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New DOJ Guidance Increases Benefits for Robust Antitrust Compliance Programs — What Companies Need to Know

The Antitrust Division's new policy gives credit for pre-existing compliance programs, but only those that meet certain high standards.

On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the US Department of Justice's (DOJ's) Antitrust Division will consider offering Deferred Prosecution Agreements (DPAs) and reduced fines in criminal antitrust investigations to corporations with robust pre-existing compliance programs. This change signifies a major departure from the Antitrust Division's previous winner-take-all treatment of cartel participants who are first in the race to self-report under the Division's Corporate Leniency Policy.

The Leniency Program, which remains in place under the new policy, provides that a company that is the first to report its involvement in illegal activity is eligible for a complete pass from criminal prosecution in exchange for providing comprehensive cooperation.[1] While other companies may be able to reduce their overall exposure through early and substantial cooperation, or by reporting a separate and unrelated conspiracy through "amnesty plus," subsequent companies to report are still subject to charges and fines for the initial criminal antitrust conduct. The Antitrust Division's new compliance credit policy marks the first time that a company that loses the race for leniency can secure a DPA or a sentencing reduction recommendation from the government when (in the judgment of the Antitrust Division) various factors, including the adequacy of a corporation's compliance program, weigh in favor of more lenient treatment. Alongside this new policy announcement, the Antitrust Division provided comprehensive guidance on what it considers to be the "elements of an effective compliance program."[2]

This new policy is a welcome development for corporate counsel who have invested substantial time and effort into developing antitrust compliance programs, only to find that the Antitrust Division would not give them credit for those efforts. This new policy and detailed guidance represents a fundamental shift in the Division's thinking — aligning the Division's criminal enforcement program with the compliance crediting practices of other DOJ Components. It will also provide defense counsel with more opportunities to argue for DPAs or reduced fines based on a company's pre-existing compliance program. In the past, the Antitrust Division has taken a more rigid and mechanical approach to charging decisions and fine calculations, basing them primarily on the timing and nature of a company's cooperation. With this new policy, the DOJ appears open to a more comprehensive analysis of a company's culpability, including its prior efforts to prevent such conduct through robust compliance programs.

However, the potential benefits of this new policy will not be easily obtained, because what constitutes an effective compliance program will be based on the subjective determination of DOJ lawyers. Further, if the new policy is widely adopted and the benefits are apparent, satisfying this new standard may become more challenging as companies implement increasingly comprehensive antitrust compliance programs in response, presenting benchmarks to the Antitrust Division that in effect raise the standard for what can and should be done.

The Evolution of the Antitrust Division's Views on Crediting Corporate Compliance

Previously, the Antitrust Division stood alone within the DOJ as the only division that refused to credit pre-existing compliance programs at the charging or sentencing phases. The rest of the DOJ, including the Criminal Division, has followed the Justice Manual (formerly the United States Attorneys' Manual),[3] which instructs federal prosecutors to consider "the adequacy and effectiveness of the corporation's compliance program" when making a charging decision or sentencing recommendation.[4]

The Criminal Division has offered declinations, non-prosecution agreements, and DPAs to companies in part because of pre-existing compliance programs that failed to detect or prevent misconduct.[5] In doing so, the Criminal Division acknowledged that a strong compliance program is valuable, even if it falls short on occasion.

The Justice Manual, however, had specifically exempted the Antitrust Division, noting that "the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty [for an antitrust violation] is available only to the first corporation to make full disclosure to the government."[6] However, in line with the Antitrust Division's new approach to compliance, this language has been removed from the latest version of the Justice Manual.[7] The Division's previous aversion to crediting compliance programs was partly rooted in the desire not to undercut the appeal of the Leniency Program. As Delrahim explained when he announced the change in policy, the Division's previous position was an "all-or-nothing philosophy" that was "born of our efforts to highlight the value of winning the race for leniency at a time when the modern Leniency Program was establishing itself as the Division's most important investigative tool."[8]

Starting in 2015, the Antitrust Division began providing credit for compliance programs created during the course of an investigation.[9] But prior to the latest policy shift, it had not acknowledged that an existing compliance program that failed to detect the cartel before another company self-reported could nonetheless be "effective." Although Delrahim stated the shift in policy was driven by a desire to incentivize companies to implement robust compliance programs, another factor was likely the need to address the perceived dip in major cartel prosecutions. Over the past decade, the Antitrust Division's criminal prosecutions have fallen from a high in 2011, with charges against 27 companies, to a low in 2017 and 2018, with eight and five companies charged, respectively.[10] This decline comes at a time when antitrust practitioners have openly questioned the benefits of the Leniency Program. The Antitrust Division's decision to begin to explore civil damages against leniency recipients, increasing exposure for executives, the perceived ineffectiveness of the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), and the significant increase in civil damages actions in other jurisdictions — to name just a few factors cited by practitioners — has caused companies to think long and hard about whether applying for leniency has more upsides than downsides. Yet leniency remains the DOJ's "most important investigative tool for detecting cartel activity,"[11] and for this reason the Antitrust Division is focused on ensuring that this programmatic change does not significantly diminish the incentives to win that race. The Antitrust Division is likely counting on this policy change to both reinvigorate and supplement the

program by incentivizing companies to increase opportunities for detection and reporting of cartel conduct through enhanced compliance efforts.

Key Considerations and What Constitutes an "Effective Compliance Policy"

Four features stand out from the announcement. First, the Antitrust Division now acknowledges that additional tools are needed to incentivize compliance programs and improve antitrust enforcement. Second, the policy adopts the broader DOJ view that a company can have a compliance program that merits credit in charging or sentencing recommendations despite the company's failure to detect cartel activity and be the first to report it. Third, companies now have new mitigation options if they lose the race for leniency but nevertheless have effective compliance programs. Finally, the policy change introduces subjectivity by prosecutors, who will now be evaluating antitrust compliance programs.

The Antitrust Division's new public guidance provides nine holistic elements of an effective compliance program, including: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques ...; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[12]

For corporate counsel looking for assurances that their compliance program will meet the Antitrust Division's standards if the company is ever faced with a potential cartel prosecution, this laundry list of factors provides helpful, but only partial, guidance. The ultimate decision as to whether the company will receive credit hinges on the subjective determination of prosecutors, who could take different approaches in weighing those factors. Nonetheless, Delrahim emphasized three key questions that prosecutors should ask when they evaluate a compliance program: (1) "Does the company's compliance program address and prohibit criminal antitrust violations?" (2) "Did the antitrust compliance program detect and facilitate prompt reporting of the violation?" and (3) "To what extent was a company's senior management involved in the violation?"[13]

The first question makes clear that any effective antitrust compliance program must be broader than the offense at issue, and must address all potential antitrust violations. The second question highlights that early detection and reporting, even if the company is not the first to report the offense, is still an important consideration for the Antitrust Division when evaluating the effectiveness of a compliance program. Thus, prompt disclosure will continue to matter regardless of how robust a compliance program is. The final question reveals perhaps the most significant disqualifying factor: if senior management are involved in the offense, a company may not receive credit for its pre-existing compliance program. This reflects the Antitrust Division's long-standing view that cartel offenses are routinely corporate in nature. Historically, most major criminal antitrust violations have involved senior sales executives, so many companies will find meeting this requirement to be challenging. Going forward, practitioners will need to evaluate how the Antitrust Division applies its new policy to gain greater insight into which factors are most significant.

In the interim, key questions remain, including:

- Will the DOJ provide examples of effective or ineffective compliance programs to better inform the business community about where lines will be drawn?

- How will the standards evolve as applied, and will the Antitrust Division update its guidance accordingly?

- Are there factors that will disqualify a compliance program from being considered for credit?
- How will the Antitrust Division ensure that it applies the policy consistently so that results do not vary depending on the views of individual prosecutors?

Compliance Credit Around the World

Australia, Canada, the UK, Chile, France, Hong Kong, India, Israel, Italy, and Singapore treat the existence of a compliance program as a mitigating factor and offer fine discounts to companies that have compliance programs (or otherwise exhibit a compliance culture). In France, a compliance program usually results in a 5% reduction in fine, but it can earn up to a 10% reduction.[14] Italy appears to have been the most recent jurisdiction to consider compliance programs as a mitigating factor, adopting its regulations in September 2018.[15]

Initial indications are that the European Commission (EC) will not in the near term change its policy, which refuses to credit compliance programs that ultimately failed to prevent cartel conduct. EC officials have frequently expressed concerns that compliance programs could be used as a convenient cover, in particular given the EC's inability to pursue criminally "rogue" employees who disregard compliance programs. That said, given the impending significant changes to the Directorate-General for Competition leadership, the EC could possibly change its approach in the longer term.

What Companies Should Focus on Now

Companies should use the Antitrust Division's new guidance as a starting point to identify areas for improvement in their antitrust compliance programs. Companies with an existing antitrust compliance program should:

Maintain and update written antitrust policies. Companies should periodically update their antitrust policies to reflect any changes in applicable antitrust laws. Companies should also update their antitrust policies after making any material changes to their business or business model, such as forming a new joint venture or selling products through a new distribution channel. They should also keep records regarding which individual employees have received antitrust training.

Set a fixed schedule to train and retrain all executives and employees. Such training should focus on antitrust prohibitions and internal procedures for reporting antitrust concerns, including through the use of periodic tests to audit the effectiveness of the company's antitrust training.

Periodically conduct and update internal risk assessments of company business practices. For example, and as applicable, companies should: (1) audit the terms on which they are selling and offering to sell their products or services as well as the sales practices of key employees; (2) review the scope and any restrictions in their licensing agreements; (3) assess the purpose and benefits of their participation in industry groups and trade associations; and (4) evaluate bidding procedures, particularly relating to government contracts, which draw the most scrutiny from the Antitrust Division.

Promptly respond to and investigate any reported or detected antitrust concerns.

Designate a board member or other senior level executive to be responsible for antitrust compliance. This is an important step, even for companies with a designated compliance officer, to establish a culture of antitrust compliance and demonstrate the company's commitment to an effective compliance program.

Companies without an existing antitrust compliance program should quickly take steps to formalize whatever informal and/or on-the-job guidance that executives and employees have been receiving. Corporate compliance policies have been and will remain an important tool in detecting, preventing, and addressing antitrust violations. And while the existence of an antitrust compliance program is by no means a "Get Out of Jail Free" card, now at least the Antitrust Division will give credit to companies that invest in robust compliance.

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Endnotes

[1] US Dep't of Justice, Antitrust Division, Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters (Jan. 26, 2017).
[2] US Dep't of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019).
[3] *See* Justice Manual § 9-28.800.
[4] *Id.* at § 9-28.300. *See also* Brian A. Benczkowski, Assistant Attorney General, US Dep't of Justice, Keynote Address at the Ethics and Compliance Initiative 2019 Annual Impact Conference (April 30, 2019), (stating that "prosecutors assess a company's compliance program at the time of the misconduct to determine the company's culpability score under the U.S. Sentencing Guidelines, which determines the company's ultimate fine range").
[5] *See* Justice Manual § 9-28.800 ("While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.").
[6] *Id.* at 9-28.400 (updated August 2008).
[7] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Algo Esta Cambiando*: Innovation and Cooperation Among Antitrust Enforcers in the Americas (May 10, 2019), ("I am pleased to announce that the Justice Manual has been updated to reflect this new approach to Compliance."). *See also* Justice Manual § 9-28.400 (updated July 2019) ("However, this would *not necessarily* be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business.") (emphasis added).
[8] *Id.*
[9] *See US v. Barclays PLC*, No. 3:15-cr-00077(SRU) (D. Ct.), Dkt. Entry 44, DOJ Sentencing Memo. at 10 (Dec. 1, 2016); *US v. Kayaba Industry Co*., Ltd., No. 1:15-cr-00098-MRB (S.D. Oh.), Dkt. Entry 21, DOJ Sentencing Memo. at 10 (Oct. 5, 2015); *US v. BNP Paribas USA, No.* 1:18-cr-00061-JSR (S.D.N.Y.), Dkt. Entry 7, DOJ Sentencing Memo. at 8 (May 22, 2018).
[10] US Dep't of Justice, Antitrust Division, Criminal Enforcement Trends Charts (Jan. 28, 2019).
[11] *See supra* note 1.
[12] Makan Delrahim, Assistant Attorney General, US Dep't of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019).
[13] *Id.*
[14] Matthew Levitt, Christopher Tomas & Falk Shoning, "Cartel Leniency in EU: Overview," 11:12 Practical Law Country Q&A (updated July 1, 2017).
[15] Italian Competition Authority, Guidelines on Antitrust Compliance (Sept. 25, 2018).