Corporate Compliance & the Antitrust Division

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A. Guidance

Antitrust practitioners and in-house counsel have long argued for compliance guidance from the Antitrust Division. Although the Antitrust Division has espoused support for compliance programs, it has provided minimal guidance on the key elements of an effective compliance program. There are few speeches on the topic, and none after 2002. The few public statements addressing corporate compliance have been narrow in scope, only addressing the issue within the confines of the Guidelines. In response to requests for guidance, the Antitrust Division has said that company counsel is in the best position and has the greatest expertise to identify compliance needs and implement an effective program. Additionally, there is a concern that any guidance on the issue might be perceived as providing a safe harbor, leading companies that break the law but follow DOJ’s guidance to argue for leniency when DOJ’s guidance has been heeded.

While the Antitrust Division has abstained from providing compliance guidance, practitioners can nevertheless discern its thinking on the issue by looking to two recent cases – one criminal and one civil – in which the DOJ requested the appointment of an independent corporate monitor. In each case - *United States v. AU Optronics Corporation* ("AUO") and *United States v. Apple Inc.* ("Apple") – the DOJ successfully advocated for a court-imposed monitor in order to ensure that the defendant company put policies in place to prevent future antitrust violations. The Antitrust Division’s position in these cases, and the guidance it provided as part of its request for a corporate monitor, are instructive and disclose the DOJ’s viewpoint on at least some of the required elements of an effective compliance program.

In *United States v. AU Optronics Corporation* ("AUO"), the government prosecuted AUO for its participation in what it called “the most harmful, egregious antitrust conspiracy ever prosecuted by the United States.” In March 2012, following an 8-week trial, AUO was convicted of engaging in a nearly 5-year conspiracy to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels sold worldwide. At sentencing, the Antitrust Division requested not only a sizable criminal fine, but also, for the first time ever in a criminal case, probation and the appointment of an independent corporate monitor. At sentencing, the DOJ noted that while AUO “apparently claims to have adopted (or to be in the process of developing) [a compliance program], it is not effective.” Although it seems logical to argue that a corporate defendant convicted of price fixing had an ineffective compliance program in place at the time of the illegal conduct, it still begs the question - what, according to the Antitrust Division, is an effective antitrust compliance program?

As part of its request for a court-imposed corporate monitor, the Antitrust Division provided guidance as to the minimum elements required for AUO’s corporate antitrust compliance program. For example, the proposed compliance program called for:

- The assignment of one or more senior corporate officials who shall report directly to the Audit Committee of the AUO Board of Directors, with responsibility for the implementation and oversight of compliance with policies and procedures established in accordance with the antitrust compliance program;
- Periodic communications by senior management that provide strong, explicit, and visible support and commitment to its corporate policy against violations of the antitrust laws and in support of its antitrust compliance program; and
• A reporting system, including an anonymous “Helpline” for directors, officers, employees, agents and business partners to confidentially report suspected violations of the antitrust laws.

While this guidance was provided specifically to address AUO’s conduct and corporate culture, presumably any company could use these basic elements as a roadmap for an effective antitrust compliance program.

Similarly, in the civil context, in July 2013, following a 3-week bench trial, Apple was found guilty of conspiring to fix prices of e-books in the United States. The DOJ, as part of its proposed remedies, successfully requested the appointment of an external monitor to enhance Apple’s internal antitrust compliance policies (the appointment of the monitor is now on appeal to the Second Circuit). DOJ’s monitor request outlined some “basic tenets” of an effective internal compliance program, including:

• Making sure that the company’s internal compliance officer was newly-appointed;
• Establishing a mandatory minimum for employees of four hours of training on the requirements of the Final Judgment and antitrust compliance; and
• Requiring the company to log potential improper communications with competitors.

Again, these requirements could be adopted by any company seeking to develop an antitrust program that meets at least some of the DOJ’s standards.

While DOJ's AUO and Apple compliance program guidance provides insight into DOJ's thinking on the issue, this guidance could also be used as a jumping-off point for DOJ discussions with the antitrust bar on the issue of corporate compliance. Antitrust practitioners and their clients would benefit from a discussion of the DOJ’s considerations in these cases and more generally about the basic necessary elements of an effective corporate compliance program. The Antitrust Division could use the AUO and Apple recommendations to open a dialogue on compliance with the defense bar and thereby foster effective compliance.

Moreover, Justice Department guidance of this type is not unprecedented. The Criminal Division, for example, has provided considerable guidance on the issue of compliance in the context of the Foreign Corrupt Practices Act (“FCPA”). For example, in November 2012, the Criminal Division and SEC published “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (“Resource Guide”). Among the myriad issues addressed in the Resource Guide, the Criminal Division and SEC provide practical guidance on effective compliance programs. While acknowledging that “when it comes to compliance, there is no one-size-fits-all program”, the Criminal Division and SEC detail ten hallmarks of an effective compliance program. The list is not intended to be exhaustive, but it does give practitioners some helpful reference points in assessing the effectiveness of an FCPA compliance program. Similar guidance from the Antitrust Division would undoubtedly be well received and would assist attorneys in assessing and developing adequate antitrust compliance programs.

B. DOJ Treatment of Compliance
In addition to providing compliance guidance, the Antitrust Division could address compliance as part of the negotiated corporate plea resolution, both by crediting compliance efforts and requiring compliance program changes.

The Antitrust Division has never reduced a penalty for compliance efforts or required compliance program changes as part of a plea agreement. In contrast, the Criminal Division takes into account a corporation’s compliance program in fashioning an appropriate resolution. In the Resource Guide, for example, the Criminal Division outlines the potential benefits corporate defendants can obtain because of compliance efforts:

“DOJ and SEC…consider the adequacy of a company’s compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. It will often affect the penalty amount and the need for a monitor or self-reporting.”

Moreover, the Criminal Division also regularly requires companies to improve or establish compliance programs to prevent future violations. In short, the Criminal Division is engaged with the corporate community on the issue of corporate compliance, recognizing defendants’ compliance efforts, fostering efforts to implement sufficient compliance programs, and, where necessary, ensuring, as part of the corporate resolution, that adequate compliance programs are implemented.

The Antitrust Division, conversely, has never publicly credited a corporate defendant for a compliance program. The Guidelines call for a reduction in the corporate fine for defendants with an effective compliance program. As applied by the Division, however, this reduction is available only if there was no involvement of high-level personnel (defined broadly) in the illegal activity, and no delay in reporting the activity. The Antitrust Division has reasoned that cartel conduct necessarily involves high-level management. And, while under the Guidelines, there is a limited exception for high-level personnel involvement when specific criteria are met, the Antitrust Division takes the position that the exceptions would effectively qualify the defendant for amnesty. Consequently, the Antitrust Division has never reduced a defendant’s penalty for compliance efforts.

Similarly, in further contrast to the Criminal Division, other than in AUO, the Antitrust Division has never imposed changes to a company’s compliance program in a criminal case. It has never publicly required a defendant to implement or improve a compliance program, employ a corporate monitor, or submit to a probationary period or corporate monitor as part of a negotiated plea resolution. On those occasions when district court judges have asked about a corporate defendant’s efforts to remediate past and avoid future cartel conduct, particularly in the context of probation, defense counsel has addressed the issue without comment from DOJ. Moreover, even in the most egregious cases, where the same company has been prosecuted multiple times by the Antitrust Division, it has not required any changes in corporate compliance. Thus, when it comes to corporate compliance in the plea context, the Antitrust Division brandishes neither a carrot nor a stick; the issue instead goes unaddressed altogether.

If the Antitrust Division slightly modified its current position on compliance, by employing both a benefit and penalty in appropriate cases, it could significantly incentivize companies to improve their corporate compliance efforts. While justifiably the Antitrust Division will not reduce fines under
the Guidelines, there are other forms of credit that could be given to companies that undertake the effort and expense to implement or strengthen their antitrust compliance programs. For example, the Antitrust Division could give an additional fine discount to cooperating companies that significantly bolster their existing compliance programs. Such a discount would incentivize cooperating companies to make significant compliance program investments. Moreover, this approach would be consistent with policies being considered or employed by other global cartel enforcers. For instance, just this month, the Canadian Competition Bureau announced that it is considering a policy to promote compliance by treating companies with compliance programs more leniently. Increasing the incentive can only improve how corporate defendants approach compliance.

Moreover, if the Antitrust Division employed penalties – corporate monitors, probation, or even specific compliance program improvements – in the most egregious cases, companies might proactively undertake compliance changes to avoid such penalties. Companies would be incentivized to quickly address compliance lapses and aggressively improve compliance programs early in an investigation. If the Antitrust Division seriously reviewed a cooperating company’s compliance program, the company would undoubtedly review its compliance program and tackle aggressively any weaknesses in that program.

C. Conclusion

The mission of the Antitrust Division is to “promote economic competition through enforcing and providing guidance on antitrust laws and principles.” By encouraging and fostering effective corporate compliance, the Antitrust Division will be meeting this objective and ultimately protecting American consumers. Providing guidance on adequate compliance programs and addressing compliance as part of the negotiated plea resolution with cooperating defendants should lead to stronger compliance programs, and stronger compliance programs should lead to fewer breaches of the law.