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Minimizing antitrust troubles by implementing effective compliance

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Historically, antitrust enforcement accelerates following economic downturns, as evidenced by the aggressive measures undertaken by the Department of Justice ("DOJ") Antitrust Division ("the Division") following the dot-com crash in the early 2000s and the 2008 financial crisis.

As companies emerge from this current Coronavirus downturn, regulators will undoubtedly scrutinize certain business activity.

In fact, in April 2020, the Federal Trade Commission published a joint statement with DOJ that addressed their continued vigilance of anticompetitive conduct harming labor markets in response to the pandemic, as well as DOJ's broad oversight of companies that exploit the COVID-19 pandemic with fraudulent schemes.[1]

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Before the current crisis surfaced, the Division announced a policy that, for the first time, considers companies' antitrust compliance at the *charging* stage of criminal antitrust investigations.[2]

Under this policy, companies are incentivized to eradicate anticompetitive conduct by implementing vibrant and comprehensive compliance programs.

In tandem with this policy change, the Division also released a guidance document (the "Guidance")[3] that details how prosecutors should evaluate such compliance programs.

We will discuss the Division's historical approach to prosecuting companies for antitrust violations, the significance of this policy change, and ways to implement a compliance plan that will be favorably viewed by DOJ.

1. THE DOJ'S HISTORICAL ANTITRUST PROSECUTIONS

For years, DOJ antitrust prosecutions have been both expansive and punitive. In 2019, the Division collected $365 million in total criminal fines and penalties,[4] and 10 corporations and 25 individuals were sentenced for antitrust violations.[5]

Given that its enforcement jurisdiction applies to foreign business activities that have a "substantial and intended effect in the U.S.," these prosecutions have impacted numerous companies throughout the world.[6]

Significantly, it is extremely challenging for foreign companies and individuals to defend against allegations of unlawful antitrust activity due to the difference in language and culture.

It is particularly challenging to fathom the draconian consequences as even cases involving misconduct by a few employees can result in extraordinary consequences for companies.

Foreign companies whose products are shipped to, or provide services in the U.S., including Asia-based companies such as AU Optronics Corporation (Taiwan), Yazaki Corporation (Japan), and Korean Air Lines (South Korea), have paid millions of dollars in penalties and have witnessed their employees being imprisoned.[7]

Recently, an auto parts investigation, which is the largest criminal investigation DOJ has pursued, yielded more than $2.9 billion in fines and convictions of 46 corporations and 32 executives,[8] most of whom are Japanese corporations and executives.

As resources for the Division have only increased in recent years, the Department's impact will continue to reverberate worldwide.[9]

Significantly, U.S.-based convictions have been used, in turn, by other countries to prosecute the same conduct. Many countries now coordinate investigative processes and share relevant information.[10]

Such collaboration led, in 2018, to the Multilateral Framework on Procedures (MFP), which were designed to establish fundamental principles of transparency and procedural fairness in antitrust enforcement and promote consistent review mechanisms across leading antitrust agencies around the world.[11]

In addition to the International Competition Network (ICN) and the Organization for Economic Co-operation and Development (OECD), competition authorities in Asia gather to freely exchange opinions and information on issues and policy trends for the

purpose of promoting and strengthening cooperative relationships through regional frameworks such as the East Asia Competition Policy Top Meeting and East Asia Competition Law and Policy Conference, and the Asia-Pacific Economic Cooperation (APEC).[12]

The DOJ's leniency policy

DOJ has historically maintained that companies that commit antitrust violations would be criminally charged, unless they otherwise qualified for leniency.

This all-or-nothing self-reporting program allows the first company to report an unlawful antitrust scheme to secure immunity from criminal charges and protection from treble damages in parallel civil litigation.

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This leniency policy has, for years, incentivized companies to promptly self-disclose unlawful antitrust conduct.

Under the leniency policy, those companies who self-disclose afterwards have been ineligible for immunity and must either settle with the government or proceed to trial.

In those instances, the fact that such companies had implemented exceptional compliance programs was irrelevant — at the charging stage.[13]

While this aggressive policy has been effective for DOJ, many (including corporate compliance officials) have criticized it for being excessively harsh and misaligned with DOJ's other compliance policies that credit good-faith efforts and provide mechanisms for resolving criminal investigations without felony dispositions.

Such criticism was finally addressed last year.

2. THE DOJ'S CURRENT LENIENCY APPROACH

In 2019, the Division changed course and began to allow its attorneys, in appropriate cases, to resolve criminal investigations without criminal charges if the companies have implemented adequate and effective compliance programs — a determination made solely by DOJ.

The Division instituted this change to incentivize companies to prioritize antitrust compliance and to be proactive in detecting and reporting price fixing, bid rigging, and market allocation schemes.

In DOJ's view, early detection and prompt remediation of such conduct reduces the need for enforcement activity, minimizes harm to consumers, and saves taxpayer dollars.

DOJ will not grant automatic credit for companies that merely maintain a compliance program, but will evaluate each program to determine whether the plan warrants special treatment.

Assuming DOJ concludes that the relevant compliance program is effective — notwithstanding the occurrence of unlawful conduct — prosecutors are permitted to enter deferred prosecution agreements (DPAs) with the corporations under investigation.[14]

However, the resolution of cases through non-prosecution agreements (NPAs) will likely be rare as DOJ has not eliminated the Leniency Program and remains interested in encouraging prompt self-reporting.

DOJ's evaluation of compliance programs

The Guidance outlines the Division's expectations regarding antitrust compliance and serves as a helpful framework on how to implement effective programs and enhance existing ones.[15]

It instructs prosecutors to begin their assessment by posing three questions:

(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 violations?

(3) To what extent was a company's senior management involved in the violation?

From there, the Guidance poses three "fundamental" questions for prosecutors to consider:

(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?

The Guidance then presents nine key factors (each bearing related questions) to help determine whether a compliance program passes muster:

(1) The program's design and comprehensiveness

- How well is the program designed and how thoroughly is it integrated with the company's business? (e.g., do employees have access to antitrust compliance resources?)

(2) Culture of compliance within the company

- How has corporate management articulated the company's commitment to ethical conduct and supported reinforcement of compliance values?

(3) Responsibility for, and resources dedicated to, antitrust compliance

- Does the program enable company employees to take ownership and responsibility for compliance with sufficient autonomy and authority?

(4) Antitrust risk assessment techniques

- Is the program tailored to the company's business and industry?
- Does the program provide opportunities to detect violations through periodic review and data collection?

(5) Compliance training and communication to employees

- Do the employees receive training and communications regarding the antitrust policies and duties?

(6) Periodic review, monitoring and auditing

- Does the program contain periodic review procedures and proactively and specifically audit for potential antitrust violations?

(7) Reporting mechanisms

- Can employees report antitrust violations in an anonymous and confidential manner?

(8) Compliance incentives and disciplinary measures

- Does the company have proper incentives and discipline that ensure the compliance program is well-integrated and enforced?

(9) Remediation methods

- Does the program take remedial action against employees to prevent recurring violations?

DOJ's findings on these topics will be dispositive on whether companies will secure appropriate credit for the maintenance of their compliance programs when negotiating corporate criminal dispositions of criminal antitrust investigations.

3. RECOMMENDATIONS FOR COMPANIES

With this updated Division approach and the issuance of the Guidance, company boards and management should reevaluate their compliance programs to determine whether any changes are appropriate.

In so doing, it might be helpful to consider the following:

(1) Code of Conduct/Policy Manual. Antitrust principles should be specifically addressed in the Manual. Critical documents should be widely distributed; they should clearly outline the "dos and don'ts" to employees and address communications with competitors, relationships with customers or distributors, attempted monopolization, and potential gray areas.

(2) Specification. Companies should determine which business practices or job functions expose the company to the greatest antitrust risk and whether their current antitrust programs/training are tailored to the company's business and industry. Consideration should be given to whether targeted training is needed for certain departments on specific topics.

(3) Roles & Responsibilities. Companies should review the relevant roles and responsibilities of those overseeing antitrust compliance and make it a top priority for the management team. Senior management should be highly engaged in the compliance process and assign at least one high-level executive with oversight and authority to implement and enforce the program.

(4) Reporting. Companies should establish effective reporting systems for potential antitrust violations. Companies should establish a system (e.g., a hotline, specific email address) where internal reports of potential unlawful conduct are channeled with an ability to do so anonymously to the compliance or legal departments, while also considering potential privilege implications. Employees should be informed about the disciplinary consequences arising from failing to report violations.

(5) Internal Controls & Investigation. Companies should implement internal controls and establish internal investigation mechanisms for exploring potential misconduct. Periodic check-ups to ensure employees understand and are following the correct procedures are advisable. Along those lines, an internal team that conducts audits and determines whether violations have occurred might be advisable. Companies should also track and monitor their business contacts with competitors, especially those high-risk employees responsible for sales and pricing or attending trade or industry association meetings.

(6) Retention Policies. Companies should implement clear document retention policies and preserve any potentially incriminating or suspicious documents or communications. All such communications should obviously be investigated.

(7) Counsel. Companies should consult with counsel to assist in these compliance measures. In so doing, companies might consider a second opinion from experienced antitrust counsel regarding creating a new compliance program or revamping an existing one.

The Division instituted this change to incentivize companies to prioritize antitrust compliance and to be proactive in detecting and reporting price fixing, bid rigging, and market allocation schemes.

Although these measures may be time consuming and costly at the outset, the benefits of implementing an effective compliance program are substantial.

With this revised DOJ approach to investigating unlawful antitrust conduct, the failure to implement an effective compliance program is imprudent at best and potentially devastating at worst.

Notes

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, "Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets" (Apr. 2020), available at https://bit.ly/3bdXznH.

[2] U.S. Dep't of Justice, "Antitrust Division Announces New Policy to Incentivize Corporate Compliance," Justice News (July 11, 2019), available at: https://bit.ly/32Iz9Pu.

[3] U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://bit.ly/2YRKlIn.

[4] U.S. Dep't of Justice, "Criminal Enforcement Trends Chart," available at https://bit.ly/2YQfsUu.

[5] U.S. Dep't of Justice, *Congressional Submission FY 2021 Performance Budget*, p. 12, available at https://bit.ly/2EzjBpi.

[6] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997).

[7] U.S. Dep't of Justice, "Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy," Justice News (Sept. 20, 2012), available at https://bit.ly/3bdZtVm; U.S. Dep't of Justice, "Yazaki Corp., Denso Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies" ," Justice News (Jan. 30, 2012), available at https://bit.ly/3*I*z1ikp; U.S.Dep't of Justice, "British Airways PLC and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling $600 Million for Fixing Prices on Passenger and Cargo Flights" (Aug. 1, 2007), available at https://bit.ly/3jwQXDM.

[8] U.S. Dep't of Justice, "Japanese Auto Parts Company Pleads Guilty to Antitrust Conspiracy Involving Steel Tubes," Justice News (May. 31, 2018), available at https://bit.ly/34KDMv0

[9] U.S. Dep't of Justice, *Antitrust Division (ATR): 2021 Budget Summary*, available at https://bit.ly/3*I*xMFhn (For 2020, the Division requested $166.8 million for its budget (covering 695 positions and 335 attorneys), and for 2021, the Division requested $188.5 million (covering 782 positions; 390 attorneys)).

[10] U.S. Dep't of Justice & Fed. Trade Comm., *AntiTrust Guidelines for International Enforcement and Cooperation*, p. 48-49 (Jan. 13, 2017), available at https://bit.ly/32K8IZt.

[11] In April 2019, the MFP was adopted by the International Competition Network (ICN) and incorporated into its Framework on Competition Agency Procedures (CAP). ICN's CAP protocol was approved by its core agency members, including those in the US, Brazil, France, Japan, Mexico, and South Korea. In May 2019, the CAP framework was available for competition agencies, both ICN members and non-member agencies, to participate through an opt-in procedure. This multilateral agreement applies the same principles outlined in the MFP and promotes review mechanisms to ensure that participating agencies consistently abide by these standards. *See* U.S. Dep't of Justice, "New Multilateral Framework on Procedures Approved by the International Competition Network," Justice News (Apr. 5, 2019), available at: https://bit.ly/32Idqaf; U.S. Dep't of Justice, "International Competition Network Adopts Framework for Competition Agency Procedures and Recommended Practices on Investigative Process, Announces U.S. Agencies Will Host 2020 ICN Annual Conference," Justice News (May 19, 2019), available at: https://bit.ly/3beZuZq.

[12] APEC, established in 1989, is a framework for regional cooperation for the sustainable development of the Asia-Pacific region. Since its inception, the number of participating members increased from 12 to 21 countries or regions. APEC advocates "open regionalism" with the aim of respecting the autonomy of the participating economies and sharing the results of liberal trade and investment policies. Its members include countries participating in NAFTA (North American Free Trade Agreement), as well as countries in Asia, Russia, and Latin America, to enhance regional collaboration.

[13] In certain circumstances, the "second in the door" company could reap some benefit if valuable cooperation was provided but rarely resulted in a non-criminal disposition. U.S. Dep't of Justice, "Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations," Justice News (Mar. 29, 2006), available at https://bit.ly/2YSDC0L. Additionally, DOJ has a Leniency Plus policy which allows leniency applicants to receive credit if they provide information on a separate violation to the DOJ, and a Penalty Plus policy that penalizes a company's failure to report an additional crime that it was involved in after pleading guilty to the initial crime.

[14] A DPA allows prosecutors to dismiss criminal charges after a period of time if a company meets certain requirements and/or implements certain changes.

[15] U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://bit.ly/3gLbxPh. This process is aligned with the DOJ Criminal Division's guidance on evaluating the efficacy of corporate compliance programs and the Department of Treasury's Office of Foreign Assets framework for sanctions compliance. The new policy provides greater overall consistency across the DOJ's enforcement approach, which is what compliance officials have sought.

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