violation, such as bid-rigging and thereafter cooperates with the Division in its investigation and prosecution of the conspiracy, will avoid all criminal penalties.

2. All other companies that cooperate will still face criminal charges, but receive DOJ sentencing recommendations based on their self-reporting and cooperation.

3. *See generally*:

a. Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (rev. Jan. 2017).

b. Daniel J. Fetterman & Mark P. Goodman, Defending Corporations and Individuals in Government Investigations §§8:18-28 (2017-18 ed.) ("Fetterman & Goodman, GOVERNMENT INVESTIGATIONS").

D. Japan: There is a leniency program under the current Antimonopoly Law in Japan, which allows five leniency applicants ***before*** the initiation of JFTC's investigation (i.e., dawn raid) and three ***after*** the JFTC's investigation to enjoy the benefit thereof.

a. 1st applicant filed before initiation of investigation: total immunity;

b. 2nd applicant filed before initiation of investigation: 50% deducted;

c. 3rd applicant through 5th applicant filed before initiation of investigation: 30% deducted; and

d. Any applicant filed after initiation of investigation: 30% deducted.

1. The leniency program in Japan will be materially changed after the amendment to the Antimonopoly Law, the effective date of which has not been decided yet.

a. For the 2nd applicant and after, the reduction rate according to the order of application described above would be lowered;

b. However, an additional reduction of the administrative surcharge up to 40% for the applicant by the JFTC is allowed depending on the degree of cooperation with the JFTC for its investigation.

c. *See* https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/190619071.pdf.

E. Singapore: the CCCS has adopted a Leniency Programme which applies to cartel cases only.

1. The first undertaking to come forward before an investigation has started may get immunity. After an investigation has started but before a proposed infringement decision (PID, similar to a Statement of Objections) is issued—up to 100%.

2. Further applicants may get up to 50%.

3. There is no limitation on the number of application but reduction of penalty will only be granted if there is real added value to the investigation.

F. Privilege considerations relating to participation of in-house counsel in any investigation need to be evaluated.

1. In the US, communications with in-house counsel as part of the investigation will be protected under the attorney-client and work product privileges. *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981).

2. In the European Union, however, the privilege is not recognized for in-house attorneys. Case C-550/07 P, *Akzo Nobel Chemicals Ltd et al. v. Commission* (ECJ 10 September 2010). 3.

3. US antitrust enforcers generally will recognize privileges established in other jurisdictions. *See* DOJ-FTC Model Waiver form and FAQs.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

G. In Japan, as of the conference (Nov. 2019), the privileges at issue are not applicable.

1. In 2019, together with the amendment to the Antimonopoly Law, the JFTC announced that it will issue rules and regulations whereby , while it is limited to the administrative cartel enforcement context only, the privilege will be newly introduced and be in effect around the end of the year 2020.

2. It would be subject to some certain requirements specific to the Japanese version (under discussion), and it is expected that some certain prerequisite conditions will have to be satisfied for the purpose of such in-house counsel.

3. *See* Treatment of confidential communication between an enterprise and attorney. https://www.jftc.go.jp/en/pressreleases/ yearly-2019/March/190312_3.pdf.

H. In Singapore, typically, legal privilege does not by right extend to in-house lawyers.

1. However, the CCCS Guidelines make clear that, with regards to competition investigations, legal privilege applies to both communications with lawyers in private practice (including foreign lawyers) and with in-house lawyers.

I. Separate legal representation for individual company executives and employees will need to be considered to address potential conflicts of interest.

1. Regarding conflicts under New York State law, *see* NYCPR Rules 1.7, 1.13.

2. *See generally* Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §3:17-18.

3. In Japan, unless there is a conflict of interest or differences in the defense strategy, the lawyer who represents the corporation may represent the employee during the process of investigation by the JFTC, in particular, the JFTC J administrative investigation process.

a. However, in practice, if the individual employee's conduct becomes subject to a criminal sanction, an independent lawyer should represent such individual.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

4. Singapore – same as Japan.

    a. Note: there is no ***individual*** liability in Singapore for competition cases, unless the individual obstructs the investigation by destroying documents, lying to CCCS officers, etc.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

III. [Scenario B] The Conspiracy Is Known To Government Enforcers But Only In Its Broad Outlines.

A. Against your advice, Sun Energy decided to hold off on an internal investigation and declined to report the conspiracy to any antitrust enforcer. However, Sun Energy did not attend the Sao Paulo meeting, where Broad Lights and Rays 'US rigged their bids for the Brazilian project.

B. Now, the GC tells you that she has learned that Rays 'R US has deposited $10 million in a Swiss bank account for the benefit of a Brazilian government contracting official, who discovered the bid rigging scheme, and who needed to be paid to keep quiet. The GC says that Rays 'R US has gone to "antitrust enforcers," but which ones is not clear.

C. Furthermore, the GC says this isn't the only instance in which pay-offs have been made to contracting officials. The others, however, were much smaller in amount—on the order of $50,000-100,000—and almost always came from Broad Lights. She says this particular payment is so large that it's unlikely Rays 'R US paid without part of the money coming from Broad Lights.

D. Sun Energy's GC does not know whether Rays 'R US knows about the prior payments, or, if it does, whether it has disclosed them to the enforcers it has approached.

E. The bribery of a foreign official by a US company creates a significant risk of an FCPA violation.

1. The FCPA covers all "issuers"—companies based in the US or abroad whose securities are registered in the US or that file reports under the Securities Exchange Act of 1934—and domestic companies, plus persons whose acts in the US facilitate an anti-bribery offense. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §13:5.

2. Broad Lights could also be at risk. Foreign non-issuer companies are covered if they use the means or instrumentalities of interstate commerce in furtherance of prohibited activity. *Id*. at 736 (citing 15 U.S.C.A. §78dd-3(a)).

3. The FCPA also covers false records created to conceal a bribe. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §13:12-14.

F. In mid-2018, the US DOJ also issued a policy statement designed to encourage self-reporting under FCPA.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

1. If a company "has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated," a presumption in favor of a declination of prosecution decision arises, "absent aggravating circumstances involving the seriousness of the offense or the nature of the offender." US DOJ, JUSTICE MANUAL §9-47-120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

2. In remarks in June 2019, Deputy Assistant Attorney General Matthew Miner noted that "the Policy furthers our commitment to rewarding companies that try to do the right thing." https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9.

G. In Japan, corruption may be subject to the criminal enforcement of the law (Unfair Competition Prevention Act, Act No. 47 of May 19, 1993).

H. In Singapore, corruption would fall under the Prevention of Corruption Act, which is administered by the Corrupt Practices Investigation Bureau ("CPIB"). So, bribery could be investigated, but not by the CCCS.

I. Under US law, withdrawal from a conspiracy typically requires:

1. An unequivocal affirmative expression of withdrawal made to co-conspirators, or

2. A report the conspiracy to law enforcement officials.

3. *See generally*:

a. *Smith v. United States*, 568 U.S. 106 (2013) (defendant continuied to be a conspirator although incarcerated while the conspiracy continued).

b. *In re Optical Disk Drive Antitrust Litig*., 2017 WL 6503743 (N.D.Cal. Dec. 18, 2017) (exiting the industry through sale of the relevant business can provide the required affirmative expression of withdrawal from a price fixing conspiracy).

J. In Singapore, the law is similar to the US.

New York State Bar Association: International Section
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Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

IV. Scenario C] The Dike Is Leaking

A. Sun Energy's GC now tells you that she has heard rumors that in 2015 (years after the bid rigging conspiracy began) Broad Lights and Bavarian Panel Works, a German company, made an arrangement under which Bavarian Panel Works agreed to limit its business to Europe, and Broad Lights agreed to keep the bid rigging scheme out of Europe. To avoid suspicion, from time to time, Broad Lights submitted fictitious bids on European projects, which enabled Bavarian Panel Works to appear to win against "competition."

B. A geographic market division by competitors is a per se violation of the Sherman Act.

1. "HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business [50] or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Ga., Inc*., 498 U.S. 46, 49-50 (1990).

2. "One of the classic examples of a per se violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 608 (1972).

3. Under US law, each participant in an antitrust conspiracy is responsible, both criminally and civilly, for the acts of co-conspirators performed during and in furtherance of the conspiracy. Joint and several liability is a "vital instrument for maximizing deterrence." *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629, 633 (7th Cir. 2002).

4. Moreover, under US law, an antitrust conspirator may not reduce its damage exposure by seeking contribution from the other co-conspirators who are alleged to have been more culpable. *Texas Indus., Inc. v. Radcliffe Materials, Inc*., 451 U.S. 630 (1981).

C. Japan: Market division is prohibited as an unreasonable restraint of trade and is subject to the cease and desist orders.

1. The calculation of administrative surcharge is made based on the sales of the defendant company.

2. Therefore it may be difficult for the JFTC to impose the administrative surcharge on a defendant non-resident company—e.g., a foreign corporation like that in the hypothetical—if there are no sales in the relevant geographic market—here, the Japanese market.

D. In Singapore, market-sharing and customer-allocation are a by object infringement of the Competition Act.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

V. [Scenario D] The Dike Gives Way

A. Still acting against your advice, Sun Energy has again failed to approach any antitrust or other enforcer.

B. Now, Sun Energy's GC informs you that she has learned Broad Lights in fact provided part of the $10 million pay-off, wiring money from one of its Singapore bank accounts to a Rays 'R US account in the UK. And, Broad Lights, too, has gone to one or more antitrust enforcers and is working out "plea" deals. Full-blown investigations by multiple enforcers are getting underway.

C. The reach of US law is long.

1. "For instance, a foreign national, living abroad and having never even traveled to the U.S., may be criminally prosecuted under U.S. law if he or she uses the telephone, mail, or internet to communicate with others located in the U.S. or if he or she utilizes the U.S. financial system to perpetrate a crime or launder profits." Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §5:34, at 220.

2. Both the language of the underlying US statute and the effects of the conduct are relevant to jurisdiction.

   a. In the US, absent clearly expressed congressional intent to the contrary, US federal laws will be construed to have only domestic application. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

   b. No US antitrust jurisdiction in price fixing case where plaintiff, a non-US resident, purchased from a seller, a non-US resident, in a transaction outside the US. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

   c. *Compare*: Congress's incorporation of RICO predicate offenses that be committed outside the US "gives a clear, affirmative indication that §1962 applies to foreign racketeering activity — but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2102 (2016).

   d. *See generally* Foreign Trade Antitrust Immunities Act (FTAIA), 15 U.S.C. §6a.

3. US jurisdiction is based on effects in the US, "even if the physical acts themselves occurred elsewhere. If a foreign national's actions are in furtherance of a corrupt payment . . . and have made use of U.S. mails or any means or instrumentality of interstate commerce, U.S. regulators may see a sufficient basis to exercise territorial jurisdiction." Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §13:5, at 737-38.

D. The Japanese Antimonopoly Law has no provision expressly setting forth the JFTC's jurisdiction. However, the JFTC considers that it has jurisdiction over conduct that has an effect on the Japanese market, irrespective of where such activities are carried out.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

VI. [Scenario E] The Aftermath

A. Investigations have begun with publicly disclosed "raids" in the US and Singapore. The US criminal investigation is believed to be proceeding, although not formally confirmed by the US DOJ. Private lawsuits, some of them class actions, are filed in the US.

B. Global antitrust enforcers cooperate extensively in investigations and enforcement actions. *See generally* Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §8:13.

C. In the US, the constitutional privilege against self-incrimination can constrain the US DOJ's ability to cooperate with both enforcers abroad and company counsel. *See*:

1. *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (privilege violated where a US witness relied in part on testimony of defendant that was compelled by a foreign enforcer).

2. *United States v. Connolly*, No. 16-cir-00370-cm (S.D.N.Y. May 2, 2019): (government found to have "out-sourced" its criminal investigation to company counsel, but error was harmless).

D. Companies and individuals who are charged criminally face legal and practical consequences.

1. The DOJ will likely consider indicted defendants that do not submit to US jurisdiction as "fugitives" and thus subject to the "fugitive disentitlement" doctrine.

a. "Federal courts do not play 'catch me if you can.' If a defendant refuses to show up to answer an indictment, ignores an arrest warrant, or leaves the jurisdiction, the court may decline to resolve any objections to the indictment in his absence." *United States v. Martirossian*, 917 F.3d 883, 885 (6th Cir. 2019).

b. Courts, however, have discretion whether to apply the doctrine, and typically may consider its underlying justifications: "(1) assuring the enforceability of a decision against a fugitive; (2) imposing a penalty for flouting the judicial process; (3) discouraging flights from justice to promote efficient operation of the courts; and (4) avoiding prejudice to the other side engendered by a defendant's flight." *Hanson v. Phillips*, 442 F.3d 789, 795 (2d Cir. 2006).

2. *See generally*:

   a. *United States v. Sindzingre*, 2019 WL 2290494 (S.D.N.Y. May 29, 2019) (discussing authorities) (LIBOR manipulation committed in France); and

   b. *United States v. Hayes*, 118 F. Supp.3d 620 (S.D.N.Y. 2015).

E. Extradition of individuals to face trial in the charging jurisdiction may also be a risk to evaluate.

1. Extradition is "the formal process by which a person found US Attorneys' Manual §9-15.100.

2. Normally governed by bilateral treaty, which is between two countries, and which establishes the circumstances and terms of surrender. The US has more than 100 such treaties.

3. Extradition treaties set out the conditions authorizing and limiting extradition. Among the more common provisions are:

   a. A treaty may list "extraditable" offenses.

   b. The treaty may describe kinds of offenses by category. Historically, price fixing was not covered.

   c. Dual criminality ("bad in both places") often required. Jurisdictions around the world are increasingly including price fixing as a criminal offense.

   d. Citizens of the rendition state not covered (there is, in international law, "a persistent repugnance" among many nations to extraditing their own citizens).

   e. National sentiment generally may be a consideration.

   f. Location of the violation (unlawful conduct that occurred in the US may be required).

   g. For individuals sought to be extradited, the US DOJ may issue a "red notice" to Interpol, "is the closest instrument to an international arrest warrant in use today." US DOJ, CRIMINAL RESOURCE MANUAL §6.11, https://www.justice.gov/jm/criminal-resource-manual-611-interpol-red-notices.

h. A red notice will not necessarily be publicly available, thus exposing an individual to arrest upon traveling internationally.

i. *See generally* Jay L. Himes and Rudi Julius, "I'm Never Too Far Away": Extradition of Non-US Nationals Charged With Price-Fixing, 28 Int'l Law Pract. 121 (No. 2 2015).

4. Japan has a bilateral extradition treaty with the United States (The Treaty on Extradition between the United States of America and Japan), whereby an antitrust violation, including cartel conspiracy, is covered.

a. For the purpose of Japanese domestic enforcement of a certain request thereunder, the Act of Extradition (Act No. 68 of July 21, 1953) will govern.

b. At this stage, however, there is no precedent where a Japanese national was extradited for the purpose of the US cartel enforcement.

F. For an overview of issues involving non-US nationals, *see* Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §§5.33-43.

G. Coordination on simultaneous criminal and civil (treble damage antitrust) litigation is a recurring scenario in the US.

1. In the US there tends to a preference for staying (suspending) parallel civil litigation to preserve the integrity of law enforcement investigation, often conducted through secret grand jury proceedings.

a. The stay can apply to some proceedings, most commonly discovery, but not to others, such as motions to test the legal sufficiency of the complaint.

b. With DOJ investigations often taking years, however, often US courts will allow discovery to proceed in phases—first document production and later pretrial witness examination (depositions).

c. For coordination of criminal and civil proceedings generally, *see* John Bogart, Jay L. Himes & Howard Sedran, CONCURRENT ANTITRUST CRIMINAL AND CIVIL PROCEEDINGS: IDENTIFYING PROBLEMS AND PLANNING FOR SUCCESS (2013).

d. *See generally:*

(i) The United States' Motion to Intervene and Stay Discovery, *In re Broiler Chicken Antitrust Litigation*, Case No. 16-cv-8637 (ND Il June 21, 2019), and

(ii) Intervenor United States' Memorandum in Support of Its Unopposed Motion to Extend Order Staying Discovery, *Southeast Ready Mix, LLC v. Argos North America Corp.*, Civil No. 1:17-CV-02792-ELR (ND GA July 19, 2019).

H. A benefit of US antitrust leniency is also the opportunity for the company granted leniency to receive damage limitation benefits: (1) actual damage exposure, based in amount on the company's market share, and not treble damages, and (2) no joint and several damage exposure for injuries caused by sales made by co-conspirators.

1. These benefits exist by statute, which applies only to the company granted leniency by the DOJ, not to other companies that plead guilty in the same investigation.

2. The benefits are conditioned on the leniency recipient providing "satisfactory cooperation" to the plaintiffs in the civil litigation.

3. *See generally*:

a. The Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), Pub. L. No. 108-237, tit. II, 118 Stat. 661, *as amended*. Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010).

b. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §8:29.

c. *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, 2013 WL 4536569 (C.D. Cal. Aug 26, 2013) (ACPERA benefits denied where the leniency recipient did not provide satisfactory cooperation).

I. US violations can have significant collateral effects.

1. Companies can be "debarred" from doing business with the US government under the FCPA. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §13:17, at 765-66.

2. Antitrust violators whose offense arises from dealings with the federal government, such as bid rigging, may similarly be debarred. *See* GSA, Frequently Asked Questions: Suspension & Debarment,

https://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment.

3. Dealing with the government includes bidding on overseas projects funded by the government. *United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003) (foreign subsidiary of domestic corporation convicted of bid rigging on project in Egypt that the US funded).

4. While the FCPA does not create a private right of action, the acts underlying the violation may give rise to securities fraud, unfair competition, RICO, or breach of fiduciary duty claims. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §13.17, at 766-77.

5. Monitors may also be ordered to oversee company activity. *Id.* §13:17, at 768-70.

Panel 1 Outline: Challenges in Cross-Border White Collar Criminal Investigations

VII. [Scenario F] Hope Springs Eternal . . . .

A. Sun Energy's GC has read that the US DOJ recently adopted a new policy regarding consideration of corporate antitrust compliance programs and issued a document to guide prosecutors' evaluation of corporate compliance programs at the charging and sentencing stage. She asks whether Sun Energy could avail itself of the benefits of the change.

B. While the JFTC has advocated the establishment of compliance program to the companies, the Antimonopoly Law provides that the amount of administrative surcharge is calculated based on (1) the rate under the Antimonopoly Law, and (2) the sales amount of the cartel period (up to 3 years).

1. The company's compliance program is not a factor to determine the amount of administrative surcharge.

2. After the amendment to the Antimonopoly Law, the degree of cooperation with the JFTC will be a factor, but the compliance program itself will not be a factor.

C. Regarding US DOJ consideration of compliance programs in charging and resolution decisions, *see generally*:

1. US Department of Justice, US ATTORNEY'S MANUAL, Principles of Federal Prosecution of Business Organizations §9-28.000 *et seq.*

2. US Department of Justice, Antitrust Division, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

3. Fetterman & Goodman, GOVERNMENT INVESTIGATIONS §2.1 *et seq*.