CLIFFORD

CHANCE

TIME TO GET YOUR HOUSE IN ORDER: U.S. DOJ ANTITRUST DIVISION ANNOUNCES CREDIT FOR STRONG COMPLIANCE PROGRAMS

On July 11, 2019, the U.S. Department of Justice's Antitrust Division (the "Division") unveiled its new policy requiring prosecutors to credit qualifying corporate compliance programs at the charging and sentencing stages of a criminal antitrust investigation, even if the compliance program was in place at the time of an alleged antitrust violation and did not prevent the conduct at issue. The Division also issued detailed guidance on what elements it will consider when evaluating whether a compliance program will qualify for credit.[1] Due to the extraterritorial reach of the U.S. antitrust laws, this policy shift has important implications for all companies whose business has an effect on U.S. commerce and underscores the importance of developing and maintaining a robust corporate compliance program. Companies should carefully scrutinize their existing antitrust compliance programs to ensure that they would be considered "effective" pursuant to the Division's newly-issued guidance.

Background

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[2] The Division's policy is to criminally prosecute cases that involve cartel conduct between horizontal competitors, such as price fixing, bid rigging, and customer and territorial allocation.[3] These criminal prosecutions often result in guilty pleas and significant

---

[1] The new Division guidelines follow the release of guidance from the Criminal Division of the Department of Justice earlier this year on what constitutes an effective compliance program. See U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (April 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[2] 15 U.S.C. § 1.

[3] Antitrust Division Manual, Chapter III Investigation and Case Development.

Attorney Advertising: Prior results do not guarantee a similar outcome

monetary penalties for organizations, and prison sentences for executives involved in the conduct.

Outside of the antitrust context, Department of Justice policy generally instructs federal prosecutors to consider a variety of factors in making charging decisions or sentencing recommendations against a corporate entity. Among these factors is whether the company maintains a compliance program that is "adequately designed for maximum effectiveness in preventing and detecting wrongdoing."[4] That evaluation permits prosecutors to credit infringing companies for an effective compliance program even if it failed to prevent or detect the charged offense.[5] These policies are formalized both in the Department of Justice Manual and the U.S. Sentencing Guidelines.

The Division, however, has long maintained a different approach. As a matter of policy, Division prosecutors would *not* consider the adequacy and effectiveness of a corporate compliance regime at the charging or sentencing stage of a criminal antitrust case. Rather, the Division concluded that any corporate compliance program that failed to prevent the antitrust conduct at issue was not "effective," and so was not worthy of credit. This policy was rooted in the Division's belief that crediting such compliance programs risked undermining the effectiveness of the Division's Corporate Leniency policy, the centerpiece of the Division's criminal enforcement efforts against cartel activity. The Leniency policy provides immunity from prosecution to the first company (and in most cases, that company's participating employees) to identify and self-report to the Division their role in a criminal antitrust conspiracy and cooperate in the Division's investigation of the other participants.

Critics have long complained that the rigidity of the Division's policy toward compliance programs ignored the practical challenges of maintaining a robust compliance culture in a large organization, in which even the most strident compliance regime cannot be everywhere, all the time. In recent years, the Division secured antitrust penalties against large institutions for the conduct of comparatively small numbers of employees, such as the charges brought against banks in the foreign exchange currency market price-fixing cases. Critics argued that by failing to credit robust compliance regimes in those settings—indeed, even in cases where a company's compliance program may identify the conduct and lead the company to self-report their actions to the Division, albeit *after* a leniency applicant had done so—the Division's approach did not adequately incentivize compliance as a tool to *prevent* criminal antitrust conduct within a company.

However, in a number of public speeches over the last year, senior leadership signaled that the Division was reconsidering its approach to corporate compliance. The first such signal from the Division came in May 2018, about a month after the Division hosted a Roundtable on Criminal Antitrust Compliance in April 2018, in which panelists, including in-house counsel and private practitioners, identified the foregoing criticisms of the Division's approach.[6] The Division confirmed this reversal as policy on July 11, with the announcement of its new approach.

---

4 Justice Manual 9-28.800.
5 U.S.S.G. § 8B2.1.
6 Andrew Finch, Principal Deputy Assistant Attorney General, Antitrust Division, *Antitrust in the Financial Sector: Hot Issues & Global Perspectives* (May 2, 2018), https://www.justice.gov/opa/speech/file/1060981/download.

The New Policy

The new policy requires Division prosecutors to consider a company's compliance program at both the charging and sentencing stages of a criminal antitrust investigation. This shift in policy is reflected in both the Division's Manual and the Justice Manual. In public remarks announcing the policy change, Assistant Attorney General ("AAG") Makan Delrahim acknowledged that even companies with strong compliance programs may be implicated in cartel conduct, and said the Division should reward the efforts of companies that invest significantly in robust compliance programs to properly incentivize this type of good corporate behavior.

At the charging stage, Division prosecutors are now instructed to consider the effectiveness of a company's antitrust compliance program when deciding whether to prosecute a company. Prosecutors are directed to make this assessment "holistically" alongside other relevant charging factors for corporate criminal liability set forth in the Justice Manual (the so-called "Filip factors"), which include the company's efforts to cooperate with prosecutors, the pervasiveness of the conduct within the company, and the company's efforts to remediate any wrongdoing. The new policy further provides that Division prosecutors may now resolve criminal antitrust cases through a "deferred prosecution agreement" ("DPA"), when the relevant Filip Factors, including the strength and effectiveness of a company's compliance program, weigh in favor of doing so.[7] A DPA is a prosecutorial tool by which the government files criminal charges but defers prosecution against a defendant, who in return admits to the facts underlying of the charges and agrees to comply with a set of conditions for a set period of time, after which the charges are dismissed. In his remarks announcing the policy change, AAG Delrahim quoted the Justice Manual's recognition that DPAs "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."

The revised Division policy requires prosecutors to engage in a "fact-specific inquiry" that looks at nine factors that the Division considers to be elements of an "effective" compliance program:

- the design and comprehensiveness of the program;
- the culture of compliance within the company;
- responsibility for compliance program, including whether individual in charge has sufficient authority and a direct line of reporting to the board, and the amount of resources devoted to it;
- tailored risk assessment;
- adequate training and communication, taking into account who receives training, how often they receive training, how training is delivered, and how well it instills knowledge of antitrust laws;

[7] The Division has issued DPAs in the past, but only under exceptional circumstances, and until recently, only with financial institutions. The First DPA the Division entered into was with the Royal Bank of Scotland in connection with the bank's role in an alleged price-fixing conspiracy to manipulate Yen Libor and Swiss Franc Libor. Clifford Chance counseled Royal Bank of Scotland on this agreement.

- periodic review, monitoring, and auditing, including ensuring the program is updated for new technology and industry developments;
- reporting mechanisms for employees;
- the system of incentives and discipline; and
- remediation methods.[8]

The new Division guidance published alongside the policy change acknowledges that not all companies have the same resources at their disposal, and makes clear that the Division expects larger companies to devote more resources to developing and maintaining an effective antitrust compliance program. Multinational companies cannot limit their focus to the U.S. portion of the business: the guidance specifically raises as a consideration whether the company has foreign subsidiaries in jurisdictions where there are barriers—cultural, linguistic, or otherwise—to implementing an effective antitrust compliance policy. And to ensure that compliance is not just a "paper program," employees need to receive sufficient training, as set forth above, to understand their obligations for antitrust compliance.

AAG Delrahim acknowledged that not all factors would be applicable in each case and cautioned against treating the elements like a "checklist." Instead, the factors are guideposts for companies looking to develop and maintain an effective compliance policy. Stressing the importance of a robust antitrust compliance program, AAG Delrahim discussed the value of an "ounce of prevention" to enable companies to prevent or identify malfeasance at an early stage to avoid a "pound of cure"—*e.g.*, corporate guilty pleas and individual prison sentences.

"Clarifying" Sentencing Considerations

The Division's guidance also discusses how corporate compliance programs will be considered in the context of sentencing. Until recently, the Division had not given any credit for a defendant's antitrust compliance program when making sentencing recommendations. This changed in 2015, when the Division softened its stance and began recommending sentence reductions for a company's compliance efforts. It is important to note, however, that this credit has only been given for *prospective* compliance efforts; *pre-existing* compliance programs were not considered because of the Division's position that a compliance program was not effective if it failed to prevent the misconduct. In the guidance, the Division aligns itself with the rest of the Department of Justice, permitting prosecutors to credit at the sentencing stage a compliance program that was in place at the time of the misconduct, provided it is an "effective" compliance program pursuant to the U.S. Sentencing Guidelines.[9]

Implications

With this policy shift, the Division takes steps intended to encourage companies to develop and maintain robust antitrust compliance regimes. The Division appears willing to recognize the practical challenges facing in-house legal and compliance teams, particularly in large corporations, to stop every violation before it occurs.

---

[8] U.S. Department of Justice Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

[9] U.S.S.G. § 8C2.5(f).

But that concession depends on the company having taken objective, identifiable steps to implement a sound compliance program that gives the company the greatest possible chance to achieve what the Division expects to be the goals of an antitrust compliance program: to “prevent” as well as “detect” antitrust violations.

Of course, the practical consequences of the Division’s policy shift remain unclear. For example, one question is whether this policy change will indeed result in a dramatic increase in the number of DPAs negotiated with cartel participants who do not receive leniency. Such a company would need a compliance program strong enough to detect—but not prevent—an antitrust violation, and would likely need to self-report the misconduct to the Division before the Division contacted the company on the back of cooperation from a leniency application. It also remains to be seen how Division prosecutors, accustomed to the “all-or-nothing” approach adopted by the Corporate Leniency policy, will consistently apply a complex, nine-factor test to evaluate the effectiveness of compliance regimes likely to be unique to each corporate defendant.

These questions aside, the true value of the new policy and guidance is preventative: by encouraging corporate legal and compliance teams to reevaluate their present compliance policies to ensure they contain the features the Division sees as prerequisites for “effective” compliance, the Division is seeking to discourage criminal antitrust violations before they take place. The new guidance also puts companies on notice for issues the Division is prioritizing for enforcement, including adequate training for human resources, adequately monitoring high risk situations (such as participation in trade associations), and updating compliance efforts in light of technological developments and other evolving risks. Companies should take this opportunity to dedicate resources toward the same goal, especially now with the prospect of credit.

CONTACTS

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen@cliffordchance.com

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck@cliffordchance.com

Brian Concklin
Counsel

T +1 202 912 5060
E brian.concklin@cliffordchance.com

John Friel
Associate

T +1 212 878 3386
E john.friel@cliffordchance.com

Abigail Cessna
Associate

T +1 202 912 5452
E abigail.cessna@cliffordchance.com

Brian Yin
Associate

T +1 212 878 4980
E brian.yin@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW, Washington, DC 20006-1001, USA

© Clifford Chance 2019

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.