

The Antitrust Division changes the calculus for cooperating cartelists

Deferred prosecution agreements may now be an option for cooperating companies

13 June 2019

Change is here. A few weeks ago, Makan Delrahim – Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (the Division or DOJ) – signaled a major change in how the Division will assess a company's cooperation. Delrahim explained that "[g]oing forward . . . leniency will no longer be the only benefit" for early detection and reporting of cartel conduct. The Division followed that proclamation with an announcement on 31 May 2019 that it had entered into a deferred prosecution agreement (DPA) with Heritage Pharmaceuticals (Heritage), in part due to the "company's substantial and ongoing cooperation with the investigation to date."

The new deal: Deferred prosecution agreements

The Division's DPA with Heritage demonstrates that the Division is employing new tools to resolve cases against companies accused of cartel conduct. The Division has been reluctant to use DPAs in the past, instead relying on amnesty to reward cooperation and citing concerns that DPAs might dilute the Division's successful amnesty program. Under a DPA, DOJ files charges and the agreement itself in court. The court must accept the terms of the agreement. If the court approves the DPA, at the end of an agreed-upon period of cooperation, DOJ will seek dismissal of the charges, assuming, of course, that the defendant has satisfied the terms of the agreement. If DOJ, at its discretion, determines that the defendant has not met the terms of the DPA, DOJ will proceed with its prosecution. At trial, DOJ may rely upon the defendant's factual admissions contained in the DPA.

Despite the Division's reluctance to use DPAs, the Division entered into DPAs with several financial institutions as part of its London Interbank Offered Rate (LIBOR) investigation, including Deutsche Bank AG (2017) and The Royal Bank of Scotland PLC (2013). In these cases, the banks agreed, in part: (1) to pay a fine; (2) to cooperate with the DOJ's investigation; and (3) to strengthen their compliance programs. In return, the Division deferred prosecution. The Division has always treated the LIBOR DPAs as anomalies and has not otherwise entertained DPAs as a viable option to resolve cartel allegations. Under the Division's shift in policy, however, DPAs now appear to be an attainable resolution for companies accused of cartel conduct.

Indeed, on 31 May 2019 the Division announced a DPA with Heritage, in which Heritage admitted that it "conspired to fix prices, rig bids, and allocate customers for glyburide." According to the Division's press release, Heritage agreed to "pay a \$225,000 criminal penalty and cooperate fully with the ongoing criminal investigation." In return, the Division agreed to "defer prosecuting Heritage for a period of three years to allow the company to comply with the agreement's terms." The Division entered into the DPA with Heritage for reasons that include: (1) its "substantial and ongoing cooperation with the investigation to date, including its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement;" (2) Heritage's agreement to resolve all False Claims Act allegations related to the price-fixing conspiracy; and (3) in recognition that a conviction would likely result in Heritage's exclusion from all federal health programs to the detriment of American consumers.

Notably, the relevant terms of the Heritage DPA also apply to current and certain former employees, officers, and directors, effectively providing these individuals with protection from prosecution and requiring their cooperation. DPAs do not typically provide such terms for employees (for example, the LIBOR DPAs did not include such language). It is unclear whether the Division will include such terms as a matter of course in DPAs moving forward. It is important to note, however, that according to the Division's press release, Heritage "disclos[ed]...information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement." It is, therefore, likely that the Division expanded Heritage's protections under the DPA to ensure cooperation in the ongoing, unrelated investigations.

Heritage's deal with the Division signals to companies that the Division is expanding the tools used to resolve cases.

DPAs may weaken leniency and incentivize holdouts

The Division's use of DPAs may significantly impact how companies engage with the Division. First, DPAs may reduce both companies and individuals' willingness to plead guilty. Cartel cases are notoriously difficult to prove and resource-intensive to litigate. The Division, however, has rarely tried these cases and instead has historically resolved the majority of cases through plea agreement. Corporate defendants – recognizing the challenges the Division faces in pursuing cases through trial – may now press for DPAs instead of plea agreements. Faced with companies willing to hold out for DPAs, the Division likely will have to choose between trying more cases or expanding the use of DPAs.

DPAs may also reduce overall cooperation in Division cases. The Division needs the testimony of individuals to build cases against noncooperating companies and individuals. A witness typically will not testify without protection or incentive from the Division. The Division typically agrees to reduce or eliminate the witness's criminal liability in return for cooperation. The Division's corporate plea agreement provides this protection by exempting all company employees from prosecution for the charges laid out in the plea agreement, except for a short list of "carved-out" employees. In contrast, DPAs typically, Heritage DPA notwithstanding, do not provide protection to any company employees. For example, the Division's two prior DPAs explicitly did not extend protections to any "present or former officer, director, employer, shareholder or agent" of either Deutsche Bank or the Royal Bank of Scotland. Under a DPA, the Division will have to engage in the time-intensive process of entering into separate agreements with every company employee to get the witnesses necessary to build a case. Individuals may also be less willing to enter into separate cooperation agreements. Individuals are most incentivized to cooperate with the Division before the corporate plea agreement is signed, not after. A lack of cooperation and

witness testimony will delay the Division's efforts to bring cases to trial and reduce the number of cases the Division can ultimately bring. For example, in the Deutsche Bank and Royal Bank of Scotland cases, the Division did not bring any individual prosecutions against employees of either company. Obviously the Division could mitigate this effect, by expanding the scope of DPAs' protections to include individuals, as it did in the Heritage DPA.

Second, the use of DPAs may water down the Division's leniency program. The Division's leniency program provides a cooperating company complete immunity from prosecution, provided the company meets the requirements of the leniency program. Under the leniency program, the company must provide extensive – and costly – cooperation with the Division, as well as follow-on civil plaintiffs. In addition, by entering into a leniency agreement, the company must admit wrongdoing and may expose itself to liability from other enforcement agencies. A DPA may in some cases be a better, less costly option to a cooperating company. Instead of alerting the Division to cartel conduct, a company instead may in some cases wait for the Division to uncover the conduct. The company – if it decides not to self-report – can still advocate for a DPA and avoid a criminal conviction. Leniency is no longer the only way to avoid criminal prosecution, making the gamble not to self-report potentially less risky. The availability of a DPA may weaken leniency's appeal and incentivize a "wait-and-see" approach.

New options could mean a change in tactics for companies facing cartel investigations

Historically, the Division has been reticent to change well-established policies and practices. Its willingness to now enter into DPAs is a major policy shift that expands options for companies under antitrust scrutiny. This new tool, however, may impact other historically critical sources of cooperation. If you uncover potentially criminal antitrust conduct, please contact experienced outside counsel to fully assess the conduct and all potential options.

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