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Antitrust Stick Becomes Compliance Program Carrot At DOJ

By **Bryan Koenig**

Law360 (July 17, 2019, 3:46 PM EDT) -- A recent shift in U.S. Department of Justice thinking may inspire companies to boost their white collar antitrust compliance programs, as the Antitrust Division will now consider the monitoring programs when deciding whether to file criminal charges against businesses.

Factoring compliance programs into charging decisions as the division did last week, according to former federal prosecutors and others, could incentivize better in-house efforts that root out and prevent antitrust violations.

"This is one of the best things they could do if their goal is to reduce the amount of price-fixing," said Robert G. Kidwell of Mintz Levin Cohn Ferris Glovsky and Popeo PC. "Because they're stopping it before it happens."

Antitrust Division chief Makan Delrahim focused heavily on prevention when announcing July 11 that the division would be ending its "long-standing policy" to avoid giving companies credit at the charging stage simply because they employ a compliance program meant to monitor for and avoid corporate antitrust malfeasance.

Traditionally, the department has granted criminal leniency only to the first whistleblower to come clean completely under its leniency program, which affords far greater protections to participants than charging credit.

But the leniency program, which is only available to the first company to report an antitrust cartel and is predicated on extensive cooperation, may not be enough to combat anti-competitive conduct such as price-fixing cartels. The division has recently sought public input on corporate compliance amid worldwide declines in antitrust fines. Although division leadership has insisted that whistleblower disclosure numbers have held steady, they have not published the underlying data on disclosures.

In incorporating compliance programs into charging considerations, with prosecutors now looking for "a culture of compliance," experts say the division is moving closer to other DOJ units, which have been willing to recognize preventative efforts.

"The Antitrust Division generally stood alone," said Mark L. Krotoski, a partner with Morgan Lewis & Bockius LLP and former assistant chief in the division's National Criminal Enforcement Section.

The thinking historically, according to Krotoski and others, was that employee training and other compliance program safeguards couldn't have been that strong if violations occurred anyway. The thinking in the event of a violation, despite the presence of a compliance program, has changed, a division official told Law360, and the division no longer considers compliance programs complete failures if a violation occurred.

According to experts, the antitrust bar has argued that compliance programs at large companies can't always be so easily judged when considering the conduct of a few people out of thousands of employees.

The dynamic, however, may be different for companies grappling with anti-competitive conduct by their top executives. The continuing role of offending individuals is one of many factors contemplated by new division guidance also announced last week to help prosecutors evaluate compliance programs at the charging and sentencing stages.

Under that guidance, prosecutors may consider if senior executives were involved as well as "the employment status of culpable executives who have not cooperated and accepted responsibility for antitrust violations."

Experts note that executives often play a role in antitrust scandals.

"In the vast majority of the international cartel cases of the past 20 years, it was the 'senior management' of the companies who were the perpetrators of the illegal conduct. I assume that the division would be reluctant to give 'compliance credit' where the company's CEO or global head of sales is involved in the antitrust violation," Donald C. Klawiter of Klawiter PLLC said in an email. "That is an important area to watch as the policy is implemented."

However, crediting compliance programs at the charging stage may also help companies and their executives see greater value in investing in preventative efforts, according to Klawiter, who pointed in an interview to past experience pushing clients to make greater investments.

"The battle with corporate executives was always, 'what are we going to get out of it?'" said Klawiter, a former Antitrust Division senior official.

Companies now have a much stronger incentive to bolster their compliance programs, according to experts, who say that the level of scrutiny the division and its guidance indicate will be applied to any such programs makes it unlikely that companies will be able to game the system by relying on subpar programs to curry favor at the charging stage

"The devil is always in the details, in how you implement and how it's dealt with in practice," said Eric M. Meiring, a partner with Winston & Strawn LLP and former acting chief of the Antitrust Division, who pointed to the detailed analysis laid out in the new guidance. "I think it's going to be a little hard to game it."

The division official made a similar argument, pointing to the experience of DOJ prosecutors in rooting out gamesmanship and noting an emphasis on credit for prompt reporting of violations. Late disclosures, the official said, will make claiming credit based on a culture of compliance all but impossible.

Attorneys also argue that companies likely won't be able to rely on compliance programs just to avoid liability.

"On its own terms, it shows that is not the intent," said Jon B. Jacobs, a partner with Perkins Coie LLP and former longtime division trial attorney.

R. Mark McCareins, a Northwestern University professor and former head of Winston & Strawn's global competition practice, also pointed to the new guidelines' "explicit requirements" for judging the efficacy of a compliance program.

"In short, the mere fact that a company has a compliance program and occasionally submits its employees to a companywide review of the antitrust laws is not the type of program envisioned by the Antitrust Division," McCareins said in an email.

Prosecutors, McCareins noted, will be asking a variety of questions when contemplating whether to credit a compliance program and potentially ink a deferred prosecution agreement with a company and seek lighter penalties at the sentencing stage.

"These and other questions asked up-front by the division places the initial burden on the company seeking 'credit' for its compliance program to satisfy the requirements of an effective program," McCareins said.

The transparency and detail of the guidelines, whose public release is a first for the division, is likely to inspire stronger compliance programs, argued Krotoski, who said companies need to know what factors will apply.

"Now they can work off those elements, and if they do detect antitrust risk, they can communicate with the Department of Justice on how each of those elements have been addressed," he said.

In announcing the policy change last week, Delrahim said that in addition to the strength of their compliance programs, companies will be judged for the adequacy of those programs. Granting DPAs, he said, will also be based on other factors that include prompt self-reporting of misconduct, cooperation with probes and remedial action.

He emphasized that no checklist exists to consider a compliance program's effectiveness. Instead, prosecutors consider if the program is well-designed, applied in good faith and if it actually works.

According to Delrahim, credit will be considered on a case-by-case basis. Observers will be watching closely to see exactly how the division assesses compliance programs and how they feed into charging decisions and DPAs.

Delrahim also cautioned that the division will continue to avoid non-prosecution agreements because "complete protection from prosecution for antitrust crimes" will remain limited to the first company to invoke the DOJ's leniency program — considered one of the division's most important tools to identify antitrust conspiracies — and provide complete cooperation.

In granting at least some consideration beyond first-come leniency applications, Delrahim said the DOJ was moving beyond its previous "all-or-nothing philosophy" where everyone else was pressed to plead guilty to criminal charges with a chance to reduce penalties as an early cooperator.

Despite giving credit to compliance programs, lackluster efforts, according to experts, likely won't cut it in the eyes of the division. Instead, Benjamin Sirota, a Kobre & Kim LLP attorney and former Antitrust Division prosecutor, says the division appears to be demanding companies clear very high hurdles to get consideration at the charging stage.

"It's not going to be every company. It's probably going to be a small minority of companies," Sirota said.

If anything, experts contend that the new policy may actually yield more enforcement actions if companies are both finding and disclosing conduct sooner.

"It would increase it to the extent it enhances detection and reporting," Krotoski said.

--Editing by Orlando Lorenzo.