DOJ to Credit Compliance Programs and Consider Deferred Prosecution Agreements in Cartel Cases

July 15, 2019

Antitrust/Competition

The U.S. Department of Justice Antitrust Division has long been out-of-step with the rest of the DOJ in refusing to consider the compliance programs of corporate antitrust offenders in charging or sentencing decisions. But on July 11, 2019, Assistant Attorney General Makan Delrahim announced fundamental and sweeping changes to the Division's approach to corporate compliance policies that will bring it into line with other DOJ branches.[1] In every case, the Division will now consider compliance programs in deciding whether to file criminal charges and in calculating fines. Also, when a company faces charges, Division prosecutors may now consider proceeding by way of deferred prosecution agreements (DPAs) rather than requiring companies to plead guilty. These policy shifts could be the most significant changes to U.S. criminal antitrust enforcement since the Division adopted its Corporate Leniency Policy more than 25 years ago.

The Division's Traditional Approach

The Division's longstanding policy has been "that credit should not be given at the charging stage for a compliance program and that [leniency] is available only to the first corporation to make full disclosure to the government" in the prosecution of an antitrust crime.[2] As a Division official stated in 2002: "[O]nce a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute."[3] And in 2014 a Division official explained that compliance programs "almost never" allow companies to avoid criminal antitrust charges because (1) a truly effective compliance policy would have prevented the crime in the first place

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[1] Makan Delrahim, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement, New York, NY (July 11, 2019), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[2] *Id.*

[3] William J Kolasky, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks Before the Corporate Compliance 2002 Conference, Practising Law Institute, San Francisco, CA (July 2, 2012), *available at* https://www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective.

or resulted in its early detection and (2) companies do not accidentally enter into antitrust conspiracies and cartels are seldom short-lived or limited to low level or rogue employees.[4]

For decades, the Division was equally adamant in its refusal to consider compliance programs at sentencing. But in 2015, the Division altered its longstanding policy by giving two corporate defendants credit at sentencing for their compliance programs. In explaining the policy shift, a Division official stated that the agency would consider compliance efforts in determining fine recommendations in cases in which a company "makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense [to] occur."[5] He distinguished between "backward looking" and "forward looking" compliance efforts. He reiterated the Division's position that preexisting compliance programs that fail to deter or detect illegal cartel behavior cannot qualify for credit at sentencing. And he made clear that nominal improvements in compliance programs or paper programs are not enough and that the Division will only credit efforts that reflect "in some genuine way" efforts to change a company's culture. Finally, he announced that the Division would in the future consider crediting "similar efforts that result in real remediation and changes in a company's compliance culture."[6]

The New Policy on Compliance Programs and Deferred Prosecution Agreements

The policy change sweeps away both the prohibition against considering companies' compliance programs in making charging decisions and the distinction at sentencing between compliance programs that existed at the time of the violation (which were not to be considered) and programs that were instituted after the illegal conduct was discovered (which could be considered in extraordinary circumstances).

Division prosecutors are now required to consider putative defendants' pre-existing compliance programs in every corporate charging recommendation. There is neither a checklist nor a set of formulaic requirements for assessing the effectiveness of corporate compliance programs. But prosecutors are to consider three "fundamental" questions in their evaluation:

> "(1) Is the corporation's compliance program well designed?
>
> (2) Is the program being applied earnestly and in good faith?
>
> (3) Does the corporation's compliance program work?"

To promote transparency in its application of the new policy, the Division has issued a 19-page document titled *Evaluation of Corporate Compliance Programs in Criminal Antitrust*

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[4] Brent Snyder, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business, Joint Antitrust Compliance Workshop—Compliance Is a Culture, Not Just a Policy (Sept. 9, 2014) at 7, *available at* http://www.justice.gov/atr/file/517796/download.

[5] Brent Snyder, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks Delivered at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[6] *Id.*

Investigations [7] and announced that it intends to use the Antitrust Division Manual to provide additional clarity on how the Division assesses compliance programs. According to this new guidance, the factors that Division prosecutors should consider when evaluating the effectiveness of an antitrust compliance program include: (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, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.

Additionally, under the new approach to DPAs, the Division will continue to disfavor non-prosecution agreements in cartel cases, but Division prosecutors are now required to consider whether a DPA rather than a guilty plea would be an appropriate disposition of a case. In a DPA, the government files charges but then agrees to hold them in abeyance pending the company's successful completion of terms in the agreement. If the conditions in the agreement are satisfied, the charges are dismissed. Because DPAs do not result in final judgments, they will not—unlike guilty pleas—constitute prima facie evidence of a violation in a subsequent related civil class action proceeding.[8] Although DPAs have been widely used in other branches of the DOJ for more than a decade, the Division has long disfavored them and rarely agreed to them. Despite these changes, it remains to be seen how frequently the Division will agree to use them.

The Division's decision to consider DPAs is likely to cause fundamental changes in the way corporate dispositions are negotiated in cartel cases. In deciding whether to accept a DPA, Division staff will need to assess not just a corporation's compliance program. They also will be required to evaluate nine other factors that are enumerated in the DOJ's Principles of Federal Prosecutions of Business Organizations.[9] These factors include pervasiveness of wrongdoing with the corporation, including the complicity or the condoning of the wrongdoing by corporate management, the corporation's willingness to cooperate, its timely and voluntary disclosure of wrongdoing, and its remedial actions.[10] White-collar practitioners who handle corporate cases other than antitrust matters routinely rely on these factors to make appeals to prosecutors' discretion. Now cartel practitioners will need to do the same.

As for sentencing, the Division's new policy recognizes that an effective compliance program could be relevant in at least three ways: (1) a reduction in its Sentencing Guidelines culpability score; (2) a reduction within the Guidelines fine range or even a reduction below the fine range; and (3) a recommendation of no probation.

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[7] U.S. Dep't of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), *available at* https://www.justice.gov/atr/page/file/1181891/download.

[8] *See* Section 5(a) of the Clayton Act, 15 U.S.C. § 12.

[9] U.S. Dep't of Justice, Justice Manual at 9-28.300 (Nov. 2018), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

[10] *Id.*

Domestic Takeaways from the Division's New Policy

The Division's announcement signals an important shift in criminal antitrust enforcement in the United States. Going forward, every disposition of a corporate criminal antitrust matter will involve some consideration of the company's compliance program and several other factors. Presumably, in all but the most egregious cases—and perhaps even in those—putative corporate defendants will make far-ranging arguments that the government should proceed by DPA rather than guilty plea and that their compliance programs justify fine reductions. But for the foreseeable future, defense counsel will have difficulty advising clients that face exposure for cartel offenses on what the chances are they will receive a DPA or on whether their compliance program will justify a fine reduction.

Few Division line attorneys or their managers have experience applying the DOJ's multi-factored analysis to decide whether to offer a corporate defendant a DPA or insist on a guilty plea. Nor do they have experience evaluating compliance programs or figuring out how to translate the quality of a program into a sentencing recommendation. And initially Division staff will have no precedent in antitrust cases to guide their evaluations. If the Division's Corporate Leniency Policy is any guide, the new policy will evolve slowly on a case-by-case basis over years, not months. For the foreseeable future, the Antitrust bar will have far more questions than answers about how the Division is applying its new policy. For example:

- Will the Division be willing to consider and rely on precedent from other DOJ components? (If so, prior experience negotiating DPAs and fine reductions for compliance programs in non-cartel white collar cases will be particularly valuable.)
- Will DPAs be as widely available in criminal antitrust cases as they are in other DOJ components? What are the attributes of a compliance program and the fact patterns in an antitrust case that may warrant a DPA?
- What kind of showing will Division staffs require of putative defendants arguing for favorable treatment based on compliance programs? Will they accept attorney proffers? Will they insist on interviewing corporate representatives and reviewing documentary evidence? And how much detail will be enough?
- How will the quality of a compliance program translate into a fine reduction? What will it take to get a reduction in Sentencing Guidelines culpability scores? And what will it take to secure fines at or below the bottom of Sentencing Guidelines fine ranges?

International Implications of the Division's New Policy

The announcement is likely to have surprised enforcers around the world as much as it has surprised the Division's domestic audience. Although several jurisdictions give some credit for remedial steps to improve compliance programs, no other competition authority has gone as far as this in offering credit for pre-existing compliance programs. The shift may encourage other agencies to make similar moves, but it is not yet clear how receptive the other agencies will be.

In the EU, Commissioner Vestager is reaching the end of her five-year term, and it seems unlikely that the European Commission will signal any change of thinking before her successor is in place. If this policy were seen as a way to spur leniency applications, it may be something the EU would consider. After all, the Commission is concerned—as are many agencies around the world—by the marked slowdown in the pace of immunity and leniency applications. That said, this policy change does nothing to encourage the first company to go in for immunity, so it is not clear what effect the change will have on the number of applications.

Conclusion

The questions about how the Division will apply its new policy are myriad. But in spite of all the uncertainties, one thing is clear: companies would be well served to reassess their antitrust compliance programs because for any company that has the misfortune to find itself implicated in a cartel case and facing a Division prosecution, the potential rewards of having a strong compliance program—and risks of having an inadequate program—have never been greater.

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