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July 2019

The Antitrust Division of the US Department of Justice announces new policy to consider the existence of effective antitrust compliance programs at the charging stage of criminal antitrust investigations

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US Department of Justice, Press Release, New Policy to Incentivize Corporate Compliance, 11 July 2019

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e-Competitions News Issue July 2019

The Antitrust Division of the U.S. Department of Justice (Division) finally will consider the existence of effective antitrust compliance programs at the charging stage of criminal antitrust investigations, opening up the possibility that cartel participants could avoid prosecution even if they are not a first-in leniency applicant. The Division's previous, and longstanding, approach had been not to consider compliance programs at the charging stage, on the theory that a compliance program is by definition ineffective if it failed to prevent a criminal violation of the antitrust laws. The most important practical effect of this new policy is likely to be that the Antitrust Division will be more willing to consider the use of a deferred prosecution agreement (DPA) to resolve criminal cartel matters – an option it has strongly resisted before now.

The new policy was announced on July 11, 2019 by Makan Delrahim, Assistant Attorney General in charge of the Division, in a speech at the Program on Corporate Compliance and Enforcement at the New York University School of Law. The policy is reflected in revisions to the Department of Justice and Division Manuals and in the publication of a guidance document that Division prosecutors will use to evaluate corporate compliance programs. Following a public workshop in 2018 and evolving approaches at the Division, AAG Delrahim announced that the time had come to "recognize the efforts of companies that invest significantly in robust compliance programs." These programs should deter violations in the first place and increase early detection when a violation does occur.

Under the new policy, Division prosecutors must consider "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision" when deciding how to resolve criminal charges against a corporation. Prosecutors will be able to reach a DPA – where the Division files criminal charges but defers prosecution subject to compliance with certain conditions for an agreed period of time – with companies that are not "first in" under the leniency program but do (1) have a "robust and effective" compliance policy, "(2) promptly self-report [wrongdoing], (3) cooperate in the Division's investigation, and (4) take remedial action" to prevent future misconduct. The Division's leniency program, which offers non-prosecution agreements to companies that are the first to self-report wrongdoing, remains in place.

Prior to this announcement, DPAs have been used to resolve criminal antitrust violations only a handful of times, the first in 2013, with the Royal Bank of Scotland (LIBOR rate manipulation) and most recently in June 2019, with Heritage Pharmaceuticals (price-fixing in the generic drug industry). Although the new policy is a welcome development and is likely to result in more DPA resolutions, AAG Delrahim made clear that a compliance program "does not guarantee" that a corporate defendant will receive a DPA and that prosecutors will conduct a "fact-specific inquiry" into whether the program is "adequately designed for maximum effectiveness in preventing and

detecting wrongdoing by employees."

Sentencing Stage

Although the Division has sometimes considered compliance programs in sentencing recommendations, its practice has not always been predictable. For example, the Division has never recommended that a corporate defendant receive the three-point credit in its culpability score that the Sentencing Guidelines permit for a corporate defendant with an "effective" compliance program. The new guidelines on Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (the Guidelines) and AAG Delrahim's speech provide clearer guidance and suggest that the Division will now give more weight to compliance programs in sentencing recommendations.

As AAG Delrahim explained, there are three potential ways effective antitrust compliance programs can impact sentencing determinations. First, the Sentencing Guidelines provide for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program and has not unreasonably delayed reporting the violation, and the violation did not involve high-level personnel. Second, when determining the appropriate corporate fine to recommend within the Guidelines range, or in extraordinary circumstances, whether to recommend a fine below the Guidelines range, prosecutors may take into account the existence of a compliance program. Third, the existence of an effective compliance program is relevant to a probation recommendation or the recommendation of an external monitor.

Evaluating Compliance Programs

The Guidelines detail the elements of an effective compliance program and outline the inquiry that Division prosecutors will undertake when evaluating antitrust compliance programs in the context of criminal investigations.

Under the Guidelines, the "fundamental" questions in this evaluation are whether the program (1) is "well designed,"

(2) is "being applied earnestly and in good faith," and (3) "work[s]" in practical application. To facilitate this

assessment, the Guidelines direct prosecutors to consider whether programs "address and prohibit criminal antitrust violations" and "detect and facilitate prompt reporting of the violation" as well as "to what extent a company's senior management [was] involved in the violation."

The Guidelines also provide a list of nine factors, and relevant questions related to each factor, that Division prosecutors should consider when determining the effectiveness of an antitrust compliance program, including "responsibility for, and resources dedicated to, antitrust compliance;" "antitrust risk assessment techniques;" "monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program;" "compliance incentives and discipline;" and "remediation methods." The Guidelines recognize that one size does not fit all for compliance programs – e.g., the size of a company and the corresponding effect on resources allocated to antitrust compliance are recognized as factors to be considered.

AAG Delrahim stressed that, while the Guidelines provide "a lengthy list" of factors to be considered, "the guidance emphasizes that these elements and questions are not a checklist or formula, and not all of them will be relevant in every case" and that "prosecutors evaluate programs on a case-by-case basis."

Takeaways

AAG Delrahim's speech and the new Guidelines bring the Antitrust Division's stated policy closer to the rest of the Justice Department with regard to corporate compliance programs and make effective antitrust compliance

programs more valuable than ever. The new Guidelines are also helpful in setting out clearer criteria to evaluate whether a compliance program is "effective." In the past, Division prosecutors took the position that a program was by definition not "effective" if a violation had occurred. While the new policy departs from this approach, as AAG Delrahim made clear, prosecutors are still going to conduct a searching examination of the design and implementation of the program, and, just as importantly, the company's and top management's commitment to the program. Therefore, it is imperative that (1) the program is designed with the specific antitrust risks the company faces in mind, (2) there is comprehensive, well-documented follow-through, and (3) that any potential issues be brought to counsel's and management's attention as quickly as possible. Of course, it is important to remember that the primary benefit of a comprehensive compliance program is not credit with prosecutors if a violation has occurred, but prevention of a violation in the first place. We welcome the opportunity to discuss any questions you might have regarding these issues.