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The DOJ Antitrust Division's policy on independent compliance monitors: is it misguided?

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THE DOJ ANTITRUST DIVISION'S POLICY ON INDEPENDENT COMPLIANCE MONITORS: IS IT MISGUIDED?

Robert Connolly examines the Antitrust Division's policy on independent compliance monitors and its position on compliance programs as a mitigating circumstance

I. Introduction

The US Department of Justice's Antitrust Division has recently taken the position that if a company goes to trial against the Division and loses, the Division will seek to impose an independent compliance monitor on the company. This is an unfortunate development that is not based on sound policy considerations of remedial need. A look at the record, confirmed by the Division's own statements, shows that the Division seeks to use independent compliance monitors as a weapon to deter a corporate defendant from exercising its right to trial. The Division should refrain from this intrusion into corporate governance, or else articulate a more rational basis for seeking an independent corporate monitor than "You fought the Law and the Law won."

II. Background

In March 2012, AU Optronics and its US subsidiary, AU Optronics Corporation America [hereinafter "AUO"] were convicted by a jury for participating in a five-year conspiracy to fix the price of Thin Film Transistor-Liquid Crystal Display (TFT-LCD) panels. In its sentencing memorandum, the Antitrust Division sought a corporate fine of $1 billion and 10 years in prison for each of the two convicted executives. The court rejected the Division's fine and prison recommendation, and imposed a corporate fine of $500 million and prison sentences of three years. The Division also took the unprecedented position that the companies should be placed on probation and required to hire an independent monitor to institute and monitor a compliance program.

More recently, at an American Antitrust Institute's *Counseling Antitrust Compliance* program on June 12, Bob Kramer, the General Counsel for the Antitrust Division, spoke about the AUO independent compliance monitor.[1] Kramer said that the AUO case was an easy call for the Division, given that the company had been fixing prices since its inception. Nonetheless, this was a highly unusual sanction sought by the Division. The Division has historically avoided corporate governance issues in criminal matters, explaining that as a prosecuting agency it was neither equipped nor interested in getting involved in corporate governance. The Division's position seems to have changed. Kramer stated that the AUO monitor may be a model as a condition of probation in other cases that the Division tries and wins. "The interesting thing to think about and watch for over the next couple of years is the extent that this model becomes part of probation in other cases that we try."[2] Kramer also indicated that as long as a company pled guilty, the Division would not seek to require a corporate monitor as part of a plea agreement.[3]

The Division's position on compliance programs now seems to be:

- The Division will give no credit to a company for having a compliance program if the company is involved in price-fixing because the compliance program is presumed to be ineffective;
- If a company enters into a plea agreement (or leniency agreement), the Division won't seek an independent compliance monitor to bolster the company's ineffective compliance program;
- But, if a company goes to trial and loses, the Division will seek probation and the additional penalty of having an independent compliance monitor appointed.

III. Why an independent monitor for AUO and not...?

The Division has not sought an independent monitor in previous cases where the need for one arguably equaled and probably exceeded the purported need in the AUO case. The Division argued in its sentence memorandum that this extraordinary remedial measure was needed because AUO was unrepentant and had been fixing prices since its inception (five years). The Division also cited AUO's continued employment of some of its indicted executives. These are on first glance plausible reasons and indeed, the Division convinced the Court that an independent monitor should be appointed. But, examination of other cartel cases shows the only distinguishing factor between AUO and many other corporate cartel defendants is that AUO went to trial and lost.

Going to trial does not necessarily mean a defendant is unrepentant. It may mean the plea agreement is deemed unreasonable

Going to trial does not necessarily mean a defendant is unrepentant. It may mean many things, including the Division's asking price for a plea agreement is deemed unreasonable. And racing in to cooperate with the Division doesn't necessarily indicate repentance. It may simply mean that leniency or a particular plea deal is too good to pass up.

AUO believed it had a jurisdictional legal defense under the Foreign Trade Antitrust Improvement Act. That claim is being pursued on appeal. Moreover, the Division's investigative model, which has been quite successful, is that the early companies to cooperate get significant discounts from the sentencing guidelines. The reverse is true: a company that loses the cooperation race (which can be for many reasons) is facing the full measure of the guidelines because the Division will no longer depart from the guidelines for cooperation. AUO was facing a Division recommended fine of $1 billion. The AUO executives were facing guidelines sentencing ranges of up to the 10-year maximum. Even the most repentant cartel sinner may reasonably think a $1 billion fine and 10 years in jail was a punishment that did not fit the crime and elect to go to trial where there is at least a chance of acquittal. Two AUO executives were acquitted. The trial may also serve as an extended sentencing hearing providing the defendant a forum to present a case for a guidelines departure. Judge Susan Illston said at sentencing that she was persuaded to depart from the guidelines by several factors including the defendants' genuine, though ill-conceived, belief that the price-fixing would help the LCD industry and the lack of personal benefit from their actions.[4] The sentences imposed by the court after the AUO trial were drastically lower than the guidelines-range sentences sought by the Division.

The Division also argued the following facts warranted an independent compliance monitor: AUO did not have a compliance program during the conspiracy; it had been fixing prices since its inception; and AUO continued to employ some individual price-fixers. But, doesn't having an antitrust compliance program that is blatantly ignored show even greater disregard for the law – and a greater need for an independent compliance monitor? As the Department of Justice has noted: "[i]ndeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program."[5] Call it a tie – but the fact that AUO did not have a compliance program does not justify the Division's extraordinary request. Also, the five-year duration of AUO's price-fixing would not even garner an honorable mention in the Cartel Hall of Fame.

Finally, the Division has not required termination of culpable individuals as part of corporate plea agreements or leniency. AUO's conduct was fraudulent, flagrant and foul – in other words it was a member of a hard-core international price-fixing cartel.

Is the Division's position a new form of "Trial Penalty Plus," or motivated by a legitimate concern of recidivism? Consider these situations where the Division has not sought an independent monitor and has no plans to do so going forward – unless a company goes to trial and loses:

- **Leniency applicant**

By the Division's own definition, a leniency applicant has a failed leniency program; otherwise they would have no cartel participation to confess. But, the Division doesn't require a leniency applicant to appoint an independent compliance monitor. This is so even though the leniency applicant escapes any criminal penalty whatsoever for its criminal conduct. Even private damages can be single under the Antitrust Criminal Penalty Enforcement and Reform Act. Under these circumstances, chances are that the leniency applicant made a good deal of money from the cartel. The leniency applicant also has leveled a crippling blow at competitors who will be prosecuted. The lesson to a leniency applicant may be that, played right, a cartel can be a profitable endeavor. Certainly a case could be made that a leniency applicant should have an independent compliance monitor – unless one is to be sought solely as a trial penalty.

- **Favorable treatment under plea agreements**

The Division sought an independent monitor for AUO while also recommending a $1 billion fine and 10-year jail sentences for its convicted executives. Wouldn't these record-setting penalties (if imposed) be a sufficient deterrent and prevent recidivism? If not, isn't it the case that other cartel members

who received much lighter sentences are even more likely to be recidivists? While these companies cooperated, the penalty they received from the illegal activity was significantly lower than that received by AUO. It can be argued that the lighter the punishment of the company and its executives, the more the need for a monitor – since the deterrent value of sentencing has been lessened by the degree of the discount. A case could be made that a plea agreement that includes a significant discount from a guidelines fine should require an independent compliance monitor – unless one is to be sought solely as a trial penalty.

- **Penalty plus**

A part of the Corporate Leniency Policy, the Division has developed a program of "penalty plus." If a company qualifies for leniency on Product A but fails to disclose its involvement in cartel activity on Products B, C and/or D, it will pay a "penalty" for failing to disclose the other illegal activity. This is a compliance program that failed twice, once to allow the cartel activity, and again as the company attempted to cover up further involvement. Certainly a case could be made that a part of "penalty plus" should be the requirement of an independent compliance monitor – unless one is to be sought solely as a trial penalty.

- **Repeat offenders**

The Division has not sought an independent monitor, even for repeat offenders. Some multinational companies have been indicted more than once for independent cartel activity. Also some companies have continued to conspire in Product B even while "cooperating" with the Division in an investigation on Product A. For example, one company in the vitamin cartel continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy. These situations might indicate the need for an independent compliance monitor to remedy a serious corporate culture problem. Certainly a case could be made that repeat offenders should be required to have a compliance monitor – unless one is to be sought solely as a trial penalty.

Is the Division's position a new form of "Trial Penalty Plus," or motivated by a legitimate concern of recidivism?

- **Obstruction/Coercion**

The Division has not sought a monitor even in cases where a company engaged in obstruction of justice during an investigation. The company's existing compliance program failed once when the company got involved in cartel activity and failed again, grievously, when the company obstructed justice during the investigation. Certainly a case could be made that where a company engages in obstruction of justice during the investigation, it should be required to have a compliance monitor – unless one is to be sought only as a trial penalty.

The Division has not sought monitors in all these other cartel cases because it is an extreme intrusion into corporate governance and seeking one could greatly reduce the number of pleas the Division obtained. Moreover, the Division argues that because of the high penalties imposed on the cartelist, recidivism is not a legitimate concern.[6] But, to pass on a compliance monitor in every other situation except when a company loses at trial indicates that the Division does not have a good-faith concern about the need for extraordinary remedial measures, but simply seeks to impose an additional trial penalty. The Division should base any request for an independent monitor on an evenly applied rationale for the need for remedial measures – or simply revert to its long-standing practice of forbearance on this issue.

IV. A Word (or two) in defense of the Division's failure to find a compliance program to be a mitigating circumstance

The private bar is often critical of the Division's policy of not considering compliance programs in mitigation when making initial charging decisions or as a consideration in the sentence to be imposed. But critics often fail to address the Division's legal and policy arguments for its position. It has been suggested that the Division's resistance to crediting compliance programs is motivated by a desire to maintain the leniency program as the sole refuge from prosecution. But, the Division's indifference to compliance programs predates the modern (1993) leniency program. In fact, it is well settled that a corporate compliance program, even one that specifically prohibits the very conduct in question, does not absolve the corporation from liability. This black-letter law was developed principally in antitrust cases holding that a "corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if [...] such acts were against corporate policy or express instructions."[7] Aside from being on sound legal ground of *respondeat superior*, the Division is also on sound policy ground for its unwillingness to base charging decisions on failed leniency programs. If the Division were to credit failed compliance programs at the charging stage, there would be less incentive for companies to improve their compliance programs. It might also create a huge loophole where companies could have a robust compliance program while senior executives covertly engage in price-fixing. Proving cartel cases beyond a reasonable doubt is a tough order to

begin with; requiring the Division to prove that a compliance program was a sham may insulate cartels from prosecution – a burden Congress has not sought to impose and the Division has not accepted voluntarily.

The Division has also declined to give credit in plea agreements and sentencing recommendations for failed compliance programs. The reasoning for this is straightforward. Almost every manual on effective compliance programs emphasizes "buy-in" from the top as a crucial component. Yet an antitrust conspiracy invariably is either engaged in or blessed by the most senior executives of a company. Almost all of the Division's cartel cases have had a variant of "top guy" and "working group" meetings. Top-level guys, the most senior management, are necessary to cartels because it takes a senior executive to commit a company to the cartel. The Division is not impressed with executives who attend, or even lecture at, compliance programs in between cartel meetings.

Corporations should examine the consequences of an antitrust violation and prioritize programs that prevent criminal conduct

Even in an extraordinary situation where a very low-level employee managed to snare a company into a price-fixing agreement, the guidelines already account for the lowly status of this rogue price-fixer. Penalties are based on the volume of commerce affected by the conspiracy so the lower level the employee, the lower volume of commerce he/she could affect. The guidelines, which are followed by the Division, are already set up to match the penalty to the level of authority a price-fixer may have.

The Division believes it does reward compliance programs that are effective at detecting cartels. The Division provides leniency – a complete pass to the company that first detects and reports cartel activity. And, even if a company misses out on leniency, early detection can put it the front to the queue for a favorable plea agreement.

The sentencing guidelines take a similar approach. There is a rebuttable presumption that a compliance program is deemed ineffective if "a person within the high-level personnel of the unit of the organization [...] participated in, condoned, or was wilfully ignorant of the offense."

The sentencing guidelines were amended to permit a limited exception for the involvement of high-level personnel.[8] But, this exception to high-level personnel involvement mirrors the Division's leniency program. Credit may still be given for an effective compliance program if the activity is detected and reported before discovery is made outside of the organization. But, a company meeting this criteria could seek leniency and avoid a fine altogether.

Some informed observers continue to think the Division's view on compliance programs is short-sighted. Reasonable people may differ in this point. But, the view here is that the Division's position is rational, principled and applied evenly.

V. Why you should care about a compliance program – even if you think the Division doesn't

The chief complaint about the Division's position on antitrust compliance programs is the belief that it provides no incentive for companies to spend the time and money on compliance. But, this is too narrow a perspective for a proper cost/benefit analysis. Rather than concluding a compliance program isn't worth the expense because the Division won't credit it if it fails, corporations should examine the dire consequences of an antitrust violation and prioritize compliance programs that prevent criminal conduct. The consequences of a criminal antitrust violation can be so severe that prevention and early detection may be more crucial here than in any other area of concern. In addition, the very fact that it is senior executives who engage in cartel behavior means that an antitrust compliance program can be more focused and less expensive than compliance programs that have to drill down to third-party vendors.

Here are just a few headlines that may help counsel convince corporate executives that antitrust compliance dollars are well worth spending:

- **Jail.** In antitrust cases executives have been going to jail and the average prison sentence is now around two years. The people going to jail are not lower-level officials or third-party contractors who paid a bribe. They are the most senior members of the corporation. A strong compliance program may keep these senior people away from temptation – and a possible prison sentence.

- **Monetary penalties.** Foreign Corrupt Practices Act compliance programs are a mushrooming industry, but cartel cases can be much more life-threatening to a corporation. The Antitrust Division collected $1.12 billion in fines in 2012, and for international cartel cases, there may be fines from the EU, Canada, Japan and perhaps other jurisdictions. Years of private damage litigation will also follow in the United States and elsewhere.

- **Training.** Antitrust training can be limited but still effective. As mentioned above, it is fairly senior executives that have the authority to commit the company to a cartel.

> Accordingly, training can be more focused and less costly. Effective training and monitoring of a small nucleus of people can prevent a calamitous misstep by senior management. And, intense training focused at the top provides the "buy-in" of senior management for an ethical and law-abiding company.

While this has already been mentioned, it bears repeating. If a compliance program results in the detection of a violation, the company may be able to qualify for leniency. Leniency is even a more valued prize than a Deferred Prosecution Agreement.

VI. Conclusion

The Division has taken an unfortunate position in seeking compliance monitors if a company goes to trial and loses. The Division should abandon this policy. The Division's policy on not giving credit for compliance programs in charging or sentencing decisions is not well-received by the defense bar, but it is a defensible position both on legal and policy grounds. But, regardless of how one feels about the Division's position on compliance programs, it would be a mistake not to give antitrust compliance a high degree of attention. ■

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Footnotes

1 "Enforcement Perspectives on Compliance," American Antitrust Institute 14th Annual Conference: Counseling Antitrust Compliance on the Frontier, Washington DC, June 2013

2 See MLex alert, "DOJ may ask for compliance monitor as part of sentence in future criminal antitrust trials" http://www.mlex.com/US/Content.aspx?ID=401148

3 At closing argument in the Apple e-books price fixing case, the Division stated that it would seek imposition of a corporate monitor if it won the case. See MLex alert, "DOJ may seek corporate monitor if Apple loses e-books price-fixing case" http://www.mlex.com/US/Content.aspx?ID=407909 On July 10, 2013, the trial court ruled in the Division's favor.

4 See MLex alert, "AUO individual cases suggest there's not much to lose by going to trial" http://www.mlex.com/US/Content.aspx?ID=276760

5 Memorandum of the Deputy Attorney General, Federal Prosecutions of Corporations, June 16, 1999, available at http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF

6 See Werden, Hammond and Barnet, Recidivism Eliminated: Cartel Enforcement in the United States Since 1999, September 22, 2011, available at http://www.justice.gov/atr/public/speeches/speech-hammond.html

7 See United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983); see also United States v. Hilton Hotels Corp, 467 F. 2d 1000 (9th Cir. 1972); United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 (3rd Cir. 1970).

8 United States Sentencing Commission, Guidelines Manual Section 8C2.5(f)(C)(i)-(iv)