

Unclassified

English - Or. English

21 August 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Latin American and Caribbean Competition Forum

Session III: Ex officio Investigations

- Contribution from the United States -

9-10 October 2024

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

Mr. Marcelo Guimarães, Competition Expert - Marcelo.Guimaraes@oecd.org

JT03548457

Session III: Ex officio Investigations

- Contribution from the United States –

Introduction

1. The Antitrust Division of the United States Department of Justice deploys an array of investigative techniques and proactive strategies to detect cartel schemes. This submission will discuss how antitrust enforcers can use the full panoply of detection tools, investigative techniques, and proactive strategies to uncover anticompetitive conduct. This includes affirmative strategies and policy changes to encourage whistleblowers and complainants that will further threaten cartel cohesion. This submission will also discuss why law enforcement coordination at the international level bolsters the threat of detection and punishment for cartels. This includes intelligence sharing before investigations begin and consultations as investigations and prosecutions commence.

2. The Antitrust Division is now at the leading edge of broader federal efforts to address competition issues. As reflected in President Biden’s July 9, 2021 Executive Order, the Antitrust Division is part of a “whole-of-government” approach to addressing anticompetitive conduct by, among other things, harnessing the combined power of various federal agencies to promote competition across different industries.¹ This means that the Antitrust Division is working ever more closely with other law enforcement and prosecution components as well as federal agencies that act as purchasers and regulators.

1. Proactive Investigations

3. The Antitrust Division is pursuing proactive investigations, sometimes referred to as ex officio investigations, at a pace not seen in decades.² Many of these matters are intelligence-driven at inception and involve consultation with other antitrust enforcers. Other proactive investigations are predicated on complaints from industry participants, tips from citizens, and referrals from other agencies.

4. While Type A and Type B leniency applicants continue to play a central role in our caseload, in a number of critical industries, the Antitrust Division is actively pursuing leads that were not originated by leniency applicants. In pursuing these matters, we are using all investigative techniques at our disposal. Current Antitrust Division investigations involve the use of grand jury subpoenas, search warrants, wire taps, consensually recorded conversations, undercover agents, confidential informants, and more.³

5. The Antitrust Division is also building up our own detection toolkit, including recently hiring in-house cartel investigators. The investigators, many of whom are retired federal law enforcement agents and have worked cartel cases and know our prosecutors,

¹ Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² Manish Kumar, Deputy Assistant Attorney General, *Remarks at Second Annual Spring Enforcers Summit*, (March 2023) available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-remarks-second-annual-spring>.

³ *Id.*

are helping us to be more strategic and proactive about our enforcement, as opposed to waiting for a leniency application to come in.

2. Working with Partners as Force Multipliers

6. Increasingly, antitrust investigations and prosecutions are not being run by the Antitrust Division alone but are being conducted in consultation and often coordination with local U.S. Attorney's Offices, the general prosecution arm of the federal government in the United States. This is part of a larger trend of congruence between the Antitrust Division and the larger Department of Justice, which is illustrated in part by the recent announcement of a department-wide voluntary self-disclosure policy for companies that is consistent with the Antitrust Division's leniency policy.⁴

7. Working with law enforcement partners extends the reach of the Antitrust Division. The Procurement Collusion Strike Force (PCSF), first launched in 2019, serves as a model for the Antitrust Division and the wider U.S. Department of Justice's interagency approach to combating antitrust violations and collusion in public procurement.⁵ In only a few years of existence, the PCSF has already recorded a number of noteworthy successes, including in international enforcement.⁶

8. The PCSF initiative shows the force multiplier concept at work. Through the PCSF, antitrust prosecutors in the five criminal offices of the Antitrust Division can collaborate through preexisting partnerships with more than twenty U.S. Attorney's Offices around the country. In addition to the FBI, the PCSF also adds ten more federal law enforcement agencies that can assist in Antitrust Division investigations, with specialist investigators in Offices of the Inspector General from the Department of Defense to the Environmental Protection Agency, among others.

3. Data Analytics

9. The United States is also putting resources into data analytics, sometimes referred to as "cartel screens," to identify warning signs of potential collusion.⁷ To that end, the PCSF Data Analytics Project, launched in 2020, works to encourage the application of data analytics to procurement data throughout the federal government.⁸ This training, which has included investigators, analysts, auditors, and data scientists for various federal agencies with procurement and investigation functions, focuses on recognizing suspicious bid patterns and identifying other red flags of collusion. The PCSF collaboration on this

⁴ Lisa Monaco, Deputy Attorney General, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group*, (Sept. 2022) available at <https://www.justice.gov/opa/speech/file/1535301/download>.

⁵ For more information on the PCSF, see <https://www.justice.gov/procurement-collusion-strike-force>.

⁶ Philip Andriole and Chris Maietta, Trial Attorneys, New York Office, *The PCSF: A Global Presence for a Global Problem*, DOJ Journal of Federal Law and Practice, (Dec. 2022) available at <https://www.justice.gov/usao/page/file/1559136/download>.

⁷ Note by the United States, *Data Screening Tools for Competition Investigations*, (Nov. 2022) DAF/COMP/WP3/WD(2022)35

⁸ See <https://www.justice.gov/atr/division-operations/division-update-spring-2021/pcsf-expansion-and-early-success>.

front has extended internationally, including work with two global leaders on data analytics, the Danish Competition and Consumer Authority and Switzerland's Competition Commission.⁹

10. In developing data analytics, one of the core goals is to supplement and inform traditional investigatory techniques following an industry complaint, whistleblower allegation, or leniency application. Federal agencies have a plethora of procurement platforms that can act as sources for data screening. In addition, the Antitrust Division is investing in cutting-edge collusion detection methods by building out our internal capacity. As has been publicly announced, the Division is actively hiring data scientists to work alongside its attorneys and economists.¹⁰

4. Encouraging and Protecting Whistleblowers

11. Increasingly, cartel members risk defection not just by a fellow cartel member that seeks leniency, but from their own current and former employees or other individuals that may act as whistleblowers. While less heralded than the Corporate Leniency Program, the Antitrust Division's Individual Leniency Program provides eligible individuals with the same broad protections from prosecution as the Corporate Leniency Program.¹¹ This means that so long as certain conditions are met, an individual can come forward to report an antitrust violation in the United States, whether they were a witness or even a participant, without fear of criminal prosecution.

12. The Individual Leniency Program was recently bolstered by the passage of the Criminal Antitrust Anti-Retaliation Act (CAARA).¹² Signed into law on December 23, 2020, CAARA provides robust legal protections for whistleblowers by prohibiting retaliation by employers for assisting in the investigation of a criminal antitrust violation.¹³ The law is broad in the scope of persons protected from retaliation, as it includes not just employees, but also agents, contractors, and subcontractors.¹⁴ The Individual Leniency Program and CAARA therefore protect a would-be whistleblower from potential prosecution by the Antitrust Division or retribution from an employer.

13. At this stage, there is no direct financial incentive for antitrust whistleblowers under the Sherman Act. Where the federal government is a victim of an antitrust conspiracy, however, both Section 4A of the Clayton Act and the federal False Claims Act can be invoked as one of the means to recover damages, as was the case when the Antitrust Division prosecuted three South Korean companies for bid rigging fuel supply contracts to

⁹ Note by the United States, *Data Screening Tools for Competition Investigations*, (Nov. 2022), DAF/COMP/WP3/WD(2022)35

¹⁰ David Mamone, *Kanter: DOJ hiring more data scientists*, Global Competition Review, (March 2023) available at <https://globalcompetitionreview.com/gcr-usa/article/kanter-doj-hiring-more-data-scientists>.

¹¹ U.S. Dep't of Justice, Antitrust Division, *Individual Leniency*, Justice Manual 7-3.330, available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.330>.

¹² 15 U.S.C. § 7a-3.

¹³ See <https://www.justice.gov/opa/pr/antitrust-division-observes-national-whistleblower-appreciation-day-0>.

¹⁴ *Id.*

the United States military.¹⁵ Whistleblowers in these types of False Claims Act cases, sometimes referred to as *qui tam* actions, typically receive between 15 and 30 percent of the government’s recovery.¹⁶ Therefore, a mechanism already exists to incentivize whistleblowers in cases where the United States is a victim of price fixing, bid rigging, or the like.

5. Affirmatively Identifying Industry Complainants

14. Historically, industry complainants have been an important source of investigative leads for the Antitrust Division. The Antitrust Division has been taking affirmative steps to identify potential complainants that may have information that leads to the successful discovery of cartel activity.

15. While many of these efforts are not in public view, there are important outreach efforts that the Antitrust Division does publicly announce for purposes of deterrence and lead generation. For example, in February 2022, the Antitrust Division announced a global supply chain initiative to deter and detect price fixing and other collusive schemes aimed at exploiting global supply chain disruptions and other inflationary pressures following the Covid-19 pandemic.¹⁷

16. Upstream suppliers, downstream customers, distributors, retailers, and other types of market participants are uniquely positioned to detect cartel behavior in their respective industries. Generally speaking, the Antitrust Division does not publicly discuss the details of industry-specific outreach or the factors that led to that outreach. Indeed, the Antitrust Division treats this information confidentially, as it would information from any other confidential human source that is assisting an investigation. It is the Antitrust Division’s consistent practice to “protect the identity of complainants and the information they provide to the full extent of the law.”¹⁸

17. Confidential sources that cooperate with the Antitrust Division and the FBI agents and other law enforcement personnel involved in the investigations are a key component in detection efforts. The Antitrust Division currently is—and will continue—working with individuals and with good corporate citizens in the business community as part of the effort to ferret out bad actors.

6. Improving Accessibility and Ease for Public Complainants

18. The Antitrust Division has long maintained a public tip line for citizen complaints. Over the decades, members of the public have submitted complaints that have generated countless leads for both civil and criminal antitrust investigations. The Antitrust Division’s current incarnation of a tip line, the Citizen Complaint Center, was launched in 2009, and includes a public website with step-by-step instructions for how public complaints can be

¹⁵ See <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.

¹⁶ See <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

¹⁷ See <https://www.justice.gov/opa/pr/department-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain>.

¹⁸ See <https://www.justice.gov/atr/confidentiality-policy-regarding-complainants>.

submitted via a toll-free number and email.¹⁹ In 2019, the PCSF launched a companion PCSF Citizen Complaint portal that allows for complaints to be submitted online.²⁰

19. The Antitrust Division is currently undertaking a review of ways to update or improve the Citizen Complaint Center as part of the U.S. Department of Justice’s broader Access to Justice efforts.²¹ Guided by the Access to Justice principles, the Antitrust Division is exploring ways to promote accessibility, ensure fairness, and increase efficiency in how members of the public can register antitrust complaints and concerns. This includes potential updates to the Citizen Complaint Center to incorporate user-friendly information about the whistleblower protections in CAARA and potential avenues for whistleblower recovery, such as the False Claims Act referenced above.

7. International Cooperation and Detection

20. With supply chains and distribution channels that increasingly span the globe, timely and effective international cooperation among antitrust enforcers is critical for cartel detection. This is a time when “[w]e must deepen cooperation among jurisdictions committed to the shared values that underlie free and open markets. . . . This demands and requires increasing collaboration from enforcers.”²²

21. Now more than ever competition agencies are coordinating on detection methods, in particular by more closely cooperating on sharing intelligence as well as partnering on outreach. For example, the Antitrust Division’s Deputy Assistant Attorney General Manish Kumar recently collaborated with his counterpart at the European Commission, Maria Jaspers, to issue a joint video encouraging companies impacted in their supply chains by potential collusive behavior to report the conduct to our agencies.

22. The Antitrust Division coordinates on search warrant (dawn raid) timing with international jurisdictions as much as possible, because it eliminates the possibility that subjects can coordinate ahead of document production or interviews. In one recent case-related example, after a fellow enforcer received information suggesting that collusive conduct occurred in their jurisdiction, this enforcer was able to provide the Division with evidence that allowed our prosecutors to develop probable cause for search warrants here in the United States. This all occurred outside our normal leniency channels.

23. As part of the global supply chain initiative, the Antitrust Division is working with a number of antitrust enforcers around the globe, including the European Commission’s Directorate General for Competition, the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission, and the United Kingdom Competition and Markets Authority.²³ As a result

¹⁹ See <https://www.justice.gov/atr/citizen-complaint-center> <https://www.justice.gov/atr/citizen-complaint-center>.

²⁰ See <https://www.justice.gov/atr/pcsf-citizen-complaint>.

²¹ See <https://www.justice.gov/atj>.

²² Jonathan Kanter, Assistant Attorney General, *Remarks for the 2022 International Bar Association Competition Conference*, (Sept. 2022) available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-virtual-remarks>.

²³ Richard A. Powers, *Keynote at the University of Southern California Global Competition Thought Leadership Conference*, (June 2022) available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern>.

of these and other bilateral and multilateral conversations, the Antitrust Division has proactively initiated multiple cartel investigations, some of which are not yet public.²⁴

24. *Trilateral World Cup Initiative:* In September 2023, the Antitrust Division, Mexico’s COFECE, and Canada’s Competition Bureau announced this initiative focused on sharing information and conducting joint outreach to prevent anti-competitive conduct related to the 2026 FIFA World Cup games. This two-pronged approach furthers the important goals of prevention and detection related to what is expected to be the most-watched sporting event in history. Since launching the initiative, the agencies have participated in joint outreach events, launched a social media campaign, and set up websites for reporting collusive behavior related to the games.²⁵

25. The Antitrust Division also serves as a co-chair of the International Competition Network’s Cartel Working Group (ICN CWG), alongside our counterparts at Chile’s Fiscalía Nacional Económica (FNE) and Italy’s Autorità Garante Della Concorrenza e del Mercato (AGCM). With the FNE and AGCM, the Antitrust Division launched a multi-year project called “Back to Basics,” a series of experiential learning programs designed to help ICN CWG members improve cartel detection and enforcement techniques. Since the launch of the “Back to Basics” project in 2022, the ICN CWG has hosted programs on the practicalities of conducting search warrants (also known as dawn raids), a roundtable on cartel enforcement techniques, and in May-June 2023, the ICN CWG’s first-ever Virtual Leniency Workshop.

26. Organized by the Antitrust Division, the Virtual Leniency Workshop provided competition agency staff with an opportunity to learn from experienced practitioners about the practical aspects of developing an investigation based on leniency and working with leniency applicants using a hypothetical case exercise. The workshop included over 160 people from 36 different countries participating as attendees, speakers, role players, and facilitators. As ICN CWG co-chair, the Antitrust Division will continue to lead the work of the “Back to Basics” project, including future work on a “Proactive Detection and Sanctions Toolkit” which will begin next year.

27. The Antitrust Division is also working to expand successful national initiatives to the international level. Building on the success of the PCSF, the PCSF: Global initiative was launched with an inaugural presentation to the OECD’s Competition Committee in 2020. PCSF: Global works to expand the reach of the PCSF to include international competition enforcers in a coordinated effort to combat collusion.²⁶ PCSF: Global has already conducted workshops, trainings, and presentations in countries ranging from the Republic of Korea to Bosnia-Herzegovina, and to audiences including U.S. and foreign criminal investigators, prosecutors, analysts, and auditors. Not surprisingly, the PCSF has already recorded its first successful international prosecution, which yielded a significant criminal fine for a price-fixing conspiracy targeting the United States Department of Defense.²⁷

²⁴ Manish Kumar, Deputy Assistant Attorney General, *Remarks at Second Annual Spring Enforcers Summit*, (March 2023) available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-remarks-second-annual-spring>.

²⁵ The Antitrust Division’s reporting page is located here: [Antitrust Division | 2026 World Cup – Report Collusion | United States Department of Justice](#)

²⁶ See <https://www.justice.gov/atr/division-operations/division-update-spring-2021/pcsf-expansion-and-early-success>.

²⁷ See U.S. DOJ Office of Public Affairs, *Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement*, (June 2021) available

28. These initiatives are part of concerted efforts by the Antitrust Division to deepen ties and build capacity within the international antitrust enforcement community. In fiscal year 2023, the Antitrust Division cooperated on 13 criminal matters within 10 jurisdictions. We have also engaged in consultations covering a wide range of criminal enforcement topics and conducted technical assistance programs spanning criminal, civil, and policy topics for jurisdictions across the globe.

Conclusion

29. For decades, the Antitrust Division has extolled the importance of heightened detection risk as a cornerstone of an effective leniency program. Proactive investigations, then, are rightly thought of as a component of, not an alternative to, a thriving leniency program. As discussed above, each cartel member faces a choice about whether it is in its interest to defect from a conspiracy and seek leniency. The risk of detection, the proactive use of investigative tools and strategies, and robust international cooperation all lead to the same conclusion: seeking leniency is the right choice, both in game theory and in the real world.

at https://media.defense.gov/2021/Jul/09/2002758992/-1/-1/1/210625_BELGIAN-SECURITY-SERVICES-FIRM-A.PDF.