

Lessons From the International Cartel Workshop

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The ABA and IBA hosted the 2022 [International Cartel Workshop](#) in Lisbon, Portugal, over three days in late June. The biennial workshop is considered the premier international cartel conference, and was attended by senior members of the private bar and government enforcers from around the world, including several members of Winston's Antitrust/Competition Group.

The workshop provided a unique opportunity for close interaction between private attorneys, in-house counsel, and government enforcers, centered around a detailed hypothetical multijurisdictional investigation involving global businesses engaged in conduct raising a variety of nuanced antitrust considerations. Demonstrative programs took the investigation through each step from responding to an initial government raid, to conducting internal investigation and developing a defense strategy, and through negotiating a resolution with enforcers in the U.S. and Europe. Speakers acted out their usual real-life roles—defending or investigating a company's conduct—all in the context of the hypothetical. For example, Co-Chair of Winston's Antitrust/Competition Practice, Eva Cole, together with trial attorneys from the U.S. DOJ Antitrust Division, presented a mock negotiation seeking to resolve the DOJ's investigation into whether a company entered anticompetitive agreements with its competitors to restrict hiring and employee poaching between the companies.

Along with demonstratives highlighting best practices around common issues in antitrust conduct investigations, the workshop also involved discussion of enforcement agencies' latest policies and priorities.

A recurring topic was the current state—and arguably declining effectiveness—of antitrust leniency programs offered by government enforcers. Leniency programs work to disrupt and detect cartels by encouraging participants to self-report to enforcers, providing substantial benefits to those that self-report and cooperate in the government investigation. These benefits vary by jurisdiction and can include immunity from criminal prosecution for the corporation and individual employees, eliminated or reduced government fines, and reduced damages exposure in follow-on class actions and other private civil lawsuits. The U.S. DOJ Antitrust Division was the first to adopt a formal leniency program in 1993 and has come to [consider](#) it the DOJ's "most important investigative tool for detecting cartel activity." Enforcers in other jurisdictions soon followed with their own leniency programs with varied conditions. These programs were highly successful from the enforcers' perspective, leading to decades of global cartel investigations and record fines from the 1990s through the mid-2010s. However, in recent years, leniency

applications appear to have declined both in their frequency and in the magnitude of conduct they are reporting. The criminal fines and penalties obtained by the U.S. DOJ Antitrust Division have declined from their peak in 2015.

While some hope that declining enforcement is a reflection of companies' increased antitrust compliance, other panelists voiced concern that antitrust violations are still occurring but now are less likely to be reported through a leniency application. Much discussion, formally in panels and informally in breaks and meals, focused on the reasons leniency applications may be declining and what could be done to make the leniency programs more effective. The discussions highlighted uncertainties around changes in government policies, including the U.S. DOJ's recent adoption of the "promptness" requirement for self-reporting after discovery of wrongdoing; significant private damages exposure remaining even when government leniency is obtained; increased U.S. DOJ focus on prosecuting individual executives; and tensions between the desire to punish wrongdoers and the need to offer incentives for those wrongdoers to self-report. Other comments questioned whether agencies' efforts to expand the scope of their enforcement—such as emphasizing “no-poach” labor cases or focusing on practices by a few technology giants—have distracted from efforts to prosecute more traditional price-fixing and bid-rigging behavior.

Overall, the workshop reflected how Winston's antitrust attorneys continually monitor the evolving enforcement landscape and adapt the advice we give our clients accordingly. In a multijurisdictional investigation, clients must play three-dimensional chess, weighing how decisions with one enforcer in one jurisdiction may affect outcomes in another jurisdiction or in private litigation years down the road. Amid changing legislation, government policies, and political priorities, the need for expert antitrust counsel is as strong as ever.

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[Eva Cole](#)

[Seth Farber](#)

[Kevin B. Goldstein](#)

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Eva Cole



Seth Farber



Kevin B. Goldstein

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