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**Working Party No. 3 on Co-operation and Enforcement**

**Competition Compliance Programmes – Note by the United States**

8 June 2021

This document reproduces a written contribution from the United States submitted for Item 1 of the 133<sup>rd</sup> OECD Working Party 3 meeting on 8 June 2021.

More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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## *United States*

### 1. Introduction

1. The Antitrust Division of the United States Department of Justice criminally prosecutes corporations and individuals who participate in hardcore cartel agreements. In the United States, unreasonable restraints of trade are illegal under Section 1 of the Sherman Act.<sup>1</sup> Section 1 may be enforced both civilly and criminally,<sup>2</sup> but as a matter of prosecutorial discretion, the Antitrust Division brings criminal antitrust prosecutions only based on “*per se*” illegal conduct, such as agreements among competitors to fix prices, rig bids, and allocate customers and markets.<sup>3</sup> Criminal prosecutions of antitrust conspiracies have resulted in significant fines and long periods of incarceration.<sup>4</sup>

2. Criminal enforcement is a strong deterrent of corporate criminal activity. Effective corporate compliance policies can also play a large part in deterring and detecting cartel activity. Historically, the Antitrust Division considered a company’s compliance program necessarily ineffective if that company was involved in cartel activity.<sup>5</sup> In 2019, the Division announced a change in policy that will permit Division prosecutors to consider the effectiveness of a compliance policy when making charging decisions.<sup>6</sup> This means that companies seeking a negotiated criminal resolution may resolve their liability through entering into a Deferred Prosecution Agreement (DPA) if, after considering the company’s compliance program together with the other factors contained in the Department of Justice’s Principles of Federal Prosecution of Business Organizations, the Division believes that it was adequate and effectively implemented, notwithstanding the cartel activity.<sup>7</sup> This change provides an important incentive for companies to create and maintain effective

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<sup>1</sup> 15 United States Code § 1, <https://uscode.house.gov/browse/prelim@title15/chapter1&edition=prelim>; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (explaining that the Sherman Act only proscribes unreasonable restraints of trade).

<sup>2</sup> See 15 U.S.C. §§ 1, 4, 15a, <https://uscode.house.gov/browse/prelim@title15/chapter1&edition=prelim>.

<sup>3</sup> U.S. courts have held that some agreements are always unreasonable restraints of trade and are therefore illegal in and of themselves, or “*per se*” illegal. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Those agreements include hardcore cartels: horizontal agreements on price fixing, bid rigging, and customer and market allocation. See also U.S. Dep’t of Justice, Antitrust Division, *Antitrust Division Manual* at III.C.1 (5th ed. Updated 2016), <https://www.justice.gov/atr/file/761166/download>.

<sup>4</sup> Statistics showing the number of corporations and individuals charged, as well as total fines and penalties imposed and average prison sentences in months can be found on the Antitrust Division’s website: <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

<sup>5</sup> 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-1-0>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; U.S. Dep’t of Justice, *Justice Manual*, 9-28.300 Factors to be Considered, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300> (identifying the “adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” as one of the eleven factors considered).

compliance programs. The Antitrust Division takes into account the size and resources of a company in evaluating that company's antitrust compliance program.<sup>8</sup>

3. This submission provides an overview of antitrust crimes in the United States, explains the changes in the Antitrust Division's policy regarding consideration of corporate compliance policies, and describes some key facets of a well-designed corporate compliance policy.

## 2. Cartel Enforcement in the United States

### 2.1. Nature of Antitrust Crimes

4. The United States recognizes that antitrust crimes, by their nature, involve the functioning of the business itself and go to the heart of the business.<sup>9</sup> For example, hardcore price-fixing agreements directly affect the price at which companies sell their goods or services to their customers, just as agreements to rig bids or allocate customers or markets directly affect where and to whom corporations sell their goods or services. And agreements relating to the sale of goods or services are not the only cartel agreements that go to the heart of a business. Labor is central to American business; corporations cannot function without employees. Cartel agreements that fix wages and those that limit or prohibit solicitation or hiring of competitors' employees result in lower salaries and reduced worker mobility.<sup>10</sup>

5. High-level employees often play key roles in cartels, and the Antitrust Division has prosecuted these executives for their involvement in criminal wrongdoing.<sup>11</sup> For example, in the Division's prosecution of a price-fixing cartel in the sale of packaged seafood, the former Chief Executive Officer of Bumble Bee Foods LLC, a large producer of packaged

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<sup>8</sup> United States Dep't of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (Evaluation of Compliance Programs) 2 (2019), <https://www.justice.gov/atr/page/file/1182001/download>.

<sup>9</sup> U.S. Dep't of Justice, *Justice Manual*, 9-28.400 Special Policy Concerns, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.400>; See also Abrantes-Metz, R. and D. Sokol, "Antitrust Corporate Governance and Compliance" at 1, *Oxford Handbook of International Antitrust Economics* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2246564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246564) (accessed on April 29, 2021).

<sup>10</sup> U.S. Dep't of Justice and Fed. Trade Comm., Antitrust Guidance for Human Resource Professionals (Oct. 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/992623/ftc-doj\\_hr\\_guidance\\_final\\_10-20-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf). ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."); see also Joint Statement of the Bureau of Competition of the Fed. Trade Comm. and the Antitrust Division of the Dept. of Justice Regarding COVID-19 and Competition in Labor Markets (Apr. 2020), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement\\_on\\_coronavirus\\_and\\_labor\\_competition\\_04132020\\_final.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf).

<sup>11</sup> Combe, E. and C. Monnier (2020), "Why Managers Engage in Price Fixing? An Analytical Framework", *World Competition*, Vol. 43/1, at pp. 41-42, <http://www.emmanuelcombe.fr/wp-content/uploads/2020/06/article-combe-monnier-2020.pdf> (accessed on May 2, 2021). See, e.g., U.S. Dep't of Justice, Antitrust Division, *Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna*, <https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna>.

seafood, was found guilty at trial.<sup>12</sup> He was sentenced to 40 months' imprisonment for his participation in the conspiracy.<sup>13</sup> Similarly, a company co-owner pleaded guilty to participating in a conspiracy to rig bids for construction contracts relating to insulation,<sup>14</sup> and two freight executives pleaded guilty to fixing prices for freight forwarding services.<sup>15</sup> And high-level personnel including executives, chief executive officers, and presidents of companies have been charged with antitrust crimes and are awaiting trial for *per se* illegal conduct in various industries, including healthcare, generic drugs, and chicken sold to grocery stores and restaurants.<sup>16</sup>

## 2.2. Importance of Antitrust Crimes

6. Cartel behavior has significant effects, and, ultimately, it is the consumer who is often harmed. The Organisation for Economic Cooperation and Development (OECD) estimates that developed countries spend 12% of GDP on public procurement alone, and an even greater percentage of GDP is spent in developing countries.<sup>17</sup> Moreover, eliminating bid-rigging could reduce public procurement costs by at least 20%.<sup>18</sup> In the United States, eliminating bid rigging affecting public procurement could save American taxpayers billions of dollars. And the effects of cartels are not limited to public

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<sup>12</sup> U.S. Dep't of Justice, Antitrust Division, *Former CEO Convicted of Fixing Prices for Canned Tuna*, <https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna>.

<sup>13</sup> U.S. Dep't of Justice, Antitrust Division, *Former Bumble Bee CEO Sentenced To Prison For Fixing Prices of Canned Tuna*, <https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna>.

<sup>14</sup> U.S. Dep't of Justice, Antitrust Division, *Insulation Contracting Firm and Co-Owner Plead Guilty to Antitrust and Fraud Charges*, <https://www.justice.gov/opa/pr/insulation-contracting-firm-and-co-owner-plead-guilty-antitrust-and-fraud-charges>.

<sup>15</sup> U.S. Dep't of Justice, Antitrust Division, *Two Freight Transportation Executives Sentenced to Prison Terms for Price Fixing*, <https://www.justice.gov/opa/pr/two-freight-transportation-executives-sentenced-prison-terms-price-fixing>.

<sup>16</sup> U.S. Dep't of Justice, Antitrust Division, *Former Owner of Health Care Staffing Company Indicted for Wage Fixing*, <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>; *Six Additional Individuals Indicted on Antitrust Charges in Ongoing Broiler Chicken Investigation*, <https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation>; *Former Generic Pharmaceutical Executive Pleads Guilty for Role in Criminal Antitrust Conspiracy*, <https://www.justice.gov/opa/pr/former-generic-pharmaceutical-executive-pleads-guilty-role-criminal-antitrust-conspiracy>; *Former Cancer Center President Indicted for Participation in a Long-Running Antitrust Conspiracy*, <https://www.justice.gov/opa/pr/former-cancer-center-president-indicted-participation-long-running-antitrust-conspiracy>.

<sup>17</sup> OECD, Competition, Fighting Bid Rigging in Public Procurement, available at: <https://www.oecd.org/competition/fightingbidrigginginpublicprocurement.htm>

<sup>18</sup> *Id.* The Department of Justice has developed an antitrust primer to help procurement officials to spot and stop bidding behavior that can result in anticompetitive collusion. See Dep't of Justice, Antitrust Division, *Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For* (rev'd Feb. 2021), <https://www.justice.gov/atr/file/810261/download>.

procurement.<sup>19</sup> Taking into account collusion schemes that target private citizens, the amount of money lost to hardcore agreements is staggering.<sup>20</sup>

### 3. United States Consideration of Compliance Programs

7. The Antitrust Division's mission is to promote economic competition through enforcement of the antitrust laws. The Department believes that holding individuals accountable for their wrongdoing is one of the most effective ways to combat corporate misconduct.<sup>21</sup> The Antitrust Division has also recognized the need for corporations to have strong compliance programs to detect and deter illegal conduct.<sup>22</sup> In an ideal world, compliance programs would prevent wrongdoing altogether.<sup>23</sup> But strong compliance programs also aid with early detection of wrongdoing and self-reporting.<sup>24</sup> Over the past few decades, the Antitrust Division has changed how it considers compliance programs at various stages of the prosecution of companies.

8. In the United States, the strength and robustness of a compliance program can be assessed at two stages 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 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 sentence for a company.

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<sup>19</sup> See, e.g., U.S. Dep't of Justice, Antitrust Division, *One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a \$107 Million Criminal Fine*, <https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million>.

<sup>20</sup> See U.S. Dep't of Justice, Antitrust Division, *Sherman Act Violations Resulting in Criminal Fines & Penalties of \$10 Million or More*, <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more> (listing all criminal penalties imposed on companies in the United States totaling \$10 million or more).

<sup>21</sup> Memorandum from Sally Yates, Deputy Att'y Gen., Dep't of Justice, to Assistant Att'y Gen., Antitrust Div., et al. (Sept. 9, 2015), <http://justice.gov/dag/file/769036/download>; Snyder, B., *Individual Accountability for Antitrust Crimes* (2016), <https://www.justice.gov/opa/file/826721/download>.

<sup>22</sup> Powers, R., *Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come* (2019) <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust>.

<sup>23</sup> 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-1-0>

<sup>24</sup> *Id.*

### 3.1. Antitrust Division Policy Before 2019

#### 3.1.1. Charging Stage Decisions

9. At the charging stage, all federal prosecutors are required to consider Department of Justice policy, contained in the Principles of Federal Prosecution.<sup>25</sup> 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.<sup>26</sup> 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.”<sup>27</sup> 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 Antitrust Division’s Leniency Policy, under which the Division will not criminally charge the first company to report a criminal antitrust violation.<sup>28</sup>

#### 3.1.2. Sentencing Stage Compliance Consideration

10. 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.<sup>29</sup> 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 subtracted based 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 based on factors that enhance or mitigate criminal culpability.

11. 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.<sup>30</sup> This section of the Sentencing Guidelines is applicable to all federal crimes, including antitrust violations. The Sentencing Guidelines describe the characteristics of compliance and ethics program that would permit sentencing mitigation. It further notes that compliance mitigation is unavailable if “the organization unreasonably delayed reporting the offence 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 participated in, condoned, or were willfully ignorant of the offense, or if high-level personnel of a small organization participated in, condoned, or were

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<sup>25</sup> 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>,

<sup>26</sup> *Id.*

<sup>27</sup> 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-1-0>

<sup>28</sup> *Id.*; Corporate Leniency Policy, <https://atrnet.atr.doj.gov/subdocs/0091.pdf>.

<sup>29</sup> U.S. Sentencing Commission, *United States Sentencing Guidelines*, Part A.1.3, <https://www.uscc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-1#NaN>.

<sup>30</sup> U.S. Sentencing Commission, *United States Sentencing Guidelines*, § 8B2.1 <https://www.uscc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8>; see also Amendment 673 <https://www.uscc.gov/guidelines/amendment/673>.

willfully ignorant of the offense.<sup>31</sup> Because of these limitations, the sentencing mitigation for an effective compliance program is rarely given.<sup>32</sup> The Antitrust Division has never sought to mitigate a corporation's sentence for an established compliance program under the Sentencing Guidelines.

12. 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.<sup>33</sup> The Division made it clear that it recognizes companies' extraordinary efforts to enhance compliance programs and change the corporate culture that allowed the cartel to exist and continue, and when faced with such efforts, the Division will seek lower criminal fines.<sup>34</sup>

### 3.2. Compliance Round Table 2018

13. In 2018, the Antitrust Division hosted a public roundtable to explore the issue of corporate antitrust compliance and its implications for criminal enforcement policy.<sup>35</sup> 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.

### 3.3. Compliance Policy Change 2019

14. 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 and clarified its consideration of corporate compliance programs at the sentencing stage.<sup>36</sup>

#### 3.3.1. Charging Stage

15. 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.<sup>37</sup> In addition, to promote transparency, the Division also published a guidance

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<sup>31</sup> U.S. Sentencing Commission, United States Sentencing Guidelines § 8C2.5 (includes definitions of high-level individuals and individuals with substantial authority).

<sup>32</sup> Remarks of Kathleen Grilli at Antitrust Compliance Roundtable 7, <https://www.justice.gov/atr/page/file/1064291/download>.

<sup>33</sup> 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>.

<sup>34</sup> 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>.

<sup>35</sup> Information related to the public roundtable on criminal antitrust compliance, including transcripts and videos, can be found on the Division's website: <https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-compliance>.

<sup>36</sup> 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-1-0>.

<sup>37</sup> *Id.*

document, which Division prosecutors use to assess corporate compliance programs.<sup>38</sup> The assessment is grounded in three fundamental questions set forth in the Principles of Prosecution of Business Organizations: “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?”<sup>39</sup>

16. The Division’s guidance begins with a set of non-dispositive preliminary questions, designed to focus the analysis of a company’s compliance program:<sup>40</sup>

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 the violation?
3. To what extent was a company’s senior management involved in the violation?<sup>41</sup>

17. To answer these questions, prosecutors consider nine factors to evaluate the effectiveness of an antitrust compliance program:

*(1) the design and comprehensiveness of the program; (2) the culture of compliance within the 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.*<sup>42</sup>

18. The Department “has no formulaic requirements regarding corporate compliance programs”<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> As the Antitrust Division Manual notes, “deferred prosecution agreements ‘occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.’”<sup>46</sup>

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<sup>38</sup> Evaluation of Corporate Compliance Programs, <https://www.justice.gov/atr/page/file/1182001/download>.

<sup>39</sup> *Id.* at 2; Justice Manual § 9-28.800.

<sup>40</sup> *Id.* (“These questions are intended to help Division prosecutors focus the analysis discussed below on the factors most relevant to the specific circumstances under review.”)

<sup>41</sup> Evaluation of Corporate Compliance Programs at 3.

<sup>42</sup> *Id.* at 3-4.

<sup>43</sup> Justice Manual § 9-28.800

<sup>44</sup> *Antitrust Division Manual* at III.G.2.c, <https://www.justice.gov/atr/file/761166/download>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (quoting the Justice Manual at § 9-28.400).

### 3.3.2. Sentencing Stage

19. 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 score for defendants with effective compliance programs as defined in the Guidelines.<sup>47</sup> 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.<sup>48</sup> Finally, the existence and effectiveness of a corporate compliance program is relevant to whether the Division recommends that a corporate offender receives probation.<sup>49</sup>

20. 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.<sup>50</sup> The Division has entered into DPAs with companies based on other factors from the Principles of Federal Prosecution of Business Organizations.<sup>51</sup>

## 4. Strengthening the Culture of Compliance

21. The Division changed its compliance policy to incentivize corporate compliance and good corporate citizenship.<sup>52</sup> Corporate compliance is the first line of defense in the fight against cartels. In an ideal world, effective corporate compliance policies would deter all wrongdoing. Even when wrongdoing occurs, effective corporate compliance programs aid with prompt detection, minimize harm, and put the company in a position to win the race for leniency.<sup>53</sup> If a company is not the first to report the wrongdoing, companies with a strong culture of compliance and an effective compliance program that leads to swift termination of the conduct are better positioned to earn a DPA and avoid criminal conviction.<sup>54</sup>

22. 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,

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<sup>47</sup> See *infra* n. 30-32 and accompanying text.

<sup>48</sup> See *infra* n. 33-34 and accompanying text.

<sup>49</sup> 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-1-0> (noting that the Division typically does not seek probation for pleading corporations except in limited circumstances).

<sup>50</sup> 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. Taro Pharmaceuticals U.S.A., Inc.*, 20-cr-214-RBS, ECF 2 at 3-4 (E.D. PA July 23, 2020).

<sup>51</sup> See, e.g., *United States v. Taro Pharmaceuticals U.S.A., Inc.*, 20-cr-214-RBS, ECF 2 at 3-4 (E.D. PA July 23, 2020) (generic drugs); *United States v. Sandoz Inc.*, 20-cr-111-RBS, ECF 2 at 4 (E.D. PA March 2, 2020) (generic drugs); *United States v. Florida Cancer Specialists & Research Institute, LLC*, 20-cr-78-TPB-MRM ECF 3 at 4 (S.D. FL Apr. 30, 2020) (oncology services).

<sup>52</sup> Powers, R., *Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come* (2019) <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

regardless of its size, should be appropriately tailored to the company’s line of business.<sup>55</sup> Well-designed programs focus resources in high-risk areas commensurate with the risk and the size of the corporation. From an antitrust perspective, areas of high risk include places where competitors come into contact (e.g., at sales conferences and trade shows), and portions of the business where competitively sensitive information is held and shared (e.g., sales and pricing, human resources). Well-designed compliance programs focus resources for training and detection in those areas.

23. The Division does not look only at antitrust-specific compliance; well-designed programs have effective mechanisms for employees to report wrongdoing anonymously, confidentially, and without fear of retaliation.<sup>56</sup> 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.<sup>57</sup> Indeed, the Division looks to whether the company has essentially implemented a “paper program” rather than making a true investment in compliance.<sup>58</sup>

## 5. Additional Aspects of Enforcement that Strengthen Compliance Incentives

24. A number of factors incentivize companies to create and maintain effective compliance programs. First, the Division’s leniency program remains one of the most important investigative tools to detect cartels and incentivize early reporting. In addition, the Antitrust Division has increased its outreach to federal investigators and the business community through the Procurement Collusion Strike Force (PCSF). Finally, a newly-enacted law now permits antitrust whistleblowers to sue their employer if they are retaliated against for reporting criminal antitrust activity or cooperating with a government criminal antitrust investigation or prosecution.

### 5.1. Leniency Policy

25. The Corporate Leniency Policy is a voluntary disclosure program under which companies receive non-prosecution protection if they are the first corporation to self-report participation in a criminal cartel, cooperate fully with the Division’s investigation of co-conspirators, and if they meet basic qualifying criteria.<sup>59</sup> The Leniency Policy is founded on three key principles that ensure its efficacy: (a) the threat of severe and significant sanctions, (b) a heightened fear of detection, and (c) transparency and predictability in its application.<sup>60</sup> Successful applicants receive non-prosecution protections from the United States for criminal antitrust behavior, and are exposed to only single damages in related

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<sup>55</sup> Justice Manual § 9-28.800, Evaluation of Corporate Compliance Programs, at 2, 7.

<sup>56</sup> Evaluation of Corporate Compliance Programs, at 11.

<sup>57</sup> Evaluation of Corporate Compliance Programs, at 5, 11.

<sup>58</sup> See Evaluation of Corporate Compliance Programs, at 4.

<sup>59</sup> U.S. Dep’t of Justice, Antitrust Division, *Corporate Leniency Policy* and other leniency documents are available at <https://www.justice.gov/atr/leniency-program>. In addition to a corporate leniency policy, the Antitrust Division has an individual leniency policy, which is outside the purview of this submission.

<sup>60</sup> 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>.

civil litigation.<sup>61</sup> The Leniency Policy creates powerful incentives for companies to self-report their involvement in criminal cartel activity.<sup>62</sup> Effective compliance programs help companies promptly detect wrongdoing to enable them to win the race for leniency.<sup>63</sup> 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.<sup>64</sup>

## 5.2. Procurement Collusion Strike Force

26. In November 2019, the Antitrust Division launched the PCSF, a coordinated interagency partnership focused on public procurement with the goal of deterring hardcore antitrust crimes and effectively detecting, investigating, and prosecuting antitrust cartels.<sup>65</sup> One way the PCSF seeks to achieve its mission is through focused outreach to law enforcement agents, investigators, analysts, auditors, attorneys, and procurement officers to train them on hardcore antitrust crimes and how to spot the red flags of collusion. To date, the PCSF has trained more than 12,000 individuals in these groups. The PCSF is also focused on ensuring contractors are aware of criminal antitrust laws and the high penalties that accompany violation of those laws. Since November 2019, the PCSF has opened more than 30 investigations. By increasing enforcement in the public procurement space and by increasing awareness to all key stakeholders, the PCSF increases the likelihood of detection of antitrust cartels and further incentivizes corporations to enact robust compliance programs.

## 5.3. Criminal Antitrust Anti-Retaliation Act

27. At the end of 2020, the United States passed legislation that strengthens the legal protections for antitrust whistleblowers. The Criminal Antitrust Anti-Retaliation Act (CAARA) prohibits employers from taking punitive action against employees because they report criminal antitrust violations to their employer, or who assist a federal government investigation or proceeding.<sup>66</sup> CAARA incentivizes early whistleblowing by those who may have otherwise turned a blind eye to the conduct, or worse, engaged in the criminal conspiracy. CAARA further incentivizes companies to create robust compliance programs that facilitate reporting of suspected antitrust wrongdoing without fear of reprisal. It also

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<sup>61</sup> Since 2004, successful corporate applicants to the Division's Leniency Program qualify for de-trebling of damages in civil plaintiffs' suits, provided that they cooperate with civil plaintiffs' attorneys in the civil action. Antitrust Criminal Penalty enhancement and Reform Act of 2004 (ACPERA), Pub L. No. 108-237, 118 Stat. 661 (2004), <https://www.govinfo.gov/content/pkg/PLAW-108publ237/pdf/PLAW-108publ237.pdf>, reauthorized and made permanent in H.R. Res. 7036, 116th Cong. (2020); S. Res. 3377, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3377>.

<sup>62</sup> B. Snyder, *Individual Accountability for Antitrust Crimes* (2016), <https://www.justice.gov/opa/speech/deputyassistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>

<sup>63</sup> 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>.

<sup>64</sup> *Id.*

<sup>65</sup> U.S. Dep't of Justice, Antitrust Division, Procurement Collusion Strike Force, available at: <https://www.justice.gov/procurement-collusion-strike-force>.

<sup>66</sup> Criminal Antitrust Anti-Retaliation Act of 2019 (CAARA), Pub. L. No. 116-257 (2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/2258/text>.

provides another reason to adopt a corporate culture of compliance by creating additional potential civil exposure for companies that retaliate against employees who report antitrust cartel activity. Employees who prevail in whistleblower lawsuits against their employers are entitled to relief, including reinstatement, back pay, and compensation for special damages including fees related to the law suit.

## 6. Conclusion

28. The U.S. Supreme Court recognizes that antitrust cartels are “the supreme evil of antitrust.”<sup>67</sup> They work to enrich cartelists at the expense of consumers, who are often left with higher prices or fewer choices. The United States has long worked to deter corporate cartels through criminal enforcement of the antitrust laws: holding corporations and individuals accountable for their hardcore agreements. The United States’ Leniency Policy also creates a race for companies to self-report wrongdoing by providing non-prosecution protections to the first qualifying company that self-reports, provided that the company meets certain other criteria, including cooperating fully with the investigation and prosecution of co-conspirators. This policy incentivizes companies to detect and report wrongdoing.

29. 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. Under this new policy, the Antitrust Division will consider a company’s pre-existing compliance policy when determining whether to bring a criminal charge, and the appropriate form for the resolution. This new policy recognizes that a company’s participation in a cartel does not necessarily mean that its compliance program was ineffective. Under this policy, a company with a strong culture of compliance and a robust antitrust compliance program may resolve its criminal antitrust cartel participation through a Deferred Prosecution Agreement, 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 and complying with the law.

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<sup>67</sup> *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).