

## HEAD OF CRIMINAL ENFORCEMENT IN THE DOJ ANTITRUST DIVISION LAYS OUT LENIENCY PROGRAM PRIORITIES AT THE INTERNATIONAL CARTEL WORKSHOP

On February 19, 2020, Deputy Assistant Attorney General Richard A. Powers of the U.S. Department of Justice's Antitrust Division (the "Division") opened the 13th International Cartel Workshop with a speech on leniency.<sup>1</sup> Powers is only the fourth person to serve as the Division's head of criminal enforcement since the leniency policy was instituted, and his tenure will be defined in part by how the Division copes with the growing challenges to the leniency system. While the speech mainly reflected longstanding policy, Powers' remarks provided new insight into how the Division is implementing recent policy changes aimed at incentivizing companies to create and maintain robust antitrust compliance regimes. Powers also addressed the ballooning costs of participating in the leniency program, which arise from the increasingly complex and international nature of many cartel investigations and which could continue to grow if a key damages-reduction provision is allowed to expire this June. Unfortunately, the remarks lacked specifics on how the Division plans to rein in these costs. Given the extraterritorial application of US antitrust laws, companies around the world should take note of Powers' remarks as a window into the Division's thinking on these issues.

<sup>1</sup> Remarks as Prepared for Delivery, A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international>.

## Background

Section 1 of the Sherman Antitrust Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce.”<sup>2</sup> Division policy is to criminally prosecute cases involving cartel conduct between horizontal competitors, such as price fixing, bid rigging, and customer or territorial allocation. These criminal prosecutions often result in guilty pleas and significant monetary penalties for organizations and prison sentences for participating executives.

The Division's "most important prosecutorial tool" for more than 25 years has been its Corporate Leniency Policy, which provides for total immunity from criminal antitrust prosecution for the first company (and cooperating employees) to self-report its role in cartel conduct and assist the Division in its prosecutions of co-conspirators. By encouraging conspirators to turn on one another and race to report to the Division in exchange for clemency, the Leniency Policy has been the impetus for some of the Division's most high-profile, cross-border cartel prosecutions in recent memory and has inspired competition authorities around the world to develop similar immunity programs.

## Compliance Credit

Last summer, the Division announced a new policy benefitting companies that maintain antitrust compliance programs satisfying certain criteria. For more information, see our [briefing](#) on the policy change. In short, this shift empowers prosecutors to resolve criminal antitrust charges through a corporate "deferred prosecution agreement" ("DPA") or a lower corporate penalty for companies with qualifying corporate compliance programs. The Division had previously refused such credit, even as corporate defendants charged with analogous crimes, such as corruption or fraud, could receive credit for compliance programs. The rationale for the previous approach was that companies who uncovered cartel conduct would have less incentive to apply for leniency because even if the conduct was eventually uncovered by the authorities, those companies could point to their compliance programs and advocate for a deferred prosecution agreement. Critics of last summer's policy change have raised this objection.

Powers sought to dispel this concern by explaining that the adequacy and effectiveness of a company's compliance program is only one of ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation. Also important are prompt self-reporting, cooperation, and remedial action. According to Powers, "the choice to take a wait-and-see approach when a company uncovers evidence of cartel conduct could prove to be a costly mistake." In order to receive a deferred prosecution agreement ("DPA"), the Division will require more than a compliance program – officials will likely expect some level of ongoing cooperation.

## Expectations For Cooperation

Powers also discussed the nature of cooperation the Division expects to receive from leniency applicants, and presumably to a lesser extent from companies seeking a DPA. He emphasized that an application for leniency requires proffers of relevant information to the Division staff from company counsel and the

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<sup>2</sup> 15 U.S.C. § 1.

production of relevant documents to the Division "no matter where they are located" in the world. But he clarified that these steps "are no longer sufficient" to obtain conditional leniency under the policy. Rather, the Division expects to "meet with key employees" and will demand that the company "mak[e] cooperative witnesses available for interview." Indeed, Powers explained that Division staff "almost always" request "multiple witness interviews" with relevant employees when considering a leniency application.

Moreover, the Division may require relevant employees to "assist with proactive investigative techniques," a step that Powers recently indicated could include employees being required to participate in covert operations, such as the wearing of a wire to record conversations with co-conspirators.<sup>3</sup> For these reasons, it "generally takes longer now . . . than it did 20 years ago" for companies to receive a letter granting conditional leniency, which is the first stage of leniency in which an applicant secures its immunity.

Further, even after a company earns conditional leniency, Powers explained that the Division "expects to receive motivated and engaged cooperation throughout the investigation" and that this cooperation must continue "until the very last prosecution in that conspiracy." As many of the Division's past prosecutions show, this could entail many years of continued engagement by a leniency applicant.

## International Convergence

Prospective leniency applicants face substantial burdens in the context of cross-border cartel enforcement, which could involve coordinated and multi-lateral leniency applications to a number of competition enforcement agencies and exposure to unpredictable private damages. In his remarks, Powers cited the Division's cooperation with Canadian authorities in the auto parts cartel case from years ago. But he did not mention the other jurisdictions that investigated that cartel, let alone the panoply of global enforcement agencies that have pursued parallel investigations and duplicative penalties for cartels such as LIBOR and FX. Indeed, while Powers cited the Division's on policy against "piling on," his remarks appeared to concede the Division has little practical ability to discourage non-US enforcement authorities from pursuing parallel investigations of conduct touching their jurisdictions.

Likewise, Powers acknowledged the threat of civil class action damages to leniency applicants, which are a near-certain consequence of seeking leniency in the US, where private plaintiffs sue immediately on the news of a DOJ cartel investigation. The Antitrust Criminal Penalty Enhancement & Reform Act ("ACPERA") – which eliminates the trebling of damages for cooperating leniency recipients – is set to lapse this year. Powers emphasized that the Division "supports" ACPERA's reauthorization, but no bill has yet been introduced for consideration. Meanwhile, many other jurisdictions have adopted laws that allow for private damages.

Powers declared that "the time is now ripe for international convergence on the laws governing the intersection of leniency, private damages, and cooperation

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<sup>3</sup> The State of Criminal Antitrust Enforcement in 2020, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-state-criminal>.

among enforcers." Yet he offered no specifics on what this convergence will look like or how it will be achieved.

## **Looking Beyond Leniency**

Finally, Powers' remarks emphasized that leniency is not a "stand-alone tool." He explained that relationships with other enforcement partners are key to an "enforcement regime with a credible threat of prosecution." The Division has "boosted [its] detection capabilities by building and maintaining strong relationships with law enforcement and agency partners at the local, state, and federal levels." Powers cited the newly created Procurement Collusion Strike Force, which is an interagency partnership among the Antitrust Division, 13 US Attorney's Offices, investigators from the Federal Bureau of Investigation, and four federal Offices of Inspectors General. For more information on the Strike Force, see our previous [briefing](#). In the face of falling numbers of leniency applications, the Division will likely continue to turn to other investigatory resources.

## **Conclusion**

This speech indicates that the leniency program remains a centerpiece of the Division's criminal enforcement. Today, the Division increasingly expects more from leniency applicants than it has in the past, both in the scope of assistance in the investigation stage and in the duration of cooperation throughout prosecution. When these requirements are compounded across jurisdictions in the context of a cross-border cartel investigation, leniency can be a very costly endeavor. Powers acknowledged these challenges, but his remarks were short on details concerning how the Division intends to help manage the costs and maintain the incentives for companies to participate in the program.

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