

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION



**Criminal Antitrust Enforcement &
Corporate Compliance**

James W. Attridge

Counsel to the Assistant Attorney General

1

Overview



- ❖ The Antitrust Division
- ❖ Criminal Antitrust Violations
- ❖ Compliance

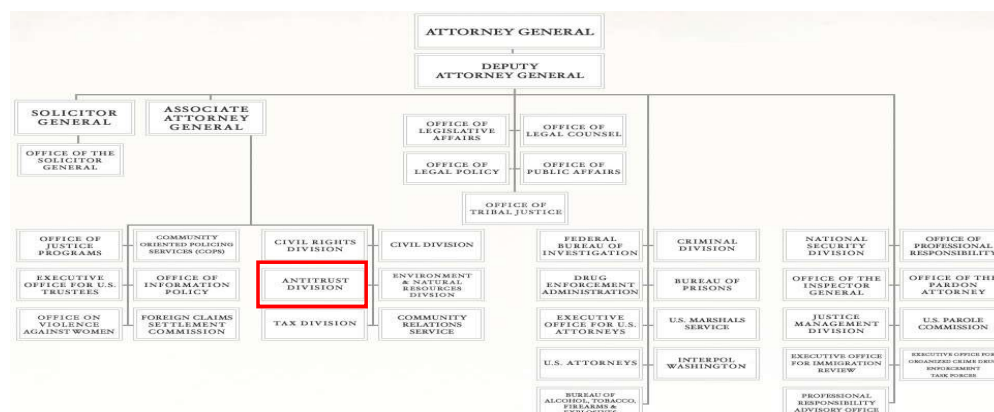
2

❖ The Antitrust Division



Our mission is the promotion and maintenance of competition in the American economy.

Antitrust Division Within DOJ



Approved by:

JEFFERSON B. SESSIONS III
Attorney General

Date:

2-5-15



DOJ Antitrust Division

Civil

- Defense, Industrials, and Aerospace Section
- Healthcare and Consumer Products Section
- Media, Entertainment, and Professional Services Section
- Technology and Financial Services Section
- Telecommunications and Broadband Section
- Transportation, Energy, and Agriculture Section

Criminal

- Washington I
- Washington II
- New York
- Chicago
- San Francisco

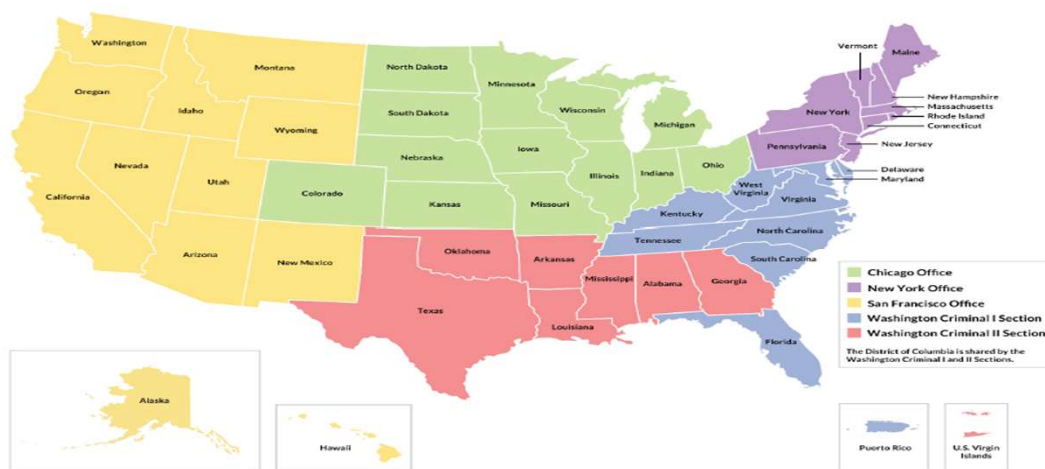
Economic Analysis Group

- Civil enforcement, regulatory proceedings, competition advocacy

5



Antitrust Division Criminal Offices



Continental U.S., Alaska, and Hawaii image credit: Chris Turkus/Stock/Getty Images Plus
Puerto Rico image credit: Shutterstock/Stock/Getty Images Plus
U.S. Virgin Islands image credit: Shutterstock/Stock/Getty Images Plus

6

The Sherman Act: 15 U.S.C. § 1



“Every contract, combination in the form of trust or otherwise, or **conspiracy, in restraint of trade** or commerce among the several States, or with foreign nations, **is declared to be illegal.**”

7

Penalties Are Significant

Criminal Penalties

- **Individuals: Incarceration up to 10 years**
- **Corporations: Fines up to \$100 million or twice gain/loss**
- **Volume of commerce drives the sentence for both individuals and corporations**

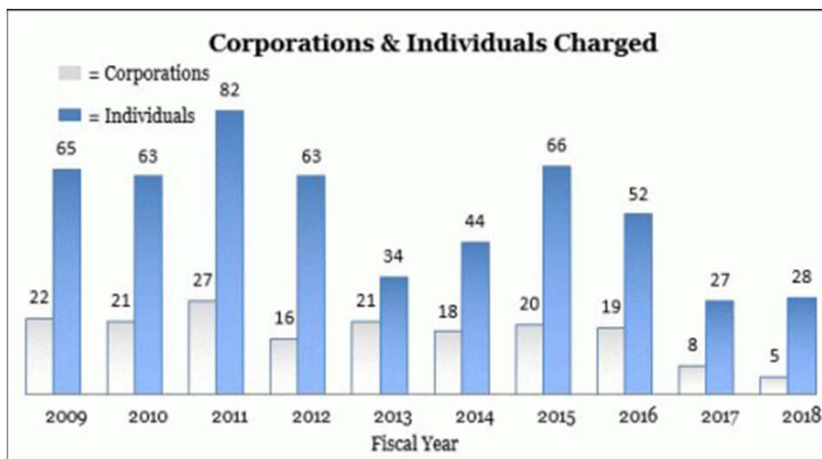
Other Penalties

- **Restitution paid to identified victims**
- **Civil lawsuits for three times the damages**
- **Because plea or conviction is based on beyond a reasonable doubt standard, debarment from federal and other contracts is often a foregone conclusion**

8



Results of Antitrust Division Efforts



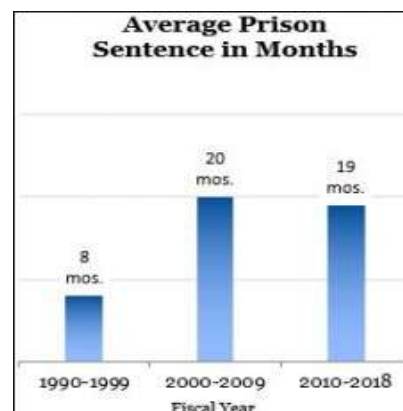
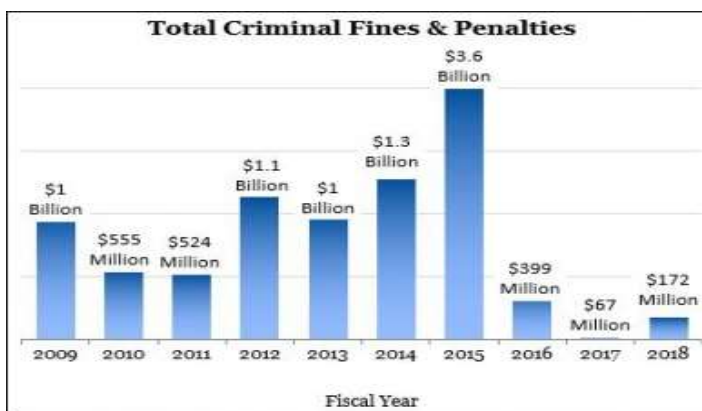
U.S. Department of Justice, Antitrust Division

9

9



Results of Antitrust Division Efforts



U.S. Department of Justice, Antitrust Division

10

10



❖ Criminal Antitrust Violations

1. Price Fixing Agreements
2. Bid Rigging Agreements
3. Allocation Agreements

11



Elements of a Sherman Act Violation:

- **Conspiracy to**
 - Fix prices
 - Allocate markets or customers
 - Rig bids
- **Knowingly joined—intended to agree**
- **Interstate or foreign commerce**
- **Statute of limitations:** Generally 5 years

12



Per Se Violations

- Criminal antitrust focuses on “*per se*” or “hardcore” violations
- Categorically illegal agreements
- **Agreement is the crime**
- Must be **horizontal** agreement



Per Se Violations – Don’t Have to Prove

- That agreement was successful
- Loss or harm as a result of the agreement
- That conduct was unreasonable or lacked economic justification



Price Fixing Agreements

- **Competitors agree to fix or otherwise determine the prices at which their products or services are sold**
- **Include agreements to:**
 - Charge the same price or raise prices together
 - Add fees or other surcharges
 - Eliminate discounts or have uniform discounts
 - Establish minimum or floor prices
 - Establish a standard pricing formula
 - Coordinate and not compete on other commercial terms (i.e., credit terms, warranties, etc.)



Warning Signs in Pricing

- Sudden and identical increases in price or price ranges that cannot be explained by cost increases
- Anticipated discounts or rebates disappear unexpectedly
- Similar transportation costs specified by local and non-local companies
- Attempts to “shop around” stonewalled



Bid Rigging Agreements

Competitors agree in advance who will win the bid.

Types of Bid Rigging:

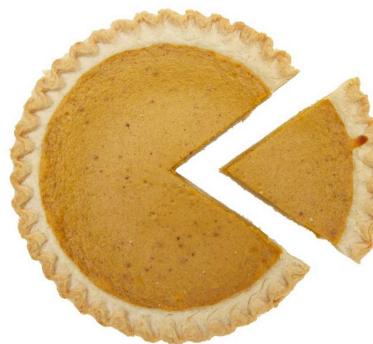
- Bid Rotation or Allocation—competitors agree to take turns winning bids
- “Complementary” or “Cover” Bids—competitors agree to submit intentionally high bids, or otherwise unacceptable bids
- Bid Suppression or Limitation—competitors agree to refrain from bidding



Allocation Agreements

Competitors agree to divide up a market, usually by geographic area, customer, or type of product.

May also include a bid rigging component to implement the allocation scheme.





What to Watch For: Suspicious Statements

- References to “courtesy” bids or “throwing in a number”
- Use of same terminology or rationales by companies when explaining price increases
- Statements indicating advance knowledge of competitor’s pricing
- A customer or territory “belongs” to a supplier
- References to “respecting” the customers or territories of competitors



Antitrust Leniency Program

- Unique investigative tool to Antitrust Division
- First company and/or individual to self-report its involvement in criminal antitrust offense obtains immunity from prosecution by the Antitrust Division (“Race to the Government”)
- Applicant provides ongoing cooperation to assist Division in prosecution of co-conspirators
- Additional information about the Leniency Program is available at www.justice.gov/atr/leniency-program

Compliance Programs



New Incentive: Consideration in Charging

- AAG Delrahim announced on July 11, 2019 that the Antitrust Division will consider compliance programs at the charging stage
- Announced Changes to:
 - Justice Manual
 - Antitrust Division Manual
- Issuance of Guidance Document

Compliance Programs



Justice Manual Revisions:

- 9-28.400 Special Policy Concerns, Section B:
- “With this in mind, the Antitrust Division has established a firm policy, understood in the business community, ~~that credit should not be given at the charging stage for a compliance program~~ and that ~~amnesty~~ **corporate leniency** is available only to the first corporation to make full disclosure to the government.”
- 9-28.800 Corporate Compliance Programs, Section A:
- “In addition, the nature of some crimes, ~~e.g., antitrust violations~~, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.”

Compliance Programs



Antitrust Division Manual Revisions:

- Revised Manual directs prosecutors to consider in charging decisions:
 - All Filip Factors, including compliance program
 - Leniency policy
 - ATR guidance document questions
- Allows Deferred Prosecution Agreement (DPA) when Filip Factors, including compliance, support it
- Non-Prosecution Agreements (NPAs) disfavored

Compliance Programs



Background on Corporate Compliance Programs:

- DOJ does not provide specific requirements
 - *See Justice Manual § 9-28.800*
- Sentencing Guidelines provide a minimum “to do” list
- Common themes
 - Compliance starts at the top
 - Not “one size fits all”

Compliance Programs



Antitrust Division Guidance Document:

- Intended to assist prosecutors and provide predictability and transparency into prosecutors' compliance evaluation
- Two sections:
 - Charging stage
 - Sentencing stage
- Not a checklist or a formula
- And compliance is only one of ten factors

Compliance Programs



Questions Posed to Prosecutors in Justice Manual § 9-28.800:

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the corporation's compliance program work?

Compliance Programs



Antitrust Division Guidance Document – Preliminary Questions:

- Does the company's compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company's senior management involved in the violation?

Compliance Programs



- 1) Design and Comprehensiveness
 - Format, Accessibility
- 2) Culture of Compliance
 - Management Conduct/Leadership
- 3) Responsibility for the Compliance and Ethics Program
 - Autonomy, Seniority, Experience
- 4) Risk Assessment
 - Tailored for Antitrust Risk
- 5) Training and Communication
 - Obligations Understood

Compliance Programs



Antitrust Division Guidance Document – Factors to Consider 6-9:

- 6) Periodic Review, Monitoring and Auditing
 - What Process and Mechanisms
- 7) Reporting
 - Accessible, Confidential
- 8) Incentives and Discipline
 - Integrated into Operations
- 9) Remediation and Role of Compliance Program in the Discovery of the Offense

Compliance Programs



Potential Sentencing Benefits:

- Potential Sentencing Credit: U.S.S.G. § 8C2.5(f)
 - Reduction of culpability score for effective compliance and ethics program
 - Results in lower Guidelines fine range
 - Hard to qualify for Credit
 - “High-level” or “substantial authority” personnel are almost always involved in antitrust offenses, which can be disqualifying
- Substantial Assistance departure to reduce criminal fine: U.S.S.G. § 8C4.1
- Fine reduction for “extraordinary” efforts to enhance or create an effective compliance program

Compliance Programs



Reduction in Fine for Remedial Measures:

- Extraordinary and forward-looking efforts to improve compliance = reduction in fine. *See* 18 U.S.C. § 3572(a)(8)
 - Antitrust Division has recommended a fine reduction in cases where efforts to improve compliance were extraordinary
- Company institutes or enhances compliance program after violation discovered and before pleading
- Note: No credit for unimplemented programs – not mere promises of future action

Compliance Programs



Consequences of Ignoring Compliance:

- Egregious Cases May Enhance Sentence
 - Company refuses to admit conduct/accept responsibility
 - Company has a history of antitrust violations
 - Company refuses to institute or enhance its compliance program
- Sentencing Recommendations may include:
 - Probation (1 to 5 years): *see* U.S.S.G §§ 8D1.1–8D1.4
 - Compliance monitor to design and implement compliance
 - At expense of the company

Compliance Programs



Consequences of Ignoring Compliance:

- Terms of Probation may include:
 - Periodic reports to the Court, Probation Office, and the Antitrust Division on status of implementing the Court-ordered compliance program
 - Affirmative duty to report antitrust violations
 - Independent Compliance Monitor
- Compare *United States v. BNP Paribas* (S.D.N.Y. 2018):
 - The government did not seek probation, in part due to “the bank’s substantial efforts relating to compliance and remediation”

Compliance Programs



Case Example: AU Optronics Corporation of Taiwan (AUO)

- Indicted 2009 for price fixing in LCD market
- AUO had no pre-existing compliance program, and even after investigation, it did little to put one in place
- Before, during, and after conviction, tone from the top was that it did nothing wrong
- Wholly inadequate steps to adopt a compliance program after conviction
- Antitrust Division asked that AUO and U.S. subsidiary be placed on probation
- Division asked for Court to appoint independent monitor to oversee implementation of an appropriate compliance program
- District Court imposed 3-year term of probation and independent monitor to oversee establishment of effective compliance program



Questions?