

Global Strategies for Antitrust Settlements

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Private antitrust lawsuits can be lengthy and complex, often involving several defendants and dozens of differently situated plaintiffs, including the potential for multiple putative classes of plaintiffs, as well as direct action plaintiffs pursuing individual claims. In international cartel cases, global defendants must increasingly face private lawsuits across multiple jurisdictions, making it virtually impossible to settle everything globally at the same time due to the complexity of these sprawling matters and jurisdiction-specific idiosyncrasies. Indeed, new actions may be filed in other jurisdictions many years after the initial lawsuits.

The United States is often a priority jurisdiction—if not the primary one—shaping the strategy for private litigation and settlement. This is because private U.S. antitrust claims allow for treble damages and joint and several liability, exposing U.S. antitrust defendants to enormous risk. In addition, the U.S. litigation system allows for extensive discovery, which can significantly impact lawsuits in other jurisdictions.

For antitrust defendants, settling antitrust claims globally requires not only a robust and coordinated global legal strategy but also patience and tenacity. An important first step in considering a potential resolution of claims is conducting a risk assessment that evaluates expected damages across jurisdictions. Risk assessments largely mirror damages calculations, incorporating certain discounts and assumptions to account for risks faced by both sides. In a price-fixing case, for example, the risk assessment typically starts with the relevant volume of commerce, applies an overcharge amount, factors in certain discounts, and finally calculates potential damages.

Risk discounts vary depending on the specific facts of the case and the circumstances of the particular claimant or potential claimant, as well as questions unique to the jurisdictions potentially at issue. Different discounts may apply to different categories of commerce. Some common discounts include:

- **General litigation risk**, assessing the overall likelihood that a claimant will win the case through trial and be awarded damages.
- **Class certification risk**, evaluating the chances of putative class plaintiffs successfully certifying a class or otherwise overcoming legal and procedural hurdles to proceeding as a collective action.
- **Proof of conduct risk**, assessing the likelihood of proving liability for a particular category of commerce.

- **Proof of pass-on risk**, determining the likelihood of indirect purchaser plaintiffs proving that any overcharge was passed on to them.
- **Foreign commerce risk**, assessing rules that limit included commerce, jurisdictional considerations, and arguments under the Foreign Trade Antitrust Improvements Act in the United States.

Risk assessments must be conducted on a jurisdiction-by-jurisdiction basis to account for each jurisdiction's framework.

Once a preliminary risk assessment is calculated, antitrust defendants can consider monetary settlement targets across jurisdictions and for different categories of commerce. Although the monetary settlement target typically plays a significant role in deciding whether to pursue settlement, antitrust defendants must also consider many other complex questions, including:

- **When and where to settle?** Private litigation proceedings unfold at different paces in different jurisdictions, making it crucial to consider the optimal timing for settlement. Understanding the various statutes of limitations is essential to anticipate where potential lawsuits may yet be filed. Moreover, settling a lawsuit in one jurisdiction may have far-reaching repercussions on existing and potential litigations in other jurisdictions.
- **How will the process in different jurisdictions drive settlement timing?** Antitrust laws, regulations, and procedures differ across different jurisdictions, shaping the settlement timeline. Some settlements require notice to potential claimants and court approval, adding complexity and delay to the process. Jurisdictions impose different requirements for opt-in versus opt-out mechanisms for class claims.
- **What are the effects of settlement in the different relevant jurisdictions?** Do some jurisdictions require cooperation or admissions that may impact efforts in other jurisdictions? For example, in the United States, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) reduces the civil damages exposure for a company granted leniency under the DOJ Antitrust Division's Corporate Leniency Policy but only if the company provides timely and satisfactory cooperation to civil plaintiffs in the United States.
- **How will a settlement agreement be enforced?** Enforcement mechanisms for settlement agreements vary across jurisdictions. Understanding these different mechanisms is important when developing a settlement strategy.
- **Are there confidentiality or disclosure requirements?** Balancing the need for confidentiality to foster settlement negotiations against disclosure requirements can be a delicate task. Striking the right balance is crucial for building trust among stakeholders and maintaining the credibility of the settlement process.
- **How will joint and several liability or the availability of contribution claims impact settlement?** In the United States and elsewhere, multiple undertakings that jointly violate antitrust laws bear joint and several liability for the entire harm. However, in some jurisdictions outside of the United States, defendants can pursue contribution claims against one another such that any co-defendant that paid full damages to a claimant can recover amounts beyond its own proportionate share from other co-defendants. Understanding these particularities is crucial when formulating an effective overall settlement strategy.
- **Have the relevant affected parties been appropriately identified?** Achieving a truly global settlement requires identifying and including all relevant stakeholders and potential claimants. This task can be exceptionally challenging, especially when dealing with a large number of potential claimants across multiple jurisdictions.

In summary, addressing these complex issues demands robust cooperation among counsel and parties globally, coupled with careful consideration and planning. Companies facing antitrust claims in multiple jurisdictions must be prepared for a lengthy process, even if the goal is to settle claims as quickly as possible. Adopting an organized and flexible approach at the outset is critical to a smooth settlement process.

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