

Eva Cole Speaks at IBRAC's 28th Annual International Seminar on Competition Policy

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On October 27, Eva Cole, co-chair of Winston's Antitrust/Competition Practice, joined a panel at the International Seminar on International Competition Policy organized by IBRAC, the Brazilian Institute of Studies on Competition, Consumer Affairs, and International Trade. The conference, which was held October 26–28, 2022, brought together Brazilian and foreign competition authorities, judges, attorneys, and economists to focus on important topics and recent developments in the world of antitrust.

Eva's panel—"Financial Contributions in Cartel Settlements: Where Are We?"—covered Brazilian settlement policy, the impact on CADE's practice of plea agreements negotiated in connection with cartels uncovered by Operation Car Wash, and the extent to which Brazilian policy and practice are in line with recommendations from the Organisation for Economic Co-operation and Development (OECD) and recent developments in the United States. Eva's discussion focused on the policies and practices surrounding cartel prosecution and settlements in the United States, including how fines are calculated under the Federal Sentencing Guidelines.

Key takeaways:

- The U.S. Department of Justice (DOJ) has recently shown a willingness to pursue criminal charges for a broader range of conduct, including, for example, alleged reductions in innovation, as well as no-poach and wage-fixing agreements that were previously only pursued as civil matters. At the same time, the DOJ has made several policy changes regarding corporate criminal investigations—including changes to its antitrust leniency program—that have increased the burdens of cooperation.
- These changes—coupled with the DOJ's announced willingness to take more cases to trial rather than settling—have led to more criminal cartel trials. As the DOJ has suffered several high-profile trial losses, companies may become more emboldened to fight cartel charges in court rather than settle.
- If a company decides to settle, a deferred prosecution agreement (DPA) may be available in certain limited circumstances. In such cases, the DOJ will file criminal charges but agree not to prosecute if the company cooperates and complies with the terms of the DPA (which may include appointment of an independent compliance monitor, for example).
- Historically, DPAs have not been used in cartel cases, but that practice has evolved over the past decade. In 2019, the DOJ announced a policy shift allowing prosecutors to consider using DPAs to resolve criminal

antitrust investigations where companies (i) maintained a robust compliance program, (ii) self-reported the wrongdoing, (iii) cooperated with the DOJ in its investigation, and (iv) remedied the misconduct.

- To date, most of the DPAs reached in the cartel context have involved health care providers, where the DOJ has recognized the significant collateral consequences of a felony conviction, which include excluding the companies from participating in federal health care programs.
- Under the Biden Administration, DOJ leadership is looking closely at the DOJ's use of DPAs and has reiterated that they will only be available in extraordinary circumstances.
- Criminal antitrust investigations are typically resolved through plea agreements, which generally require the company pleading guilty to pay a fine consistent with the range of punishments allowed under the Federal Sentencing Guidelines.
- Determining a cartel fine is a complicated calculation that involves consideration of (1) the volume of affected commerce; (2) the culpability score, which is determined by several factors, including the size of the organization, its prior bad acts, and the existence of a compliance program, among others; (3) any cooperation discount; and (4) the DOJ's recommendation within the Guidelines range. The company and the DOJ negotiate at every step of the process.

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