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Compliance Now Counts in AntiTrust

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The US Department of Justice announced on July 11 that when organizations implement programs specifically to ensure antitrust compliance, these programmes will now be rewarded in the Antitrust Divisions' decisions regarding enforcement of criminal antitrust. For the first time, the Division will consider compliance ***at the charging stage*** in criminal antitrust investigations, a change which is reflected in the Justice Manual. The Division also announced revisions to its Manual and published a document to guide prosecutors' evaluation of corporate compliance programs at the charging and sentencing stage.[1]

Assistant Attorney General Delrahim stated, "In an ideal world, corporate compliance programs prevent wrongdoing altogether. If violations do occur, robust compliance programs should lead to prompt detection, which not only nips the conduct in the bud earlier, minimizing the harm to consumers, but also gives companies the greatest chance of winning the race for leniency under the Antitrust Division's Corporate Leniency Policy."[2] A gap exists if a company does not win that race for leniency. Historically that company would be shut out, in an all or nothing scenario. This zero sum game has now been changed.

This change in the Division's approach is a recognition that even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation. Precisely how much weight and credit to give a compliance program will depend on the facts of the case.

The Division's new approach allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so. DPAs, as the Justice Manual recognizes, "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[3]

Delrahim quoted the words of former Deputy Attorney General Rod Rosenstein: "[t]he fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith." This is a very valuable insight that recognizes a paradox that can be resolved by recognizing baseline data. A simple example illustrates the point. Suppose you are doing dishes the old fashioned way and, for some unexplained

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reason, an expensive wine glass rolls out of the dish rack and smashes on the floor, resulting in a splinter of glass going into a person's foot. A representative heuristic may contribute to the presumption that you were negligent in dropping the glass. This fails to consider context, time horizons or benchmarks. Suppose this is the first wine glass broken in ten years? Equally, if one breaks a wine glass every week, chances are that there is something negligent in your system that at least calls out for an explanation.[4]

This is not to say that rewarding these antitrust compliance programmes will eradicate fines entirely. A tiered response to compliance violations, which may include fines in addition to leniency programs, may be a better driver of compliance than relying solely on public shaming and leniency. Indeed, Rob van der Noll and Barbara Baarsma researched the drivers of compliance in their article "Compliance with cartel laws and the determinants of deterrence – an empirical investigation," and found that firm based or personal fines help deter anti-competitive behaviour, even more so than leniency programs.[5]

The link between compliance programmes in areas such as foreign corruption and antitrust has been previously identified by academics. Reinaldo Diogo Luz and Giancarlo Spagnolo note in their article "Leniency, Collusion, Corruption and Whistle-blowing" that leniency rewards for antitrust sanctions may not be enough to entice wrongdoers to whistle-blow on the corruption, as the person receiving leniency will thereafter be at risk of criminal conviction for that corruption.[6] In the United States, fines and leniency programs will thus likely work in tandem to encourage antitrust compliance.

Given that programs tailored to antitrust compliance will now be rewarded and may mitigate convictions, Canadian organizations with American operations, cross-listings, or affiliations should focus on developing or modernizing such programs.

The Canadian Competition Bureau and the Department of Justice may consider following the example set by the United States. Doing so would ensure higher consistency across North American compliance regimes, and may help companies with operations in both Canada and the United States develop more robust antitrust compliance programs. It should be recognized, however, that the existing legislation in Canada for deferred prosecution agreements (remediation agreements) does not refer to Competition Act offences and would have be amended. Archibald and Jull have recommended that the government should consider expanding the remediation programme to the area of Competition law. Canadian corporations should be ready if this law is amended.

The Gardiner Roberts LLP Compliance Risk Solutions Group is able to advise on all matters of compliance and regulation. Given today's announcement, if your business carries out operations in the United States, our team is able to help your organization develop internal antitrust compliance programs.

Please do not hesitate to contact us if you have questions or concerns regarding these new developments in the United States, and how they may affect your business operations in the United States or Canada.

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1. https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance
2. https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0
3. https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0
4. Todd L Archibald and Kenneth E Jull, "Profiting From Risk Management and Compliance" (Toronto: Thompson Reuters) at 4-11.
5. Todd L Archibald and Kenneth E Jull, "Profiting From Risk Management and Compliance" (Toronto: Thompson Reuters) at INT-110
6. Todd L Archibald and Kenneth E Jull, "Profiting From Risk Management and Compliance" (Toronto: Thompson Reuters) at INT-168
7. Todd L Archibald and Kenneth E Jull, "Profiting From Risk Management and Compliance" (Toronto: Thompson Reuters) at INT-157