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– Contribution from the United States –

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The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 20-22 September 2021, via a virtual Zoom meeting.

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Session I: Compliance Programmes in Antitrust Enforcement

– Contribution from the United States[1] –

1. Introduction

1. The Antitrust Division of the United States Department of Justice criminally prosecutes corporations and individuals who participate in hardcore cartel agreements. Criminal enforcement is a strong deterrent of corporate criminal activity. Criminal prosecutions of antitrust conspiracies have resulted in significant fines to companies and long periods of incarceration for individuals. Effective corporate compliance policies can also play a large part in deterring and detecting cartel activity, and companies whose compliance programs facilitate cartel detection and prompt reporting are well positioned to win the race for leniency and avoid criminal prosecution.[2] This submission explains the changes in the Antitrust Division's policy regarding consideration of corporate compliance policies, anddescribes some key facets of a well-designed corporate compliance policy.[3]

2. Evolution of the Antitrust Division's Position on Consideration of Compliance Programs

2. Historically, the Antitrust Division considered a company's compliance program necessarily ineffective if that company was involved in cartel activity.[4] However, in 2019, the Antitrust Division announced a change in its policy to provide further incentives for companies to create robust, effective compliance policies and to foster a corporate culture of compliance.[5] Under this new policy, the Antitrust Division will consider a company's

[1] The views expressed do not necessarily reflect those of the U.S. Department of Justice.

[2] The Division's approach to corporate compliance should be considered alongside the Division's Leniency policy, which haslong provided incentives for robust corporate compliance programs. The Leniency policy creates powerful incentives for companies to self-report their involvement in criminal cartel activity. B. Snyder, *Individual Accountability for Antitrust Crimes* (2016), https://www.justice.gov/opa/speech/deputyassistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust. Effective compliance programs help companies promptly detect wrongdoing to enable them to win the race for leniency. And even if they lose the race to qualify for corporate leniency, companies with effective compliance policies and a strong culture of compliance will be better positioned to avoid a criminal conviction through a deferred prosecution agreement. R. Powers, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13thinternational.

[3] The US DOJ approach to prosecuting cartels and the development and implications of its policy toward corporate compliance programs is more fully developed in its submission to the OECD's roundtable on compliance programs in June 2021. The US paper is available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)16/en/pdf.

[4] *See* M. Delrahim, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[5] Prior to the policy change, in 2018, the Antitrust Division hosted a public roundtable to explore the issue of corporate antitrust compliance and its implications for criminal enforcement policy. The Division announced it was seeking ways to gain insight into how to promote antitrust compliance. The roundtable included discussions among in-house counsel, attorneys who represent companies in cartel investigations, and international enforcers. Information related to the roundtable, including transcripts and videos, can be found on the Division's website: https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-compliance.

pre-existing compliance policy when determining whetherto bring a criminal charge, and the appropriate form for resolution of any charges. This new policy recognizes that a company's participation in a cartel does not necessarily mean that its compliance program was ineffective.[6] The practical effect of this policy change is that a company with a strong culture of compliance and a robust antitrust compliance program may resolve its criminal antitrust cartelparticipation through a Deferred Prosecution Agreement,[7] which avoids a criminal conviction. The Antitrust Division believes that this new policy will further incentivize companies to invest in antitrust compliance and to cultivate a corporate culture of compliance with the law.

3. In the United States, the strength and robustness of a compliance program can be assessed at twostages in the course of prosecution: first, at the charging stage and second, at the sentencing stage. The charging stage refers to the time when prosecutors are considering whether to charge a corporation, and,in the case of a negotiated resolution, whether the company will be required to plead guilty, or whether the company and the government will instead enter into a deferred prosecution agreement. The sentencing stage refers to the time after a company has been convicted of a crime (i.e., after a company has pleaded guilty or after the company has been convicted at trial) when the court considers the appropriate penalty for a company.

2.1. Antitrust Division Policy before 2019

2.1.1. Charging Stage Decisions

4. At the charging stage, all federal prosecutors are required to consider Department of Justice policy, contained in the Principles of Federal Prosecution.[8] When prosecutors are considering whether to charge a company, they must also look to the Principles of Federal Prosecution of Business Organizations. The Principles of Federal Prosecution of Business Organizations contain eleven factors that prosecutors must analyze before making a charging decision.[9] One of the factors is consideration of "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."[10] However, when conducting a charging analysis before 2019, Antitrust Division prosecutors did not consider a company's compliance program because the Justice Manual recognized a special consideration for antitrust crimes due to the

[6] *See* R. Powers, *Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice* (2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate.

[7] Under a DPA, the company will be charged via criminal information, but if the company agrees to certain conditions, whichcan include taking remedial measures or maintaining or improving its antitrust compliance program, the prosecution of the case is deferred for the pendency of the agreement, usually three years, at the end of which the Division moves to dismiss the charge with prejudice. Unlike a guilty plea, a defendant that enters into a DPA is not convicted of a crime. But if the defendant breaches the DPA, the Division can move forward with the prosecution. A DPA is an important middle ground between no charge and a charge. *Antitrust Division Manual* at III.G.2.c, (quoting the Justice Manual at § 9-28.400). https://www.justice.gov/atr/file/761166/download.

[8] U.S. Department of Justice, *Principles of Federal Prosecution of Business Organizations*, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

[9] *Id.*

[10] Delrahim, M., *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

Antitrust Division's Leniency Policy, under which the Division will not criminally charge the first company to report a criminal antitrust violation.[11]

2.2. Sentencing Stage Compliance Consideration

5. In the United States, the U.S. Sentencing Guidelines serve as a baseline to establish consistent policies and practices for federal courts, and serve to inform courts about the appropriate form and severity of punishment for federal crimes.[12] Generally, the Sentencing Guidelines work as a point system: each crime is associated with a certain number of points, with points that are added or subtractedbased on various facts and factors relating to the crime (e.g., amount of affected volume of commerce, number of employees involved), and additional points are added or subtracted from the total score basedon factors that enhance or mitigate criminal culpability.

6. Since 2004, the Sentencing Guidelines have included a recognition that the existence of an "effective compliance and ethics program" may mitigate ultimate punishment of the organization.[13] This section of the Sentencing Guidelines is applicable to all federal crimes, including antitrust violations. The Sentencing Guidelines describe the characteristics of a compliance and ethics program that would permit sentencing mitigation. They further note that compliance mitigation is unavailable if "the organization unreasonably delayed reporting the offense to appropriate governmental authorities" after becoming aware of the offense. The Sentencing Guidelines also create a rebuttable presumption that a compliance and ethics program is not effective if individuals with substantial authority within the organization, or if high-level personnel of a small organization, participated in, condoned, or were will fully ignorant of the offense.[14] Because of these limitations, the sentencing mitigation for an effective compliance program is rarely given.[15] The Antitrust Division has never sought to mitigate a corporation's sentence for an established compliance program under the Sentencing Guidelines.

7. In a few cases, starting in 2015, the Antitrust Division has recommended reducing a corporation's criminal fine based on their forward-looking compliance programs.[16] The Division made it clear that it recognizes companies' extraordinary efforts to enhance

[11] *Id.*; Corporate Leniency Policy, (https://www.justice.gov/atr/file/810281/download).

[12] U.S. Sentencing Commission, *United States Sentencing Guidelines*, Part A.1.3, https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-1#NaN.

[13] U.S. Sentencing Commission, *United States Sentencing Guidelines*, § 8B2.1 https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8; *see also* Amendment 673 https://www.ussc.gov/guidelines/amendment/673.

[14] U.S. Sentencing Commission, United States Sentencing Guidelines § 8C2.5 (includes definitions of high-level individualsand individuals with substantial authority).

[15] Remarks of Kathleen Grilli at Antitrust Compliance Roundtable 7, https://www.justice.gov/atr/page/file/1064291/download.

[16] This form of sentencing credit is based on a statutory provision (18 U.S.C. § 3572) rather than the sentencing guidelines. *US v. Kayaba Industry Co., Ltd.*, 15-cr-98-MRB (S.D. OH, Sept. 16, 2015), Plea Agreement, ECF. 9, https://www.justice.gov/atr/case-document/file/791911/download; *US v. Barclays PLC*, 15-cr-77-SRU (D. CT, May 5, 2015) Plea Agreement, ECF 6, https://www.justice.gov/atr/file/838001/download.

compliance programs and changethe corporate culture that allowed the cartel to exist and continue, and when faced with such efforts, the Division will seek lower criminal fines.[17]

2.3. Compliance Policy Change 2019

8. The Antitrust Division announced a change in its policy addressing two primary areas: (1) the Antitrust Division would now consider corporate compliance programs at the charging stage, and (2) the Antitrust Division explained its consideration of corporate compliance programs at the sentencingstage.[18]

2.3.1. Charging Stage

9. At the charging stage, the Division announced that its prosecutors would now consider all the factors listed in the Principles of Prosecution of Business Organizations—including the effectiveness of a compliance program. This is in addition to consideration of the factors listed in the Principles of Prosecution and the Antitrust Division's Leniency Policy.[19]

2.3.2. Sentencing Stage

10. At the sentencing stage, the Antitrust Division clarified the three ways that effective compliance programs could have an impact. First, the Sentencing Guidelines permit a reduction in culpability scorefor defendants with effective compliance programs as defined in the Guidelines.[20] Second, the Division may find a compliance program relevant when determining the appropriate recommended corporate fine within the guidelines range, or may consider extraordinary compliance programs as the basis to ask a court to provide a downward departure from the guidelines penalty.[21] Finally, the existence and effectiveness of a corporate compliance program is relevant to whether the Division recommends that a corporate offender receives probation.[22]

[17] Snyder, B., *Remarks Delivered at the Sixth Annual Chicago Forum on International Antitrust* (2015), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[18] Delrahim, M., *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[19] *Id.*

[20] *See supra* n. 12-14 and accompanying text.

[21] *See supra* n. 15-17 and accompanying text.

[22] M. Delrahim, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0 (noting that the Division typically does not seek probation for pleading corporations except in limited circumstances).

3. What Criteria Are Considered in Assessing a Compliance Program

11. In order to provide transparency, the Division published the guidelines its prosecutors would usein assessing a compliance program.[23] The assessment is grounded in three fundamental questions: "Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work?"[24]

12. The Division's guidance begins with a set of non-dispositive preliminary questions, designed tofocus the analysis of a company's compliance program on the factors most relevant to the specific circumstances under review: [25]

- Does the company's compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company's senior management involved in the violation?[26]

13. To answer these questions, prosecutors consider nine factors to evaluate the effectiveness of an antitrustcompliance program:

> (1) the design and comprehensiveness of the program; (2) the culture of compliance withinthe company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[27]

14. The first fundamental question Division prosecutors consider when evaluating the effectiveness of compliance programs is whether the program is well designed. Companies of all sizes must efficiently allocate resources to compliance. A company's program, regardless of its size, should be appropriately tailored to the company's line of business, areas of high antitrust risk, and size.[28] A company's antitrustrisk areas will vary, but would likely include business practices that bring competitors into contact (e.g., at sales conferences and trade shows), and portions of the business responsible for collecting information on and setting prices. Well-designed compliance programs focus resources for training anddetection in those areas.

[23] United States Dep't of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (Evaluation of Compliance Programs) (2019), https://www.justice.gov/atr/page/file/1182001/download.

[24] *Id.* at 2; Justice Manual § 9-28.800.

[25] Evaluation of Compliance Programs at 2.

[26] *Id*. at 3.

[27] *Id.* at 3-4.

[28] Justice Manual § 9-28.800, Evaluation of Corporate Compliance Programs, at 2, 7.

15. The Division does not look only at antitrust-specific compliance; well-designed programs haveeffective mechanisms for employees to report wrongdoing anonymously, confidentially, and without fear of retaliation.[29] The Division also considers the company's culture of compliance—whether compliance is promoted and championed by senior leadership, how well reporting mechanisms are known, and how often the mechanisms are used.[30] Indeed, the Division looks to whether the companyhas made a true investment in compliance, versus implementing a "paper program."[31]

16. The Department "has no formulaic requirements regarding corporate compliance programs"[32] and the Division's factors are not a checklist; rather, Antitrust Division prosecutors take a holistic view of the company—including its size and resources allocated to the company's antitrust compliance program, its conduct, and relevant policy considerations, including the Principles of Federal Prosecution, Principles of Federal Prosecution of Business Organizations, and the Leniency Policy, and make a determination as to whether a charge is appropriate. In the case of a negotiated resolution, the Division will determine whether the conduct should be resolved by means of a plea agreement or a deferred prosecution agreement.[33] To date, the Antitrust Division has not entered into a deferred prosecution agreement with a company based on the effectiveness of its antitrust compliance program. The Divisionhas entered into DPAs with companies based on other factors in the Principles of Federal Prosecution ofBusiness Organizations, for example, collateral consequences to the business.[34]

[29] Evaluation of Compliance Programs, at 11.

[30] Evaluation of Compliance Programs, at 5, 11. 31 See Evaluation of Compliance Programs, at 4.

[31] See Evaluation of Compliance Programs, at 4.

[32] Justice Manual § 9-28.800.

[33] *Antitrust Division Manual* at III.G.2.c, https://www.justice.gov/atr/file/761166/download.

[34] Deferred Prosecution Agreements (DPA) contain a section explaining that a DPA is based on individual facts and circumstances of each case, and identifying some of the facts the United States considered. *See, e.g., United States v. TaroPharmaceuticals U.S.A., Inc.*, 20-cr-214-RBS, ECF 2 at 3-4 (E.D. PA July 23, 2020).