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DOJ Resolves Criminal Price Fixing Charges With Deferred Prosecution Agreements Containing Novel Divestiture Remedies

- The DOJ's recent resolution of criminal antitrust charges against Teva and Glenmark is notable for the use of deferred prosecution agreements (DPAs) rather than plea agreements.
- DPAs are rare, and cases in which they are used generally share certain characteristics. The current cases have some of those characteristics, but they also differ in several respects.
- The DPAs in the current cases also include an "extraordinary remedy" requiring Teva and Glenmark to divest business lines involved in some of the conduct at issue.

On August 21, 2023, the Department of Justice (DOJ) announced DPAs with Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA to resolve criminal price fixing, bid rigging and customer allocation charges. In general, DPAs are a middle ground between non-prosecution or leniency on the one hand and full criminal trial and prospect of conviction on the other. In a DPA, the defendant will typically admit to wrongdoing and pay a penalty, but will be able to avoid a conviction. This is in contrast to the typical way criminal antitrust cases are consensually resolved before trial, which involves a plea agreement and related guilty plea resulting in a conviction. DPAs are not common, and therefore it is notable any time one is used.

The use of DPAs in these cases is particularly notable. DPAs have generally been used only in cases with certain characteristics. The Teva and Glenmark cases share some of those characteristics. For example, many of the prior cases where the DOJ used DPAs rather than guilty pleas involved healthcare company defendants that would likely have faced debarment as a consequence of a guilty plea. Consistent with this past practice of entering into DPAs where debarment could be an issue, the DPAs in the current cases state that a relevant consideration in entering into the agreements was that a conviction "likely would result in the Company's mandatory exclusion from participation in any federal healthcare programs," and "would likely result in substantial consequences to the Company's customers and employees outside the federal healthcare programs."

The circumstances of the current cases, however, also differ from prior cases in key ways. One particularly notable difference is that the Teva and Glenmark DPAs came three years after the initial charges were filed. Typically, a DPA and the charges it resolves are announced at the same time. This reflects that DPAs can be used to incentivize and reward a defendant's early and substantial cooperation, which saves DOJ resources and helps the DOJ in cases against other defendants. Indeed, prior announcements of DPAs in generic pharmaceutical cases have stated that a factor in entering into a DPA was "the company's substantial and ongoing cooperation with the investigation to date, including its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement," which "allowed the

United States to advance its investigation into criminal antitrust conspiracies among other manufacturers of generic pharmaceuticals." In the current cases, the DPAs only mention that the companies have "agreed to cooperate in the United States' ongoing prosecution" of its generic pharmaceutical cases and describe the obligations of that cooperation. As a general proposition, it would seem that earlier cooperation would be more useful to the DOJ than later cooperation, and cooperation that supports a wider investigation would be particularly valuable.

In addition, the fact that Teva was able to get a DPA is notable because it previously entered into a DPA in 2016 related to FCPA violations. The current DPA, consistent with earlier statements by DOJ officials, says that the DOJ "generally disfavors multiple deferred prosecution agreements." However, according to the agreement, "the resolution here is appropriate given that the matters at issue in the 2016 resolution did not involve recent or similar types of misconduct; the same personnel, officers, or executives; or the same entities; and in light of the extraordinary remedial measures . . . , the compliance requirements. . . , and the Company's admission of wrongdoing . . . ."

Several terms contained in the Teva and Glenmark cases also stand out from prior cases where DPAs were used. While penalties are standard in DPAs, the amount of Teva's penalty – $225 million – is "the largest to date for a domestic antitrust cartel." Teva also agreed to donate $50 million worth of drugs to humanitarian organizations. (Glenmark agreed to a criminal penalty of $30 million.) In addition to the penalties, however, in what appears to be a novel term in an agreement to resolve criminal antitrust charges, both companies are required to divest of part of their business. Specifically, the companies will divest their pravastatin drug lines. According to the DOJ, pravastatin is "a widely used cholesterol medicine that was a core part of the companies' price-fixing conspiracy." The DOJ characterized this "remedial measure" as "extraordinary," but did not otherwise explain in its press release or the DPAs why the divestitures are part of the resolution of the criminal charges, other than to state that the business lines were "central to the misconduct."

However, the Antitrust Division of the DOJ has recently emphasized the role of remediation as a component of criminal settlements. For example, the Division's 2022 leniency policy update added a requirement that a leniency applicant "remediate the harm caused by the illegal activity" in order to qualify for leniency. Also, a DPA from 2020 that resolved a criminal market allocation charge against a Florida oncologist group, in addition to containing the standard terms regarding the criminal penalty, etc., contained a requirement that the defendant waive its non-compete agreements with former employees. The DOJ said this was "aimed at increasing competition in the treatment of cancer patients in Southwest Florida."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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