

Credit for Competition Compliance Programs Introduced in US

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Firms that have an effective competition (“antitrust” in the US) compliance program but nevertheless become involved in an antitrust offence such as price fixing can now receive credit for the program in the United States at both the charging and sentencing stages of the case, the US Department of Justice recently announced. Previously, the DOJ refused to give credit, at the charging stage, for a compliance program.

This change in policy in the US follows a change made by the Canadian Competition Bureau in 2015, when it announced that compliance programs would be treated as a mitigating factor in sentencing recommendations, and could make also consent resolutions such as prohibition orders and consent agreements possible.

In evaluating compliance programs, the DOJ will ask itself three “fundamental” questions:

1. Is the corporation’s compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the corporation’s compliance program work?

At the charging stage, firms with an effective compliance program may be considered for a deferred prosecution agreement (DPA) instead of being charged, although the DOJ warns that this is not automatic.

At the sentencing stage, a firm will be entitled to credit for having an effective compliance program.

The effectiveness of a compliance program is determined based on a number of factors:

- the design and comprehensiveness of the program
- the culture of compliance within the company
- responsibility for, and resources dedicated to, antitrust compliance
- antitrust risk assessment techniques
- compliance training and communication to employees
- monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
- reporting mechanisms
- compliance incentives and discipline

- remediation methods

Competition authorities have long recognized the importance of corporate compliance programs as an essential tool for ensuring that firms do not breach competition laws. The US DOJ's decision to provide credit for an effective compliance program adds an additional incentive for firms to implement these programs. More fundamentally, however, an effective compliance program makes it less likely that a firm will face any competition or antitrust investigation or prosecution in the first place.

Does your company have a competition compliance program that meets the requirements in recent guidance from Canadian and US competition authorities? If not, we can help you create a cost-effective compliance program. Please contact Michael Osborne or any member of our Competition, International Trade & Foreign Investment Group for more information.

The author of this article gratefully acknowledges the contributions of summer student Stacey Weltman.

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