

# EFFECTIVE RISK ASSESSMENTS IN THE EVOLVING ANTITRUST COMPLIANCE LANDSCAPE

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Last year, the United States Department of Justice (DOJ) Antitrust Division announced a significant change in its policy regarding the treatment of corporate antitrust compliance programs in its enforcement decisions. Along with that policy change, the division offered insight into how companies should approach the design and implementation of compliance programs. A key element of any compliance program is that it should be effective in deterring and detecting anticompetitive conduct, and an effective risk assessment to determine where, when, and how antitrust issues are most likely to arise is key. When companies are able to target areas of heightened antitrust risk, they are better able to tailor compliance programs, including training and reporting protocols, to be effective in serving their intended purpose. In turn, a company's ability to demonstrate that it took conscientious steps to tailor its compliance program may lead to significant benefits should the company ever find itself in the unfortunate situation of a criminal antitrust investigation. Even short of this, a well-tailored antitrust compliance program will

have important benefits by helping a company avoid pitfalls that could lead to civil liability. And of course, a robust compliance program is part of an overall approach to good corporate citizenship.

With an effective risk assessment in hand, companies will be able to make the most of the DOJ's guidance on the *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, issued in July 2019, in order to review their existing compliance program.<sup>1</sup>

## The move to 'incentivize good corporate citizenship'

When making prosecutorial decisions in the past, the Antitrust Division of the DOJ did not explicitly reward companies with strong compliance programs at the time of a criminal violation. The division's rationale was that the existence of an antitrust violation suggested that the company's compliance program was not fit for purpose. Therefore, in the past, in order for the division to agree to mitigate a company's criminal antitrust penalty, a company needed to qualify for the division's leniency program. If available, the company would be able to avoid criminal charges and, in certain

circumstances, limit liability to single damages in civil litigation. Absent that option (which would be available to only the first company to report a violation) a company could try to make a case for a penalty reduction by engaging in early and significant cooperation in the government's investigation.

Last year, the division's approach to the role of compliance programs in prosecutorial decisions changed significantly. In a speech last May, the head of the division said that it "will move away from its previous refrain that leniency is the only potential reward for companies with an effective and robust compliance program. In line with the DOJ and its other components, we can and must do more to reward and incentivize good corporate citizenship."<sup>2</sup>

Following that speech, in July 2019, the division announced that going forward, corporate antitrust compliance programs will factor into prosecutors' charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure, even when they are not the first to self-report criminal conduct. Under the new policy, prosecutors will take into account a company's compliance program along with other factors. They may then in certain circumstances agree to enter into a deferred prosecution agreement (DPA) rather than charging a company with a criminal antitrust violation and entering into a plea agreement. The head of the division stressed that "a compliance program does not guarantee a DPA."<sup>3</sup> Nevertheless, DPAs "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation," and, under the division's new approach,

the effectiveness of a corporate compliance program may weigh in favor of a DPA.

Importantly, along with the announcement of this policy change, the division issued new and detailed guidance outlining the factors that prosecutors are to consider in evaluating the effectiveness of compliance programs.

We have yet to see many public indications of how the policy is being put into practice. Nevertheless, the new policy underscores the importance and benefits of effective antitrust compliance programs and, in particular, presents an opportunity for companies to reevaluate their existing programs or establish new ones by engaging in risk assessments to deploy resources to areas where they will have the greatest benefit.

#### **Nine factors that make an effective antitrust compliance program**

The guidance document notes that an effective compliance program should "address and prohibit criminal antitrust violations" and "detect and facilitate prompt reporting of the violation."<sup>4</sup> Reflecting this, the division's guidance sets out nine factors for consideration in prosecutors' charging decisions:

1. "Design and comprehensiveness of the program";
2. "Culture of compliance within the company";
3. "Responsibility for, and resources dedicated to, antitrust compliance";
4. "Antitrust risk assessment";
5. The adequacy of "compliance training and communication to employees";
6. "Monitoring and auditing";

7. "Reporting mechanisms";
8. "Compliance incentives and discipline"; and
9. "Remediation methods."

In order to be prepared to argue to the DOJ that one deserves credit for an effective antitrust compliance program — and to avoid having to go back and recreate everything that was done after the fact — it is important to have records of the program's implementation, including copies of the relevant policies; executives' statements about the policies; data on training sessions held, including names of attendees and training materials used; and information on when the materials are updated.

## **The new policy underscores the importance and benefits of effective antitrust compliance programs and...presents an opportunity for companies to reevaluate their existing programs.**

#### **Considerations for effective antitrust risk assessments**

With this background in mind, we offer several considerations for compliance professionals to bear in mind as they design and implement effective antitrust risk assessments, which are the cornerstones of any compliance policy. The Antitrust Division's guidance says that compliance

programs should be “appropriately tailored to” a company’s particular antitrust risk. Therefore, effective risk assessments are key to an effective compliance program. Accordingly, it is important to begin any assessment of a company’s antitrust risk by identifying the functions and businesspeople within the company who are most likely to have contact with the company’s competitors.

By their nature, these functions carry increased antitrust risk; yet within this category, the risk presents itself on a sliding scale. Casual contacts between employees without strategic responsibility are quite different than contacts between high-level executives with direct influence over a company’s pricing, sales, and product offerings. The latter group, of course, should be keenly aware of potential antitrust issues and should be trained accordingly. There is also a special situation that will often require nuanced antitrust counseling: “coopetition.” This is where companies that are competitors engage in strategic business relationships with each other, including situations where they legitimately cooperate.

With the idea that certain business functions are inherently more susceptible to antitrust risk, we set forth some observations of these functions and their particular risks below. With this understanding, compliance professionals can more aptly design programs that will likely be viewed favorably by prosecutors and which, moreover, are likely to be more effective in preventing violations in the first place.

### **The C-suite and other top executives**

A strong culture of compliance starts at the top, and corporate

compliance programs must have buy-in from senior management in order to be effective. Moreover, when things go wrong, CEOs and other high-ranking managers can become criminal defendants and personally suffer the consequences of antitrust crimes. Therefore, the involvement of corporate leaders in compliance programs is key.

### **Pricing and bidding**

Agreements among competitors to fix prices or rig bids are serious antitrust offenses. Indeed, these offenses — along with market allocation and concerted refusals to deal — are treated as “per se” illegal under the antitrust laws. They are prosecuted as crimes and consequently carry the most serious repercussions for companies and individuals, including large fines and even jail time. Therefore, a particular focus of any effective antitrust compliance program should be on those individuals who have responsibility for pricing products and services or who are responsible for designing and submitting bids to potential customers. These individuals should be counseled to avoid engaging with competitors not just on the basics of price fixing, but on the myriad activities that might affect price — or that might cause a prosecutor (or jury, for that matter) to infer that an agreement was formed among competitors.

### **Sales**

Salespeople interact frequently with customers and are on the front lines of competition. They may, for example, learn of competitors’ prices and product offerings and seek to better them. The antitrust laws, overall, are meant to protect the conditions for vigorous competition on the merits, and meeting a customer’s

demand for a better price is just such an example of pro-competitive conduct. What must be guarded against, however, is any temptation to engage with competitors to the disadvantage of fair competition for a customer’s business. An effective compliance program, therefore, must guard against any incentive of a salesperson to, for example, agree with a competitors’ salesperson to divide up customers or coordinate on a bidding process where they should be competing. Salespeople need tailored training on how to appropriately respond to customers’ demands to meet competition and how to avoid conduct that might lead to an inference that they have entered into some sort of agreement with a competitor.

### **Human resources**

In the past, the human resources function might not have been at the top of a layperson’s list of areas of antitrust risk. However, almost all companies participate in the market for employees’ labor; and in recent years, the potential for antitrust violations in the labor market has become an area of focus for the Antitrust Division. Just as a company may run afoul of the antitrust laws for entering into a restrictive agreement with a competitor over the terms of trade of a product, so too can companies run into trouble when they enter into restrictive agreements affecting the ability of employees to sell their labor. In 2016, the division announced that it “intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.”<sup>5</sup> And in January 2018, the division announced that it intends to prosecute “naked” no-poach and nonsolicitation

agreements as crimes if the unlawful agreement was continued or entered into after October 2016.<sup>6</sup> Therefore, an effective compliance program should include training and monitoring of human resources professionals and others involved in the hiring of employees.

### **Participation in trade associations**

If there ever was a quintessential venue for an antitrust violation — beyond a smoke-filled back room of a restaurant — it might be the trade association meeting. Here, there are, by definition, representatives from industry competitors, many of whom may be eager to network, gossip, and advance their interests. Indeed, over the years, we have seen numerous antitrust lawsuits that allege, almost as a matter of course, that the defendants were participants in trade association activities.

To be sure, such an allegation without more would (at least one hopes) not be enough to sustain a suit. Nevertheless, trade association activities can be fraught with antitrust risk. Therefore, an effective compliance program should provide adequate guidance for employees who participate in trade associations. For example, the compliance function should include a way to track who is participating in trade associations, and ideally require that meetings are conducted pursuant to a prearranged agenda that has been vetted for antitrust risk. The meeting materials should include some sort of antitrust legend to assist participants in avoiding problematic topics. And participants in these meetings — like others who may be in contact with competitors — should be instructed to make the proverbial

“noisy exit” if the conversation happens to stray.

### **Other areas to consider**

The above functions and activities are more or less common to a broad range of businesses, but they certainly do not encompass all of the areas that may have heightened antitrust risk. Certain companies, by the nature of their specific lines of business, may have particular functions that deserve attention in their antitrust compliance programs. We set out a few examples below.

### **Participation in standard-setting organizations**

The implementation of standards — for example, technical interoperability standards — can be procompetitive. But given the nature of standard setting, the process can often involve competitor collaborations and the antitrust risk attendant in these interactions. There is also a heightened risk of a claim that the standard-setting process resulted in a concerted refusal to deal. Therefore, those involved in any standard-setting activity should receive special antitrust counseling, and programs should have controls to track who participates and what is discussed during standard-setting activity.

### **Participation in joint ventures**

Companies participating in joint ventures with competitors should train those with responsibilities related to the venture on the permissible scope of the particular venture. Prosecutors recognize that certain competitor collaborations can indeed be procompetitive, but by their very nature, potential antitrust issues are abound in the formation and

conduct of joint ventures involving competitors. In certain instances, the line between legitimate and risky conduct is not bright, and significant and sophisticated antitrust analysis may be called for. Therefore, those involved in the management of a company’s joint ventures should be well trained in antitrust compliance and have clear and open lines to antitrust counsel.

## **An effective compliance program should provide adequate guidance for employees who participate in trade associations.**

### **Participation in M&A activity**

Like many other topics we discuss, mergers and acquisitions (M&A) compliance easily merits an entire other article. Briefly, there are two general areas where M&A activity intersects with the compliance function. First, there are the specific substantive antitrust concerns of doing deals. While the competitive analysis of a deal to determine whether it would likely be challenged by enforcers is likely outside the compliance function, there are certain deal-related concerns that may indeed involve compliance professionals. For example, companies intending to merge must guard against



integrating their businesses before it is proper to do so. Oftentimes, the degree of permissible collaboration between two merging companies depends on where in the merger process the companies are. Therefore, a specific, closely monitored compliance protocol should be implemented in this situation. Another M&A-related compliance function centers on a buyer's evaluation of a target's compliance program. Indeed the DOJ Criminal Division's 2020 compliance guidance notes that while certain pre-acquisition due diligence may not be possible, an effective program must include "a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls."<sup>7</sup> Therefore, postacquisition compliance diligence and audits of the target should feature in integration plans.

### Start with the right questions

Effective compliance programs should be thoughtfully tailored

to a company's specific antitrust risk profile. Therefore, it is impossible for us to identify and comprehensively discuss the risk profile of each business function at every company. Each business will have particular and specific antitrust risk and compliance considerations. Some questions to ask include, but are certainly not limited to:

- ◆ Does the company collect data?
- ◆ Does the company possess a large enough market share, which might cause it to be deemed a monopolist?
- ◆ Does the company enter into exclusivity arrangements, either upstream or downstream?

- ◆ Does the company have a policy with respect to resale prices?
- ◆ Does the company participate in buying consortiums?

The list goes on and on. Every company should conduct a thoughtful risk assessment and ensure that their compliance program is fit for purpose and effective at guarding against a company's specific antitrust risks. <sup>CEP</sup>

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#### Endnotes

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3. Makan Delrahim, "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," New York University School of Law (remarks), July 11, 2019, <https://bit.ly/3jHXcNq>.
4. U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, 3.
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6. Department of Justice, "Principal Deputy Assistant Attorney General Andrew C. Finch Delivers Remarks at the Heritage Foundation," January 23, 2018, <https://bit.ly/3nvaEi6>.
7. U.S. Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Updated June 2020), <http://bit.ly/2Z2Dp8R>.

### Takeaways

- ◆ The U.S. Department of Justice Antitrust Division has changed its policy on how it will weigh corporate antitrust compliance programs when making enforcement decisions.
- ◆ Key to the value of any compliance program is its effectiveness, and effective antitrust compliance programs depend on effective antitrust risk assessments.
- ◆ A company must understand its particular risk profile and develop a compliance program that makes sense in light of the identified risks.
- ◆ Businesses in certain industries face more antitrust risk than those in others, and within a company, certain business functions face more risk than others.
- ◆ Compliance programs should be well documented. Keep organized records of training program materials and participants.