The Antitrust Division and Compliance: A New Chapter?

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On April 9, the Antitrust Division of the Department of Justice held a public roundtable on the subject of criminal antitrust compliance. If any other Division of the DOJ had done this, it would not be particularly exceptional, but within the antitrust compliance world, it was significant—exciting even!

Since at least the time of the Corrugated Container antitrust case several decades ago, the Antitrust Division has taken the position that it would not consider an antitrust compliance program as a possible mitigating factor when considering prosecution or recommending a sentence. Its view was that if there were antitrust violations notwithstanding a corporate compliance program, then it was necessarily a "failed program" and the company which had otherwise violated the antitrust laws was not deserving of any mitigation. This position was echoed in the U.S. Attorneys' Manual, which specified that compliance programs were a factor that prosecutors could consider in mitigation, except in antitrust which somehow (perhaps magically) was identified as being different, "well understood in the business community," violations of which always went to the heart of the company.

The roots of this approach may go back even further, to the Electrical Equipment Cases in the late 1950's and early 1960's, where General Electric introduced its antitrust compliance policy in an attempt to avoid corporate liability for price fixing. But the judge didn't buy that argument, noting that the *real* corporate policy was to ignore the written antitrust policy, and pretend it did not exist. In

other words, this was truly a “paper program,” that wasn’t followed in practice.

Additionally, after the Antitrust Division leniency program was introduced, enforcers were also concerned that giving credit for compliance would undercut the incentive for people to leave their conspiracies and confess, in the hope of getting amnesty for their antitrust transgression, while providing evidence on other cartel members that would lead to successful prosecution. Which it did.

The problem, however, was that this approach was directly contrary to the program outlined in the United States Sentencing Guidelines for organizations, which were adopted in 1991. The purpose of the Guidelines was to establish a set of objective standards that would enable a company to implement an “effective” compliance program. Human nature being what it is, there will always be incidents of employees disregarding corporate policy and violating some law. But it is always appropriate to blame the company for the unauthorized behavior of an employee? The idea was that if a company followed the Guidelines, it was objective evidence that the company had no intent to violate the law, and its compliance efforts could qualify it to receive up to a 90 percent reduction in fine, or even a non-prosecution decision. But not in antitrust.

In the last few years, cracks in this position began to appear. Credit for compliance was given in the *AU Optronics* and *Kayaba* cases. Prosecutors spoke wistfully of wishing they would actually see an effective compliance program adopted by some company accused of hard core antitrust violations. Other countries, such as Canada, adopted very helpful antitrust compliance guidelines. The Fraud Division of the DOJ provided detailed compliance guidelines. But the Antitrust Division maintained its position of not wanting to get involved in “regulatory” activities (like compliance).

So, when the Antitrust Division decided to hold a public roundtable on compliance in April, antitrust compliance geeks were really excited! Asst. Attorney General Makan Delrahim provided the kick-off speech, and Kathleen Grilli, General Counsel of the Sentencing Commission talked about the Sentencing Guidelines, and the concept of an “effective” compliance program. A panel of experienced in-house counsel then discussed what they had learned about antitrust compliance programs. Video link: https://www.youtube.com/watch?v=rtjmFHq1GD8

The next panel, including yours truly, had law firm lawyers talking about their view

of antitrust compliance programs. There was an interesting discussion of how compliance programs would interface with enforcement decisions, probation, and use of a compliance monitor. I was concerned about whether the role of the Antitrust Division should just be to play a game of "gotcha" to catch antitrust violators (and help the U.S. Treasury by collecting lots of fines) or should really focus on actively encouraging competition by supporting competitive behavior including compliance programs (and help consumers benefit from competition). Video link: https://www.youtube.com/watch?v=GjhpNkc3jjs

The last panel brought in antitrust enforcers from Canada, the United Kingdom, and Hong Kong. Those agencies provide more substantive materials to companies and individuals about how to comply with antitrust/competition laws, and they compared their experiences with their approaches to compliance. Video link: https://www.youtube.com/watch?v=xbmglW11tVk

I think a fair conclusion from all of the panelists was that compliance programs can prevent antitrust violations, and it made a lot of sense to encourage companies to invest in solid antitrust compliance. I don't recall anyone saying they were a waste of time.

So, the Antitrust Division has a lot to think about – which is what they said they would do. Actual reduction of a penalty for a company that had an "effective" compliance program will depend on the right case coming forward, but the Division certainly could produce its own compliance guidelines or sign on to the detailed standards already produced by the Fraud Division. We're standing by!