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White Collar Defense

CPI COMPETITION POLICY® INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Competition authorities worldwide investigate and prosecute antitrust infringements criminally. The U.S. Department of Justice, in particular, has famously imposed substantial fines and prison sentences against alleged conspirators, including those located abroad.

These efforts are often coordinated with other competition authorities, as many investigations are global in scope. These efforts have recently been magnified: the Department of Justice has launched a so-called Procurement Collusion Strike Force, which seeks to identify and prosecute criminal antitrust conduct in the government procurement sector.

Given the far-reaching consequences of criminal prosecutions for the companies and individuals involved, criminal antitrust enforcement inevitably raises significant questions of legal principle, alongside significant practical questions, notably with regard to individuals' willingness to participate in disclosure and leniency programs, where their interests may diverge from that of the companies that employ them. The articles in this edition of the Chronicle assess recent developments in the U.S. and worldwide, both on their own merits and in terms of how they interact with other aspects of antitrust law and policy.

Richard Powers & Alison Goldman open by assessing recent revisions announced by the Antitrust Division of the U.S. Department of Justice to its leniency policy. In addition to giving greater context about an applicant's obligations under the policy, the revisions require leniency applicants to *promptly* self-report misconduct, as well as to use best efforts to *remediate* the harm caused by the illegal activity before receiving a conditional leniency letter. These changes come against a background shift in the corporate enforcement landscape and at a time when the Division's aggressive corporate enforcement strategy has been backed with significant resources. This article offers impressions on what companies and counsel can expect as a result.

Ann O'Brien notes a wave of novel and aggressive criminal no-poach cases being brought by the Antitrust Division of the U.S. Department of Justice. The Antitrust Division has revitalized its use of Section 2 of the Sherman Antitrust Act to criminally prosecute monopolization, something the Division has not done in over 40 years. These cases raise many questions for companies and the counsel who advise them. Is the mere invitation to collude now a prosecutable criminal offense? How will the U.S. Sentencing Guidelines, which lacks a section explicitly governing criminal monopolization, apply in these cases? These trends underscore the importance of antitrust compliance programs for companies and executives alike.

Katie Hellings, Dan Shulak & Doug Tween further discuss major changes in policies and procedures at the U.S. Department of Justice Antitrust Division. In the authors' view, these changes have led to uncertainty and shaken the trust between defense attorneys and prosecutors, affecting the advice defense attorneys provide to their clients in Division investigations and prosecutions. They note a significant uncertainty perceived by the antitrust bar as to the Division's intentions, which, in their view, does a disservice to potential targets who face life-altering consequences as a result of the Division's enforcement decisions, and makes the Division's activity less successful.

In turn, **Roxann E. Henry** argues that the current criminal enforcement initiatives of the U.S. Department of Justice Antitrust Division risk taking it into territory that will likely trigger constitutional scrutiny of the criminal use of the Sherman Act. In her view, review by the Supreme Court would likely eliminate criminal antitrust enforcement powers given the void-for-vagueness doctrine and the constitutional guarantees of due process, separation of powers and the right to a jury trial.

Carsten Reichel turns to the specific question of bid rigging and other offenses relating to procurement fraud. While these are nothing new in the history of the Antitrust Division's criminal enforcement efforts, the Division's prioritization of these offenses changed in late 2019, in particular with the founding of the Procurement Collusion Strike Force ("PCSF"). The PCSF is poised to play a prominent role in U.S. cartel enforcement and maintain the Division's enforcement focus on public procurements in the coming years. This article analyzes the PCSF's development and progress to date and assesses the initiative's progress in its mission to "detect and deter" violations.

David N. Kelley, Andrew S. Boutros & D. Brett Kohlhofer analyze the recent series of revisions to the Department of Justice's policies addressing how prosecutors evaluate and treat, and resolve cases against, corporate defendants in criminal matters. The policy updates are an effort to provide greater transparency and predictability for corporate defendants to incentivize self-disclosures and cooperation. The updates also highlight the continued emphasis on bringing cases against executives — and the expectation that companies help DOJ to do so. The Department-wide changes come at a time when the Antitrust Division has been particularly active. The article summarizes core aspects of the Antitrust Division's Leniency Program, while also outlining key Department-wide updates. It also examines the interplay between the Department-wide policy updates, which emphasize individual culpability, and the Antitrust Division's immunity policies as to executives under its decades-old Leniency Program.

Finally, taking an international perspective, **Gabriela Costa Carvalho Forsman** analyzes how Brazilian practitioners face a dilemma regarding conflicting labor and criminal provisions arguably applicable to employees under internal investigations regarding, on one hand, employee cooperation obligations and, on the other hand, privilege against self-incrimination. The paper sheds light on the Brazilian experience regarding internal investigations into misconduct and the interplay between resolution applicants and public authorities; and analyzes theories regarding the enforceability of privilege against self-incrimination within internal investigations.

Criminal antitrust enforcement is as old as the Sherman Act itself. Recent moves by the Department of Justice remind the antitrust (and business) communities of this home truth. The articles in this Chronicle place recent developments in context and will provide vital guidance to practitioners and businesspeople alike in the evolving enforcement environment.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

REMEDIATION, COMPLIANCE, AND RESTITUTION UNDER THE NEW LENIENCY POLICY

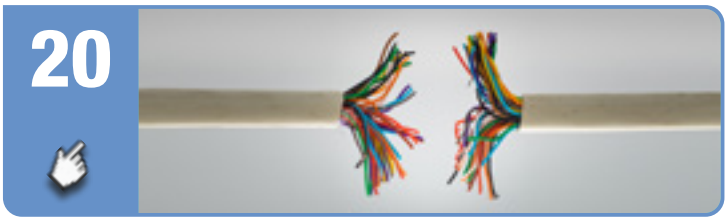
By Richard Powers & Alison Goldman

In April 2022, the Antitrust Division of the U.S. Department of Justice announced revisions to its leniency policy which incentivizes voluntary self-disclosure of criminal misconduct in order to earn non-prosecution protections. In addition to giving greater context about an applicant's obligations under the policy, the revisions require leniency applicants to *promptly* self-report misconduct, as well as to use best efforts to *remediate* the harm caused by the illegal activity before receiving a conditional leniency letter. These changes come amongst a broader shift in the corporate enforcement landscape and at a time when the Division's aggressive corporate enforcement strategy has been backed with significant resources. This article highlights the leniency policy changes in the context of DOJ-wide changes and offers impressions on what companies and counsel can expect as a result.

THE NEWEST WAVE OF ANTITRUST "CRIMES": REVIVAL OF CRIMINAL MONOPOLIZATION

By Ann O'Brien

The Antitrust Division of the Department of Justice is aggressively enforcing and expanding the scope of criminal antitrust cases it is willing to bring, including a first wave of novel criminal no-poach cases. In its next criminal wave, the Antitrust Division has revitalized its use Section 2 of the Sherman Antitrust Act to criminally prosecute monopolization, something the Division has not done in over 40 years. These modern criminal monopolization cases raise many questions for companies and the counsel who advise them. Is the mere invitation to collude now a prosecutable criminal offense? How will the U.S. Sentencing Guidelines, which lacks a section explicitly governing criminal monopolization, apply in these cases? These seismic shifts from the Antitrust Division underscore the importance of robust and regular antitrust compliance for companies and executives so that employees and counsel are aware of the changing landscape, can spot new red flags, and know to immediately report any potential issues to counsel.



DISCONNECT BETWEEN DOJ ANTITRUST DIVISION PROSECUTORS AND CRIMINAL ANTITRUST BAR RESULTS IN UNCLEAR POLICY AND LACK OF TRUST

By Katie Hellings, Dan Shulak & Doug Tween

Experienced criminal antitrust lawyers in the last few years have observed major changes in policies and procedures at the U.S. Department of Justice Antitrust Division. These changes have led to uncertainty and shaken the trust between defense attorneys and prosecutors, affecting the advice defense attorneys provide to their clients in Division investigations and prosecutions. Specifically, among other things, the Division has largely abandoned its long-standing practice of providing targets of investigations with notice and an opportunity to be heard by Division management in the front office; burdened leniency applicants with an obligation to "promptly" report and to make consensual recordings; made clear that current employees of Type B leniency applicants will no longer presumptively be included in the company's leniency; criminalized conduct that for decades had been treated civilly; and in at least two cases indicted individuals who believed their cooperation was going to result in an agreement from DOJ not to prosecute them. The significant uncertainty perceived by the antitrust bar as to the Division's intentions does a disservice to potential targets who face life-altering consequences as a result of the Division's enforcement decisions, and makes the Division's investigations and prosecutions less effective and ultimately less successful.

U.S. ANTITRUST CRIMINAL PROSECUTIONS ARE UNCONSTITUTIONAL

By Roxann E. Henry

Roxann Henry argues that the current criminal enforcement initiatives of the US Department of Justice Antitrust Division are taking it into territory that will likely trigger constitutional scrutiny of the criminal use of the Sherman Act. Review by the Supreme Court would likely eliminate criminal antitrust enforcement powers given the void-for-vagueness doctrine and the constitutional guarantees of due process, separation of powers and the right to a jury trial, and, even if some aspect of criminal enforcement power was retained, the constitutional scrutiny would lead to the abandonment of the per se standard in the context of criminal trials. Moreover, the loss of criminal enforcement of the antitrust laws would have no meaningful effect on antitrust compliance.

SUMMARIES

THE U.S. APPROACH TO CARTEL ENFORCEMENT IN PUBLIC PROCUREMENTS

By Carsten Reichel

While bid rigging and other offenses relating to procurement fraud are nothing new in the history of the Antitrust Division's criminal enforcement efforts, the Division's prioritization of and organization regarding these offenses changed in late 2019. The Procurement Collusion Strike Force ("PCSF") and procurement cases have become mainstays of the U.S. DOJ Antitrust Division's criminal cartel enforcement efforts since that time. Through a combination of its durable design, favorable circumstances for its growth, and the Antitrust Division's own diligence in building a network that spans the procurement landscape and prioritizes procurement cases, the PCSF is poised to play a prominent role in U.S. cartel enforcement and maintain the Division's enforcement focus on public procurements in the coming years. This article analyzes the PCSF's development and progress to date and assesses the initiative's progress so far in its own "detect and deter" mission.

THE 2022 MONACO MEMORANDUM: CHANGES TO DOJ CORPORATE ENFORCEMENT POLICY

By David N. Kelley, Andrew S. Boutros & D. Brett Kohlhofer

The DOJ recently announced a series of revisions to its policies addressing how prosecutors evaluate and treat, and resolve cases against, corporate defendants in criminal matters. The policy updates are an effort to provide greater transparency and predictability for corporate defendants to incentivize self-disclosures and cooperation. The updates also highlight DOJ's continued emphasis on bringing cases against executives — and the expectation that companies help DOJ to do so. The Department-wide changes come at a time when DOJ's Antitrust Division has been particularly active. This article summarizes core aspects of the Antitrust Division's Leniency Program, while also outlining key Department-wide updates. Among other changes, those Department-wide policy revisions: (i) enhance uniformity across the Department concerning voluntary disclosures; (ii) establish standards to incentivize faster disclosures regarding culpable individuals; (iii) provide clearer standards for how prosecutors will assess prior corporate misconduct, whether criminal or civil; (iv) afford greater transparency regarding the use and selection of compliance monitors; and (v) include new guidance for how DOJ will assess corporate compliance programs. This article also examines the interplay between the Department-wide policy updates, which emphasize individual culpability, and the Antitrust Division's immunity policies as to executives under its three decades-old Leniency Program. The article concludes with recommendations for the business community.

IS PRIVILEGE AGAINST SELF-INCRIMINATION APPLICABLE TO BRAZILIAN INTERNAL INVESTIGATIONS?

By Gabriela Costa Carvalho Forsman

Brazilian practitioners face a dilemma regarding conflicting labor and criminal provisions arguably applicable to employees under internal investigations regarding, on one hand, employee cooperation obligations and, on the other hand, privilege against self-incrimination. Applicability is indeed arguable since there are no specific statutory provisions or robust case law regarding internal investigations in Brazil. This paper sheds light on the Brazilian experience regarding internal investigations into misconduct and the interplay between resolution applicants and public authorities; and analyzes theories regarding the enforceability of privilege against self-incrimination within internal investigations considering the Brazilian practice and statutory regime. This article concludes that privilege against self-incrimination applies to internal investigations when private and state action are present and entwined, provides examples of Brazilian public authorities' active influence over internal investigations and points to practical recommendations to local practitioners.

WHAT'S NEXT?

For March 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **China Edition**; and (2) **Interlocking**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2023, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES April 2023

For April 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Junk Fees**; and (2) **Essential Facilities**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

REMEDIATION, COMPLIANCE, AND RESTITUTION UNDER THE NEW LENIENCY POLICY

BY RICHARD POWERS & ALISON GOLDMAN[1]

1 Richard Powers is a partner at Fried, Frank, Harris, Shriver & Jacobson LLP. He previously served as the Department of Justice's Antitrust Division Deputy Assistant Attorney General for Criminal Enforcement from 2018-2022, and as Acting Assistant Attorney General in 2021. Alison Goldman is a litigation associate at Fried, Frank, Harris, Shriver & Jacobson LLP

Since 1993, the Antitrust Division of the Department of Justice ("the Division") has maintained a leniency policy to incentivize voluntary self-disclosure of criminal misconduct. In exchange for being the first to self-report its involvement in an antitrust conspiracy and meeting the other requirements of the policy, including fully cooperating with the Division's investigation, a company and — depending on the circumstances — its culpable executives can receive significant non-prosecution protections.[2] Last year, the Division revised its leniency policy for the first time in nearly 30 years and, among other changes, added requirements around compliance and remediation. The Division also provided additional guidance on restitution in the revised, publicly available Frequently Asked Questions ("FAQs").[3]

The Division was an active participant in the DAG's Corporate Crime Advisory Group, so it is no surprise that these recent updates to the leniency policy reflect the changing landscape for corporate enforcement at the DOJ more broadly.[4] And these important policy shifts come at a time when the Division has received significant additional resources[5] and is prioritizing a more aggressive corporate enforcement strategy, as demonstrated by the number of investigations and cases in litigation.[6] This article highlights the recent changes to the Division's leniency policy in the context of DOJ-wide changes, what they mean, and offers impressions on what companies and their counsel can expect as a result — especially in heavily regulated sectors.

I. A YEAR OF CHANGE FOR CORPORATE ENFORCEMENT POLICIES

The recent changes to the Division's leniency policy correspond with revisions made to the DOJ's Corporate Criminal Enforcement Polices announced in September 2022 by DAG Monaco, as well as those subsequently made by the Criminal Division to its Corporate Enforcement Policy ("CEP") in January 2023. Among the various revisions, those particularly relevant to antitrust enforcement relate to individual accountability, Department-wide voluntary self-disclosure policies, implementation of an effective compliance program, and utilization of all available remedies to address illegal conduct and prevent future harm — including suspension and debarment.[7] The DOJ also has focused on victims' rights issues with the Attorney General publishing updated guidelines for victim and witness assistance in October 2022.[8]

Several changes to the Division's leniency policy line up with these broader updates from the DOJ. First, the leniency policy mandate for promptly *terminating* cartel conduct was changed to require prompt *self-reporting* of such conduct.[9] This change is consistent with the requirement under the CEP that self-disclosure happen "within a reasonably prompt time after becoming aware of the misconduct,"[10] and the DAG memo explaining that "voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation."[11]

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2 For individuals, under Type A of the leniency policy, cooperating current employees automatically receive non-prosecution protections. Under Type B, whether an executive receives non-prosecution protections is at the discretion of the prosecutors. See U.S. Dep't of Justice, *Just. Manual* §7-3.000 (Apr. 2022), https://www.justice.gov/jm/jm-7-3000-organization-division ("Leniency Policy").

3 U.S. Dep't of Justice, Frequently Asked Questions about the Antitrust Division's Leniency Program (Apr. 4, 2022), www.justice.gov/atr/page/file/1490311/download ("DOJ FAQs").

4 See Memorandum, U.S. Dep't of Justice, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download ("Sept 2022 CCE Revisions").

5 See Consolidated Appropriations Act, 2023, H.R. 2617, at pg. 3900–02 (2022).

6 In September 2022, the Division stated that it was actively litigating 19 criminal cases, with 18 awaiting trial, and reported that it "ended FY 2021 with 146 pending grand jury investigations, the most in 30 years." See *Oversight of Federal Enforcement of the Antitrust Laws: Hearing before the S. Comm. on the Judiciary Subcomm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong., at 2 (Sept. 20, 2022) (Statement of Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div.), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Kanter%20-%202022-09-20.pdf.

7 See Sept 2022 CCE Revisions, *supra* note 4.

8 U.S. Dep't. of Justice, The Attorney General Guidelines for Victim and Witness Assistance, (2022 Ed.), https://www.justice.gov/d9/pages/attachments/2022/10/21/new_ag_guidlines_for_vwa.pdf ("AG Guidelines"); see also U.S. Dep't. of Justice, An Antitrust Primer for Federal Law Enforcement Personnel, at 9 (updated 2022), https://www.justice.gov/atr/page/file/1091651/download ("AG Guidelines state that Department employees working at each stage of a criminal case must give careful consideration to the need to provide full restitution to the victims of the offenses.")

9 Leniency Policy, *supra* note 2.

10 See U.S. Dep't of Justice, *Just. Manual* § 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (updated January 2023), www.justice.gov/opa/speech/file/1562851/download.

11 Sept. 2022 CCE Revisions, *supra* note 4, at 7.

Second, on top of existing restitution requirements, leniency applicants must now undertake compliance and remediation efforts.[12] These undertakings track the voluntary self-disclosure polices laid out in the DAG memo, which says that "the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct."[13] This change to the leniency policy also accords with the recent CEP updates that seek to "incentivize[] even more robust compliance on the front-end, to prevent misconduct, and require[] even more robust cooperation and remediation on the back-end . . . ."[14]

Finally, the revised FAQs include substantial additional information about restitution and the Division's views on recurring issues faced by leniency applicants seeking protections in related private litigation under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA").[15] Typically, negotiated settlements in these actions satisfy the leniency policy's restitution requirement and serve as the primary means of protecting the interests of victims in Antitrust Division prosecutions. In other situations where there is no ongoing private litigation, such as where the victim is a government entity or where the investigation is not yet public, the Division will require best efforts to make restitution and applicants should be prepared to present a restitution plan as part of its application.[16]

II. REMEDIATION AND RESTITUTION

Leniency applicants now must use best efforts to *remediate* the harm caused by the illegal activity before receiving a conditional leniency letter. This requirement is focused on addressing any harm that restitution cannot cover as well as taking the necessary steps to prevent recidivism.[17] The emphasis on reducing the risk of recidivism falls under the DOJ's broader emphasis on corporate history and the effort to reward companies that take the necessary steps to reduce the "recurrence of criminal misconduct" and punish those that do not.[18] This emphasis also can be seen in the addition of "the applicant's criminal history" to the factors considered when evaluating whether granting Type B leniency would be "unfair to others."[19] Remediation as a function of compliance will be discussed in the next section.

Often, remediating the harm caused by the anticompetitive conduct is coextensive with restitution because the prosecution ends the violation and then facilitates compensating consumers who were overcharged as a result of the conspiracy. There are circumstances, however, where this is not always true — such as in market allocation cases where more might be required to restore the competitive balance. For example, the FAQs point to labor market conspiracies ("no poach" agreements) and reduced worker mobility as a possible harm that will need additional remedial efforts.[20] As a specific case-related example, the Deferred Prosecution Agreement with Florida Cancer Specialists required non-enforcement of non-competes for four years as a remedial measure for the company's participation in a market allocation conspiracy.[21] Looking ahead, prospective applicants should expect the Division to assess the range of harm to competition in the affected market as it considers solutions to help inject competition back into the space and attempts to integrate safeguards against future misconduct.[22]

12 Leniency Policy, *supra* note 2.

13 Sept. 2022 CCE Revisions, *supra* note 4, at 7.

14 Kenneth A. Polite, Jr., Asst. Att'y Gen., U.S. Dep't of Just., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

15 See DOJ FAQs, *supra* note 3, at 13-20.

16 *Id.* at 13.

17 *Id.* at 21.

18 See Memorandum, U.S. Dep't of Justice, *Corporate Criminal Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Oct. 28, 2021), www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf.

19 Leniency Policy, *supra* note 2.

20 DOJ FAQs, *supra* note 3, at 21.

21 See *United States v.Fla. Cancer Specialists & Rsch. Inst., LLC*, Case No. 20, Deferred Prosecution Agreement ¶¶4, 10 (M.D. Fla., Apr. 30, 2020), https://www.justice.gov/opa/press-release/file/1272561/download. Note that a recently proposed rule by the Federal Trade Commission would ban non-compete agreements outright. See https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking. It is unclear how this rulemaking process will unfold, including subsequent litigation, and it is unlikely that DOJ would forego insisting on these types of provisions until the scope and legality of the proposed rule is final.

22 DOJ FAQs, *supra* note 3, at 20-21 (Question 49 specifically directs an applicant to consider the nature of the illegal activity, the nature of the harm caused, and the applicant's role in it when determining the appropriate remediation.)

For restitution, the FAQs make clear that "applicants must present concrete, reasonably achievable plans about how they will make restitution" in order to receive a conditional leniency letter.[23] What this will look like will depends on the facts of the case. For example, where the government is a victim, the applicant likely will need to self-report and negotiate a financial settlement with the relevant agency.[24] The FAQs caution that federal agency victims should not have "to resort to civil recovery actions seeking damages under Section 4A of the Clayton Act" but clarify that the Division, through its civil enforcement program, "will respect the spirit of ACPERA and will not seek treble damages against qualifying applicants."[25] In a more traditional price fixing case, however, restitution often will be resolved via settlement with private litigants. In those instances where private litigation has been initiated prior to a decision on conditional leniency, an applicant should apprise the Division of the status of the litigation and whether it intends to resolve with the plaintiffs. In that situation, a representation to the Division that the applicant will resolve with victims directly and its anticipated path for doing so likely will suffice — especially given the complexity of those actions.[26]

Finally, for prospective applicants seeking to understand the benefits available under ACPERA — de-trebling of damages and removing joint and several liability — the updated FAQs include five pages of discussion on a number of topics not previously addressed.[27] Among other issues, the FAQs discuss ACPERA's requirement that leniency applicants provide "satisfactory cooperation" to private plaintiffs and the Division's view that "unreasonable" demands by plaintiffs should not prevent an applicant from qualifying for reduced liability.[28] The FAQs also discuss the Division's views on the timing of cooperation under ACPERA, how that relates to the ongoing criminal investigation, and makes clear that "the Division will apprise the court of any [] requests" that an applicant refrain from identifying itself and/or cooperating to protect the integrity of the criminal investigation.[29] Importantly, these questions and answers can serve as the basis for understanding the positions the Division might take in follow-on litigation on these and other recurring issues (or be the basis for a party's representation to the court should the Division opt not to weigh-in).

III. ANTITRUST COMPLIANCE AND ITS MYRIAD BENEFITS

Another requirement added to the leniency policy, and one that goes hand-in-hand with remediation, is that an applicant must improve its compliance program to mitigate the risk of engaging in future illegal activity. The FAQs clarify that the applicant should conduct a "root cause analysis" and undertake remedial efforts to target the root causes and implement measures to reduce the risk of recidivism.[30] Ultimately, the necessary steps required to satisfy the compliance requirement are very fact specific, including whether the applicant's programs are appropriately tailored to its size and line of business.[31]

This change bookends the Division's emphasis on compliance, which has been a focus for several years. In July 2019, the Division announced that it would reverse course on longstanding policy and begin considering compliance programs at the charging stage for non-leniency companies.[32] The Division also published Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations Guidance, which details how the Division will analyze compliance programs.[33] More recently, the DAG Memo issued in September 2022 included guidance on the importance of an effective compliance program and highlighted two areas of emphasis: compensation structures and the use of personal devic-

23 DOJ FAQs, *supra* note 3, at 13.

24 See *U.S. v. Berlitz*,Case No. 21-51 (FLW), Deferred Prosecution Agreement ¶¶ 12-13 (Dist. NJ, Jan. 19, 2021), https://www.justice.gov/opa/press-release/file/1356871/download.

25 DOJ FAQs, *supra* note 3, at 13, 19.

26 This is consistent with the AG Guidelines, which recognize the difficulty in complying with the CVRA when there are many victims. See AG Guidelines, *supra* note 8, at 24. Similarly, the AG Guidelines tacitly acknowledge the complexity of identifying victims and making restitution in antitrust cases by recognizing that "[a]ntitrust jurisprudence concerning direct versus indirect purchasers is relevant to the issue of when a person injured by an antitrust violation has suffered the requisite harm under the VRRA and the CVRA." *Id.* at 16.

27 See DOJ FAQs, *supra* note 3, at 13-20.

28 *Id.* at 16.

29 *Id.* at 17.

30 *Id.* at 21.

31 *Id.* at 21.

32 See Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

33 See U.S. Dep't of Justice, Antitrust Div., *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), https://www.justice.gov/atr/page/file/1182001/download ("CCP Guidance"); DOJ FAQs, *supra* note 3, at 20.

es and third-party applications.[34] Additional guidance on these areas remains forthcoming; however, to the extent not addressed in the current version of the Division's compliance guidance, companies and counsel should assume that compensation structures and the use of personal devices and third-party applications are now part of the analysis.

The Division's compliance guidance advises that the evaluation of a compliance program "is a fact-specific inquiry and there is no checklist or formula."[35] There are few public examples of how this guidance has played out in practice, but an analysis of the corporate compliance program component of the publicly available DPA in *Argos USA* is instructive.[36] The relevant considerations section of the *Argos* DPA provides examples of what the Division considered when evaluating compliance and remediation as it made the decision about the appropriate form of disposition. There, the Division highlighted that the:

> Company has enhanced and has committed to continuing to enhance its compliance program and internal controls, including by ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement [and that] the Company has taken certain remedial actions to address the misconduct that is the subject of this investigation, including revising and enhancing its antitrust compliance program to directly address the issues, conducting specific antitrust training for [the relevant] employees, and terminating the employees primarily responsible for the Company's participation in the illegal conduct at issue.[37]

Attachment C of the *Argos* DPA closely tracks the nine factors the Division considers when evaluating a compliance program.[38]

Proactive investment in a corporate compliance program that aligns with the Division's guidance is worthwhile. An effective compliance program not only helps deter misconduct, but it can help with identifying issues quickly, which in turn helps with winning the race for leniency. Strong compliance programs will require less improvement by an applicant after wrongdoing has been discovered and disclosed. Furthermore, recall that if a company voluntarily self-discloses misconduct, then the DOJ will not require a compliance monitor if, at the time of resolution, the company has also implemented and tested an effective compliance program.[39] Although not punitive, corporate compliance monitors are costly and onerous on a business.[40] Finally, DAG Monaco already forecasted the DOJ's concern with compensation structures and the use of personal devices and third-party applications.[41] Companies should heed this concern and update their corporate compliance program as necessary to address these topics in detail.

IV. AVOIDING DEBARMENT

Robust compliance programs are of heightened importance in heavily regulated sectors mainly due to the regulatory consequences that are associated with criminal convictions. DAG Monaco warned that companies should no longer view compliance violations as "the cost of doing business" and stated that the DOJ "will continue to find ways to improve [its] approach to corporate crime, such as by enhancing the effective-

34 Sept 2022 CCE Revisions, *supra* note 4, at 9-11.

35 DOJ FAQs, *supra* note 3, at 20.

36 See *United States v. Argos USA LLC*, Case No. 4:21-CR-0002-RSB-CLR, Deferred Prosecution Agreement (M.D. Fla., Apr. 30, 2020), https://www.justice.gov/atr/case-document/file/1350996/download.

37 *Id.* at 4-5.

38 *Id.* at 33-35 (The company is to include the following elements in its compliance program: (1) Design and Comprehensiveness; (2) Culture of Compliance; (3)Responsibility for the Compliance Program; (4) Periodic Risk-Based Reviews; (5) Training and Communication; (6) Monitoring and Auditing; (7) Reporting and Guidance; (8) Incentives and Discipline; and (9) Remediation."); see also CCP Guidance, *supra* note 32 at 3-14.

39 Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement ("DAG Remarks").

40 See e.g. *United States v. Deutsche Bank AG*, 3:15-cr-00061-RNC, Deferred Prosecution Agreement, Attachment C (Dist. Conn.) (Deutsche Bank entered into a DPA to resolve wire fraud and antitrust charges in connection with its role in both manipulating U.S. Dollar LIBOR and engaging in a price-fixing conspiracy to rig Yen LIBOR. One condition was the imposition of a compliance monitor for a period of three years with numerous conditions.), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf.

41 Sept 2022 CCE Revisions, *supra* note 3.

ness of the federal government's system for debarment and suspension."[42] Aiming to protect healthcare markets, the Division has already taken up the DAG's call to action by signing a Memorandum of Understanding ("MOU") with the Office of the Inspector General of the Department of Health and Human Services ("HHS") in December 2022.[43]

Notably, the MOU covers how the agencies would work together when the violation involves the provision of healthcare services, which would result in mandatory exclusion from the health benefit programs such as Medicare and Medicaid.[44] For companies whose compliance program does not prevent the violation in the first instance, or allow it to win the race for leniency, this MOU suggests that the Division will not be receptive to collateral consequence arguments that historically have resulted in deferred prosecution agreements. Put differently, the MOU signals that the Division will be unlikely to enter into DPAs in the healthcare sector absent a non-leniency company qualifying under the DAG memo's self-reporting standard (i.e. voluntarily self-disclosure, full cooperation, appropriate remediation, and the absence of aggravating factors).

The Division has shown its willingness to incentivize strong corporate compliance programs, and companies should expect the Division to continue to innovate how it does so. Given the potential benefits, whether preventing anticompetitive misconduct altogether, or, failing that, being able to timely self-report, they should not wait to begin tightening up compliance programs to be in line with what the Division has already clearly telegraphed it wishes to see.

V. CONCLUSION

The recent revisions and updates to the Division's leniency policy are consistent with the overall approach to corporate enforcement at the DOJ. While attempting to preserve the fundamental incentives that encourage self-disclosure — protection from conviction, fines, monitors and, if applicable, debarment — the Division is also seeking to promote good corporate cultures that attempt to prevent unlawful anticompetitive conduct in the first instance and, failing that, remediate the harm caused and take the necessary steps to reduce the risk of reoccurrence. This changing framework for corporate enforcement will guide the Division's enforcement efforts moving forward, and corporate counsel should understand the changed paradigm as it considers minimizing antitrust risk. These efforts are especially relevant in a hyper-aggressive enforcement environment where the Division has been given significant additional resources for its efforts by Congress.

42 DAG Remarks, supra note 39. See also Marshall Miller, Principal Associate Deputy Att'y Gen., U.S. Dep't of Justice, *Remarks at the American Bankers Association Financial Crimes Enforcement Conference*, https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-american ("The department is also reviewing the debarment and suspension process, including how to streamline information sharing between agencies.").

43 See Memorandum of Understanding Between the Antitrust Division of the U.S. Department of Justice and the Office of the Inspector General of the U.S. Department of Health and Human Services ("HHS MOU"), https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-office-inspector-general-department-health-and.

44 *Id.*

THE NEWEST WAVE OF ANTITRUST "CRIMES": REVIVAL OF CRIMINAL MONOPOLIZATION

BY ANN O'BRIEN[1]

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I. INTRODUCTION

The Antitrust Division (the "Division") of the Department of Justice ("DOJ") is zealously expanding the types of conduct it is prosecuting criminally. In recent years, the Division has aggressively exercised its prosecutorial powers to criminally prosecute more conduct under both Section 1 and Section 2 of the Sherman Antitrust Act.[2] Indeed, waves of significant policy and practice changes are making the criminal waters of antitrust choppier than ever.

II. THE FIRST WAVE – CRIMINAL NO POACH AND LABOR FOCUS

The first wave of criminal antitrust expansion was the criminalizing of no-poach agreements as part of an intense focus on labor movement.[3]

In 2016 the DOJ and FTC issued joint guidance for HR professionals about the application of the federal antitrust laws to hiring practices and worker mobility.[4] The DOJ said it would criminally prosecute no-poach agreements and other forms of collusion in the labor market, with a pointed warning: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poach agreements."[5]

Wage-fixing, a form of price-fixing, includes agreements among firms to fix salaries at a certain level or within a certain range, which the Division analogizes to price-fixing. No-poach agreements, on the other hand, are agreements among firms not to solicit or hire each other's employees, which the Division analogizes to market allocation. Comparing to these long-recognized categories of *per se* antitrust conduct – price fixing and market allocation – is important to the Division's criminal prosecution of this conduct because *per se* antitrust offenses typically require no showing of actual harm or affect; the agreement itself is considered a per se crime. While criminal antitrust cases, like any other federal criminal case, require DOJ proof beyond a reasonable doubt, the per se classification allows a shortcut, i.e. converting the conduct to essentially a strict liability crime, once the DOJ shows an agreement.

For years after the release of the 2016 HR Guidance, the DOJ continued to foreshadow criminal no-poach and labor market charges were coming.[6] Yet, they did not bring the first criminal wage-fixing case until December 2020;[7] the first criminal no-poach case did not come

2 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Address at the 2022 Spring Enforcers Summit, at 6 (Apr. 4, 2022), https://www.justice.gov/atr/page/file/1494606/download ("When Congress passed the Sherman Act in 1890, it made Section 2 monopolization a crime just as it did for Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. . . . the [Antitrust] Division will not hesitate to enforce the law.").

3 This is a topic CPI has covered in prior columns. See, e.g. Ann O'Brien and Kaley Sullivan, *DOJ Antitrust Division Not Backing Down on Labor*, Competition Pol'y Int'l (Oct. 5, 2022). This continues to be in the news, particularly in light of the FTC's recent move to outlaw all non-compete agreements. See Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

4 DOJ Antitrust Division & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016), https://www.justice.gov/atr/file/903511/download [hereinafter Antitrust Guidance].

5 *Id.* at 4.

6 See Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Assistant Attorney General Makan Delrahim Delivers Remarks at the Public Workshop on Competition in Labor Markets, (Sept. 23, 2019) ("I want to reaffirm that criminal prosecution of naked no-poach and wage fixing agreements remains a high priority for the Antitrust Division."), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition. Also, in April 2020, with the spread of the COVID-19 pandemic, the DOJ and FTC issued a Joint Agency Statement, noting that the agencies are on "alert" and carefully observing the hiring, recruiting, retention, or placement of workers to identify collusive and anticompetitive conduct, including wage-fixing, no-poach agreements, the exchange of competitively sensitive information, and non-compete agreements. See also DOJ Antitrust Division and Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets (Apr. 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

7 Press Release, U.S. Dep't of Just., Former Owner of Health Care Staffing Company Indicted for Wage Fixing, (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

until 2021.[8] The first criminal wage-fixing and no-poach trials began on April 4, 2022, and both resulted in across-the-board acquittals for all defendants on all antitrust charges.[9]

Despite back-to-back losses in these critical first criminal trials, Antitrust Division Assistant Attorney General Kanter has repeatedly vowed that he and the Division won't back down in efforts to investigate and criminally charge no-poach and wage-fixing agreements.[10]

The Division has brought other criminal no poach cases that are pending trial,[11] and obtained one plea in a no poach case, resulting in the payment of a $62,000 fine and $72,000 in restitution[12] and a post-indictment pretrial diversion for the charged executive.[13] However, the Division has yet to convince a jury to criminally convict a single defendant for no-poach or wage-fixing conduct.

The Division has spent significant resources investigating and attempting to prosecute no poach crimes, with, so far, underwhelming results. But, given its aggressive approach, we can expect to see the Division bring more labor cases as it forges forward relentlessly into the choppy waves of these murky labor-focused criminal antitrust waters.

III. THE NEW WAVE – CRIMINAL MONOPOLIZATION

The Division has recently returned to criminally prosecuting monopolization, bringing its first criminal monopolization case under Section 2 of the Sherman Act in over 40 years.[14] The DOJ has long been able to bring criminal charges under both Sherman Act Sections 1 (collusion) and 2 (monopolization), but for decades it has exercised its prosecutorial discretion to reserve criminal antitrust cases under Section 1 for only the post pernicious horizontal agreements among competitors not to compete deemed by courts *per se* harmful to competition – such as price-fixing, bid-rigging, and market allocation.

When the Division last brought criminal Section 2 cases in the 1970s, the Sherman Act did not carry felony penalties, so a corollary Section 2 case brought alongside a traditional Section 1 case allowed for cumulative penalties for multiple counts. This was no longer necessary after Sherman Act crimes became felonies in 1974, and even less so, after the US Sentencing Guidelines came into existence in the 1980's providing direction for sentencing multiple counts.

The resurrection of criminal prosecution of monopolization, just like criminal no poach cases, overturns decades of antitrust enforcement practice, creating new uncertainty. These cases blur previously bright criminal antitrust lines, and have enormous implications for companies and individual executives who operated under different rules for the past half century and the in-house and outside counsel advising them.

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8 Press Release, U.S. Dep't of Just., Health Care Company Indicted for Labor Market Collusion, (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion; Press Release, U.S. Dep't of Just., Indictment in Ongoing Investigation of Labor Market Collusion in Health Care Industry, (Jul. 15, 2021), https://www.justice.gov/opa/pr/indicted-ongoing-investigation-labor-market-collusion-health-care.

9 See *[Company] and its Former CEO Acquitted of U.S. Antitrust Charges*, Reuters (Apr. 18, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/ acquitted-antitrust-charges-2022-04-15/; Katie Buehler, *DOJ's 1st Wage-Fixing Suit Ends With Not Guilty Verdicts*, Law360 (Apr. 14, 2022), https://www.law360.com/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guilty-verdicts; See also Ann O'Brien & Kayley Sullivan, *Cartels 2022 – Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down … In Fact, Tripling Down*, Competition Pol'y Int'l, (Sept. 11, 2022), https://www.competitionpolicyinternational.com/cartels-2022-halfway-there-update-policy-shifts-labor-and-trial-losses-and-doj-not-backing-down-in-fact-tripling-down/.

10 Khushita Vasant, *Kanter Says US DOJ 'Not Backing Down' From Recent Losses In Criminal Antitrust Trials, Pledges More Litigation*, MLex Marketing Insight (Apr. 21, 2022), https://mlexmarketinsight.com/news/insight/kanter-says-us-doj-not-backingdown-from-recent-losses-in-criminal-antitrust-trials-pledges-more.

11 See, e.g. Ann O'Brien & Kayley Sullivan, *Cartels 2022 – Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down … In Fact, Tripling Down*, Competition Pol'y Int'l, (Sept. 11, 2022), https://www.competitionpolicyinternational.com/cartels-2022-halfway-there-update-policy-shifts-labor-and-trial-losses-and-doj-not-backing-down-in-fact-tripling-down/.

12 Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

13 Megan Rahman, Laura Kuykendall & A. Christopher Young, *Hee Pretrial Diversion Agreement Signals Small Victory for Antitrust Division in Wage Fixing and Staffing Allocation Case*, Lexology (Jan. 30, 2023), https://www.lexology.com/library/detail.aspx?g=aca550a9-98e3-4497-a063-407fb62d840e#:~:text=The%20government%20filed%20the%20pretrial%20diversion%20agreement%20on,hours%20of%20community%20service%20and%20maintaining%20good%20behavior.

14 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers ("We will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization.").

The first criminal monopolization cases brought are somewhat confusing and leave many unanswered questions about the direction the Division will take and where the criminal versus civil line will be drawn in monopolization cases brought under the Sherman Act.

IV. FIRST CRIMINAL MONOPOLIZATION CASES IN DECADES

A. Zito: An Invitation to Collude – No Actual Agreement Reached

On October 31, 2022, in a case called *U.S. v. Zito*, the Division announced its first criminal conviction for monopolization under Section 2 of the Sherman Antitrust Act since the 1970s.[15] Zito is an invitation to collude — i.e. offer that did not result in an agreement — that could have been charged under Section 1 of the Sherman Act as a *per se* market allocation case criminal antitrust case *if* the solicited competitor had agreed rather than reporting the overtures to federal authorities.

Zito, the owner of a paving and asphalt company that primarily worked to seal cracks in federal highways, pled guilty to one count of attempted monopolization for proposing to a competitor a market allocation scheme whereby his company would cease competing for business in Nebraska and South Dakota in exchange for the same treatment by a competitor operating in Montana and Wyoming. He also offered to pay the competitor $100,000 for lost business in those two states. The scheme, had it been agreed-to, would have created an effective monopoly for Zito's company in his allocated territory.

In the plea agreement, Zito agreed to pay a $27,000 fine (apparently calculated from one percent of the "relevant volume of commerce"). Zito has not yet been sentenced, and that sentencing will be closely watched by the antitrust bar.

This case was very significant because for decades, Section 1 criminal enforcement by the Division has been reserved for horizontal agreements among competitors that have been deemed by courts per se harmful to competition. For decades the Division insisted the *agreement* was the crime, but now it appears DOJ views the *invitation itself* without any agreement, as a crime again too.

It is notable that the Division has previously pursued some invitation to collude cases as attempted wire fraud cases[16], and that the FTC has used Section 5 of the FTC Act to challenge invitations to collude.[17]

The Division and FTC have traditionally pursued violations of Section 2 civilly under an analytical framework that painstakingly defines the relevant market in which the conduct is occurring, assesses market power, determines harm to competition, and weighs procompetitive justifications for the conduct.

Another criminal monopolization case that quickly followed *Zito*, raised more questions in this area.

B. Martinez, et al.: An Allegedly Violent Cartel of Another Sort

On the heels of *Zito*, in December 2022, the Division and the Criminal Division's Organized Crime and Gang Section, along with the U.S. Attorney's Office for the Southern District of Texas, filed *US v. Martinez et al.*, the second modern criminal monopolization case. This time, as a contested, indicted case rather than a conviction by plea agreement. The Division charged violations of both Section 1 and Section 2 of the Sherman Act.

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15 The Division had not brought a criminal case under Section 2 since 1977 in when it indicted Braniff Airways, Inc., and Texas International Airlines, Inc., on charges of conspiring to monopolize air service designed to keep another airline from offering air service between Dallas-Fort Worth, Houston and San Antonio. See Carole Shifrin, Braniff, TI Indicted for Monopoly, Wash. Post (Aug. 17, 1977), https://www.washingtonpost.com/archive/business/1977/08/17/braniff-ti-indicted-for-monopoly/8b809f34-a831-4f83-813b-3d28fd698e5a/; *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978). Interestingly, a few years later, in *United States v. American Airlines, Inc. and Crandall*, Civ. Action No. 3-83-0325-D (N.D. Tex. Feb. 23, 1983), DOJ sued the defendants civilly for allegedly inviting Braniff Airlines to collude on certain city-pair routes involving the Dallas-Fort Worth airport. Braniff declined the invitation and reported the conduct to the DOJ. DOJ brought a Section 2 case on the theory that the invitation to collude would have resulted in a monopolized market. The Fifth Circuit held that no agreement was required in order to sustain the Section 2 verdict, and given the relevant market conditions, American Airlines had a dangerous probability of obtaining monopoly power had Braniff agreed to its proposal. *United States v. American Airlines*, 743 F.2d 1114, 1116 (5th Cir. 1984).

16 See *United States v. Ames Sintering*, 927 F. 2d 232 (6th Cir. 1990) (bid rigging attempt); United States v. Critical Industries, Crim. No. 90-00318 (D. N.J. July 24, 1990) (price-fixing attempt).

17 Press Release, Fed. Trade Comm'n, Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude (Jul. 21, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited-competitors-collude.

The 11-count indictment charged 12 individuals in a conspiracy to monopolize the transmigrante forwarding industry in the Texas border region. Charges included conspiracies to fix prices and allocate the market for transmigrante services in violation of Section 1 of the Sherman Act, and conspiracy to monopolize the same market in violation of Section 2 of the Sherman Act. Certain defendants were also charged with various extortion and money laundering charges. The factual allegations include threats, intimidation, and acts of violence against.

While the *Martinez* case involves a host of typical organized crime-type criminal charges, sounding more like a different kind of "cartel" than an antitrust cartel, AAG Kanter's remarks in the press release emphasized the Antitrust Division's continued intent to "use all the tools at its disposal – including Section 2 of the Sherman Act – to target anticompetitive conduct . . . "[18]

The *Martinez* case was a real head-scratcher for many in the antitrust cartel bar. The conduct charged allegedly involved threats of physical violence and extortion along the Texas border and does not seem to naturally cry out for antitrust charges. The antitrust charges do not add to any potential sentence under the US Sentencing Guidelines, making the deterrent effect of the charges even more confusing. The inclusion of the antitrust count will likely complicate the proceedings.

The *Martinez* case seems very fact-specific and does not provide guidance to the bar or business community regarding the types of business conduct the Division views as constituting criminal monopolization. Given the alleged facts and multiple defendants involved, and the lack of modern precedent, the Division can expect intense motion practice and argument over jury instructions in this novel criminal prosecution.

V. OPEN QUESTIONS REGARDING CRIMINAL MONOPOLIZATION

A. Sentencing

Because the *Zito* plea agreement does not offer a clear recommended sentence—it merely refers to the sentencing guidelines—we can only speculate about what kind of sentence Zito might face. The threat of jail time for individuals has long been a Division goal and threatening it here is consistent with DAG Monaco's recent pronouncement this is the DOJ's intent to hold individuals accountable.[19] But, the relatively small fine suggests the potential for a relatively light sentence. And, while not the same jurisdiction as *Zito*, a recent ruling from the Third Circuit interpreting the word "loss" in the U.S. Sentencing Guidelines for fraud as only "actual loss" (as opposed to intended loss) could be helpful precedent for defendants like Zito, who was convicted for an attempt.[20]

Another interesting issue the sentencing raises is the plea agreement's reference to U.S. Sentencing Guidelines ("USSG") §2R1.1. That guideline, by its own title, does not clearly apply to criminal monopolization. The title is: "bid-rigging, price-fixing, and market-allocation agreements among competitors."[21] Not only is monopolization absent from the title, but the plain language of the statute contemplates agreements between competitors, i.e. conspiracies, which were not part of the charge against Zito and would not apply in potential future criminal monopolization cases involving unilateral conduct.

USSG §2R1.1 has never been applied to Section 2 conduct, and even if Zito agreed in his plea that it should apply, future defendants in litigated cases like *Martinez* have several good arguments why it should not. The fact is there is no sentencing guideline for criminal monopolization, probably because the Antitrust Division has not, by policy or practice, pursued such conduct criminally in so long. Indeed, the Sentencing Guidelines did not exist the last time the Division brought a criminal monopolization case.

B. Elements of Criminal Monopolization

Lacking modern precedent for criminal monopolization, it appears that in the Zito case, DOJ defaulted to citing the same elements as have been used in civil monopolization cases. Those elements are:

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18 Press Release, U.S. Dep't of Just., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0.

19 See Lisa Monaco, Deputy Attorney General, U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

20 See *United States v. Banks*, ___ *F.4th* ___, *2022 WL 17333797 (3d Cir. Nov. 30, 2022).*

21 U.S. Sent'g Guidelines Manual § 2R1.1(c) (U.S. Sent'g Comm'n 2021), https://guidelines.ussc.gov/gl/%C2%A72R1.1.

(1) Knowingly engaging in anticompetitive conduct;
(2) intent to gain monopoly power; and
(3) a dangerous possibility that, had the defendant's proposed agreement been effectuated, the relevant company would have gained monopoly power in the relevant market.

In future litigated cases like Martinez, it will be interesting to see whether defendants will dispute these elements, or if the government will find it difficult to meet the criminal "beyond a reasonable doubt" burden of proof on these typically civil elements.

VI. THE NEXT WAVE: CRIMINAL PROSECUTION OF INFORMATION SHARING?

On February 2, 2023, the Division announced it was withdrawing three policy statements outlining safe harbors for information sharing in the healthcare industry, calling the three longstanding antitrust policies concerning healthcare markets (two from the 1990s, and one from 2011), calling them outdated.[22] These withdrawals signal increased scrutiny of information sharing extending to other industries beyond healthcare.

While agreements to share information have not previously been considered *per se* illegal or prosecuted criminally by the Division,[23] the law in the United States differs from that in the European Union and some other countries that consider information exchanges closer to antitrust cartels. The Division's increased scrutiny on information exchange, and the U.S.'s seemingly less aggressive position on than foreign enforcers, make information exchanges that do not rise to the level of an agreement a possible next wave to watch closely on the horizon.

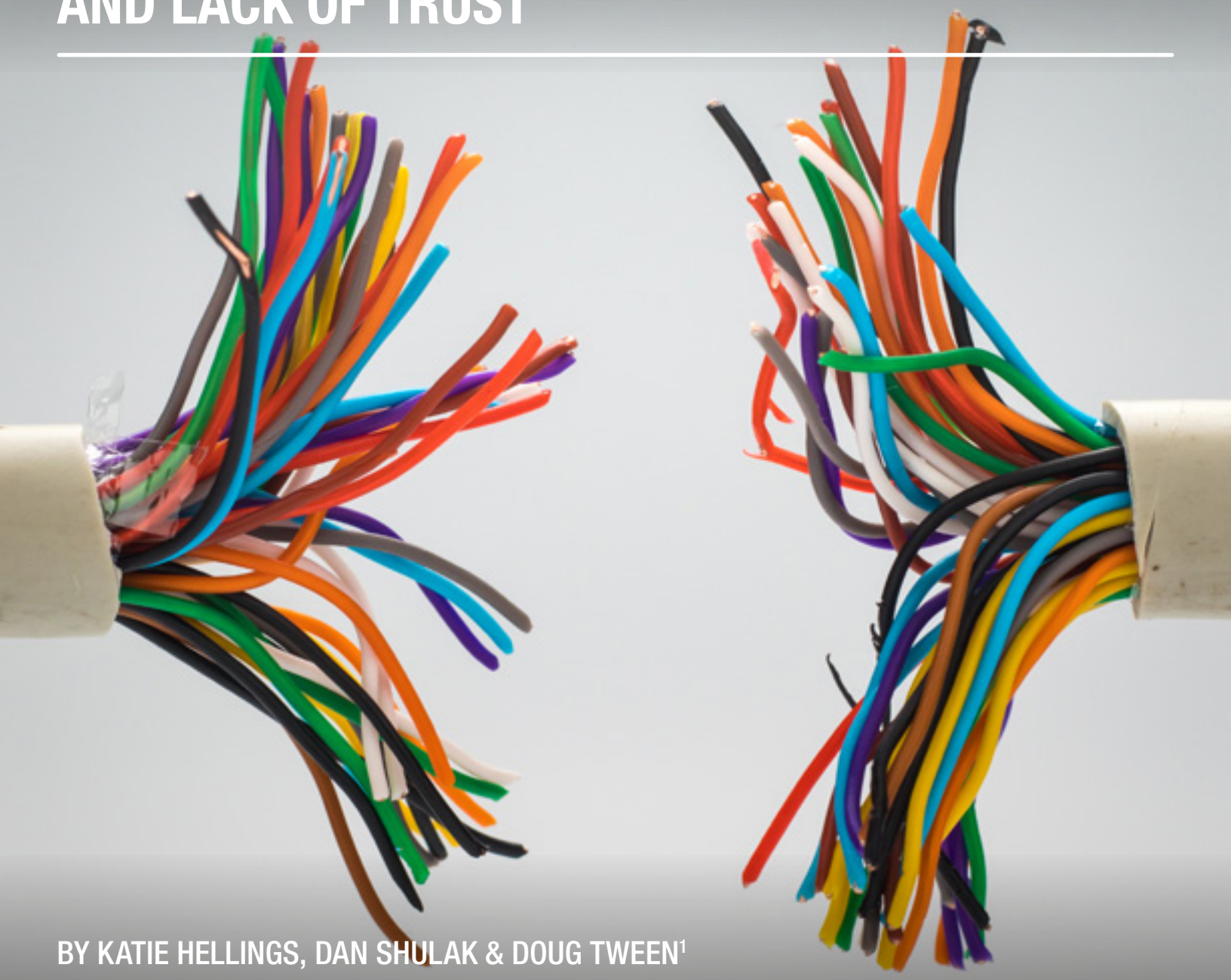
VII. CONCLUSION

The criminal no-poach and monopolization cases illustrate that antitrust law is nuanced and actively developing, underscoring just how important antitrust compliance is for companies and their executives. During the last four decades, there wouldn't have been a criminal antitrust prosecution against Zito because the competitor did not agree to the plan and therefore there would have been no market allocation *agreement* to prosecute. Now, executives risk jail time for merely extending the invitation. With the Division aggressively expanding the scope of antitrust conduct that it is willing to prosecute criminally, and self-reporting benefits based on speed of reporting, it is more imperative than ever that employees are aware of antitrust red flags and know to report to counsel immediately.

22 See Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

23 Antitrust Guidance, *supra* note 3, at 4 (2016) ("While agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect."), https://www.justice.gov/atr/file/903511/download#:~:text=Sharing%20information%20with%20competitors%20about%20terms%20and%20conditions,example%2C%20the%20DOJ%20sued%20the%20Utah%20Society%20for.

DISCONNECT BETWEEN DOJ ANTITRUST DIVISION PROSECUTORS AND CRIMINAL ANTITRUST BAR RESULTS IN UNCLEAR POLICY AND LACK OF TRUST



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Experienced criminal antitrust lawyers in the last few years have observed major changes in policies and procedures at the U.S. Department of Justice Antitrust Division (the "Division" or "DOJ"). These changes have led to uncertainty and shaken the trust between defense attorneys and prosecutors, affecting the advice defense attorneys provide to their clients in Division investigations and prosecutions.

Specifically, among other things, the Division has largely abandoned its long-standing practice of providing targets of investigations with notice and an opportunity to be heard by Division management in the front office; burdened leniency applicants with an obligation to "promptly" report and to make consensual recordings; made clear that current employees of Type B leniency applicants will no longer presumptively be included in the company's leniency; criminalized conduct that for decades had been treated civilly; and in at least two cases indicted individuals who believed their cooperation was going to result in an agreement from DOJ not to prosecute them.

There is growing evidence that these changes in policy and practice are negatively impacting the Division's cases. In 2022 the Division failed to secure a guilty verdict in its highly publicized investigation into alleged price fixing in the poultry industry. Following two mistrials, DOJ pursued an unprecedented third trial after having to explain to the district court why a third trial was likely to yield a different result. Following that third trial, and DOJ's altered trial strategy, a Denver jury acquitted all five defendants — all current and former executives in the chicken industry. In September 2022, in other cases resulting from the same investigation, the Division moved to dismiss the charges against the two remaining corporate defendants, Claxton Poultry and Koch Foods. Shortly thereafter, in October, the Division dismissed charges against the two remaining individual defendants — two former executives from Pilgrim's Pride[2] — after the court's order excluding all of the government's exhibits of co-conspirator statement evidence. Notably, one of the defendants in this case was indicted by the government despite having cooperated extensively in the investigation.

In April 2022, the Division also lost its first two criminal labor market trials: a jury in Texas acquitted the owner of a physical therapy staffing company alleged to have conspired with competitors to lower workers' pay, and a jury in Colorado found dialysis service provider DaVita and its former CEO not guilty of engaging in criminal "no-poach" agreements with competitors. Less than six months later, in September 2022, a Florida jury advised the court that it was deadlocked in its deliberations in a criminal trial involving allegations that the founder of an oncology group engaged in a conspiracy to split the market for cancer treatments with a competitor.[3] That case resulted in a mistrial.

DOJ had better success in 2022 securing guilty verdicts in its more traditional bread-and-butter bid-rigging and price-fixing cases.[4] However, these cases were much smaller, with relatively fewer defendants and smaller penalties, than the broad international investigations that were common in years past. The fines secured by DOJ for criminal antitrust cases in 2021 and 2022 dipped significantly from the prior two years. According to DOJ, as of November 8, 2022, the agency had secured only $2 million in criminal antitrust fines and penalties.[5] In 2021, the total was $151 million. This is compared to $365 million in 2019 and $529 million in 2020 — a drop of more than $520 million in fines in just two years.

DOJ's poor trial record and decreasing fine totals are a product, at least in part, of policy changes that have diluted the efficacy of the leniency program. Leniency applications are down. Without leniency applicants, the Division has fewer cooperating witnesses to rely upon in investigating and prosecuting cases. As a result, DOJ has filed fewer cases and has consistently lost at trial.

There is a considerable disconnect between the Division's public statements about transparency and its opaque practices, causing confusion in the defense bar and resulting in a general reluctance to cooperate. In a series of recent public remarks, Division leadership has emphasized transparency and consistency in criminal antitrust enforcement. For example, Assistant Attorney General Jonathan Kanter has stressed that a foundational goal for the Division is the promotion of transparency and "access to justice"[6] and that the agency is committed to making

2 Pilgrim's Pride was the lone conviction in the broiler chicken cases, having pled guilty in in February 2021.

3 The court received a note from the jury during deliberations stating that it was essentially "deadlocked." The judge indicated that she had intended to have the jurors keep deliberating, however she ultimately declared a mistrial because of Hurricane Ian's impact on the court proceedings.

4 See Press Release, U.S. Dep't of Justice Antitrust Division, Two Kentucky Real Estate Professionals Plead Guilty to Bid Rigging Farmland Auction (Nov. 30, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Construction Company Owner Pleads Guilty to Bid Rigging and Bribery (Nov. 14, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Two Companies Plead Guilty in Bid Rigging Scheme for Insulation Contracts (Aug. 4, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Military Contractor Pleads Guilty to Rigging Bids for Public Contracts in Texas and Michigan (July 14, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Commercial Flooring Contractor and Its Former President Plead Guilty to Antitrust Charges (June 9, 2022).

5 Department of Justice Antitrust Division, Total Criminal Fines & Penalties (updated 8 November 2022), https://www.justice.gov/atr/total-criminal-fines.

6 American Bar Association 70th Antitrust Law Spring Meeting (2022 ABA Spring Meeting), Enforcers Roundtable (April 8, 2022), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/events/2022-spring-meeting/2022-at-spring-brochure.pdf.

criminal charging decisions on the basis of "transparent and predictable criteria"[7] readily available to the public. Touting a focus on enforcement policies written in "plain language" for broad accessibility, Kanter has publicly stated his intention for there to be "no unwritten rules" for how the Division carries out its enforcement mandate.[8]

Echoing these sentiments, former Deputy Assistant Attorney General Richard Powers[9] also said publicly that the Division is focused on promoting transparency and accessibility,[10] stating in July 2021 that "when we consistently apply written, publicly available policies and guidance to the facts of each case, and when we make our decision-making principled and transparent, that increases confidence in our justice system."[11]

Despite these public statements, however, recent policy changes have eroded the critical trust with the defense bar. Historically, trust between the Division and criminal antitrust defense lawyers has been essential to the Division's effectiveness in securing necessary cooperation from individuals and companies. The Division's recent break from historical practices, changes in policy, and unpredictability has resulted in less cooperation, reducing the Division's ability to obtain the results it has experienced in the past.

I. RECENT BREAKS IN PAST PRACTICE

There have been recent reports of unpredictable interactions and breaks from past practice between investigation subjects and Division prosecutors that have left the defense bar with concerns about the Division's commitment to transparency and consistency. Although it is obviously impossible to get a full picture of closed-door negotiations with Division prosecutors, recent public court filings have shed some light on alleged misunderstandings, inconsistencies, and breakdowns in communication between Division staff and cooperating subjects that threaten to enhance a culture of distrust and may further stymie the defense bar's ability to advise clients to cooperate in Division investigations.

A. Unpredictable Consequences of Cooperation

One such situation involved an individual defendant in *U.S. v. McGuire et al.*, one of the broiler chicken cases.[12] On February 7, 2022, a defendant filed a Motion to Dismiss, arguing that the indictment against him was untimely and outlining his experience providing the Division "extensive cooperation" for more than a year.[13] The defendant stated that he "voluntarily assisted the government's investigation, including by explaining documents and offering background knowledge of the industry that was crucial for the government's understanding of its own case." According to the defendant, this assistance included sitting for three interviews (totaling approximately 13 hours), providing four attorney proffers, and responding to four substantive follow-up requests.[14]

However, instead of telling the defendant that a non-prosecution agreement was unavailable to him, the Division instead allegedly continued to take his assistance and then indicted him in July 2021 — eight months after indicting his alleged co-conspirators. Even when no promise is made by the Division regarding cooperation, for DOJ to continue to plumb the knowledge of a cooperating subject when it intends to indict him is generally inconsistent with past practice and arguably in bad faith. If experienced defense counsel can be misled and cooperating witnesses are indicted after multiple interviews, other defense counsel will be hesitant to engage with the Division and provide cooperation. If nothing else, it makes it significantly more difficult to advise clients to proceed with proffer interviews when there is an increased risk that the interview will simply be used by prosecutors to support an indictment of the interviewee. The likeliest result is that defense counsel will err on the side of caution and advise clients to assert their Fifth Amendment privilege against self-incrimination and refuse to speak with prosecutors without immunity and outside of the grand jury. At a minimum, this will significantly slow down investigations, as prosecutors will need to schedule scarce grand jury time. More likely is that prosecutors will be denied potentially significant evidence.

7 DOJ and FTC Spring Enforcers Summit (April 4, 2022) transcript, https://www.justice.gov/atr/page/file/1494606/download.

8 *Id.*

9 Richard Powers left DOJ in September 2022 for private practice. Marvin N. Price, Jr. is currently serving as Acting Deputy Assistant Attorney General for Criminal Enforcement until the position is filled permanently.

10 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice (April 6, 2022).

11 Press Release, U.S. Dep't of Justice Antitrust Division, Acting Assistant Attorney General Richard A. Powers Delivers Remarks at the Symposium on Corporate Enforcement and Individual Accountability Hosted by the University of Southern California Gould School of Law (July 21, 2021).

12 *U.S. v. McGuire et al.*, 21-cr-00246 (D. Co.) Indictment, https://www.justice.gov/atr/case-document/file/1420911/download.

13 Def. Mot. To Dismiss the Indictment or for Severance, 3, *U.S. v. McGuire et al.*, ECF No. 79.

14 *Id.*

Similar allegations were made by a defendant in the Texas wage-fixing case. In his Motion to Dismiss the Indictment, the defendant alleged that the Division "breached [its] oral agreement not to prosecute" him.[15] The defendant claimed that the Division reneged on an oral non-prosecution agreement without providing "any evidence to show that [the defendant] materially breached the terms" of the agreement.[16] The court rejected the defendant's Motion to Dismiss on the basis that the oral agreement was not legally enforceable. Yet this apparent miscommunication and misunderstanding between prosecutors and defense counsel will only make other defense lawyers more cautious and hesitant in future dealings with the Division.

B. Additional Burdens and Decreased Benefits for Leniency Applicants

The Division has recently increased the burdens and decreased the benefits of leniency. As Powers acknowledged in early 2020, "[w]e recognize that it generally takes longer now to receive a conditional letter than it did 20 years ago; attorney proffers and hot documents are no longer sufficient and multiple witness interviews are almost always requested by staff."[17] Powers also stated that the Division can require a corporate leniency applicant to compel employees to do consensual recording.[18] Put simply, these requirements make seeking leniency more expensive and less attractive.

In addition, the Division has shifted its practices regarding current employees. Historically, current employees of corporate leniency applicants were typically included in both Type A and Type B corporate leniency agreements, assuming they cooperated in the Division's investigation and prosecution. However, the Division now says that for Type B leniency, even current employees will be subject to individual assessments as to whether they will be included in the corporate leniency agreement. This uncertainty regarding individual exposure makes counselling companies and individuals very challenging.

The changes in the leniency program now require counsel to tell a client considering applying for leniency that it is entirely possible that the Division will look to exclude and ultimately prosecute its entire senior management — making leniency an unattractive option in all but the direst circumstances. Current DOJ policy has created additional hurdles in the leniency process and removed benefits for applicants, which in turn disincentivizes companies from applying for leniency, especially Type B leniency. A recent instance involving a current employee of Tyson Foods, which is understood to be the leniency applicant in the broiler chicken investigation, illustrates the issues with DOJ's recent policy changes.The employee was excluded from the corporate leniency agreement and compelled to enter into a separate non-prosecution agreement. While the specifics of that employee's case and the leniency discussions are obviously not public, excluding a current employee from a corporate leniency agreement does not inspire confidence in the leniency program among both the defense bar and individual defendants, and creates uncertainty around the anticipated benefits of pursuing leniency. Nor does it inure apparent benefits to DOJ prosecutors who have to engage in additional lengthy non-prosecution agreement negotiations only to present a less appealing cooperating witness to a jury.

The potential individual exposure for employees of the leniency applicant, coupled with the Division's requirement that companies make current employees available for interviews to substantiate the reported conduct, significantly complicates a company's leniency calculus. How does a company make employees available for DOJ interviews if those employees are not going to be afforded the protections of the company's leniency agreement? When must a company retain separate counsel for individuals? Separate individual counsel for employees might be required at the earliest stages of a leniency application if individual exposure is unknown, making cooperation with DOJ slower and more difficult. The recent changes to DOJ's leniency program discourage companies from seeking leniency by making it more difficult and more expensive to qualify.

Finally, the recent revisions to the Division's Leniency Policy announced on April 4, 2022[19] add a "promptness" requirement, directing applicants to "promptly report[]" illegal activity upon its discovery.[20] Prior to these recent revisions the directive in the leniency policy was for applicants to engage in "prompt and effective termination." However, in early 2022, Powers said that the amendments make "prompt reporting"

15 Def. Mot. To Dismiss the Superseding Indictment, *U.S. v. Neeraj Jindal and John Rodgers*, ECF No. 45, https://www.law360.com/articles/1395949/attachments/0.

16 *Id.* at 9.

17 Richard A. Powers, Deputy Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement, Remarks at the 13th International Cartel Workshop, (February 19, 2020).

18 *Id.* ("We may also require covered employees to assist with proactive investigative techniques, where appropriate.").

19 Press Release, U.S. Dep't of Justice Antitrust Division, Antitrust Division Updates its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (April 4, 2022).

20 The revisions to the Leniency Policy also add a directive for an applicant to make efforts to "remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity." This supplements the existing requirement that the company pay restitution to victims "when possible."

rather than "termination" the key.[21] While the Revised Leniency Policy FAQs explain that "an organization may still be eligible for leniency if it conducts a preliminary internal investigation in a timely fashion to confirm that it committed a violation *before* self-reporting,"[22] the FAQs provide little clarity on what the Division will consider to be "in a timely fashion" in this context (aside from noting that an organization that confirms its involvement in illegal activity but does not report until after learning that the Division has opened an investigation will not be eligible for leniency.) While stating that it is the "applicant's burden to prove that its self-reporting is prompt," the FAQs do not make clear under what circumstances applicants will be considered to have met this burden. Practitioners are left with minimal guidance on how to effectively advise potential leniency applicants on what timing will meet the government's standard of "prompt" reporting.

In addition, the revised FAQs add compliance officers to the list of authoritative representatives for the purpose of determining when an organization has "discovered" illegal activity.[23] Practically speaking, it can take considerable time for a compliance employee to discover potentially problematic conduct, investigate it appropriately, and report it to in-house counsel. Companies now face the risk that self-reporting will no longer be considered prompt because it took time for the internal compliance process to play out.

C. Front Office Access

For at least the last 50 years, front office pre-indictment meetings were a standard part of the charging decision process — not as a matter of right, but certainly a longstanding practice — and one that benefitted all sides. If, after a thorough investigation and hearing arguments from defense counsel, Division staff recommended bringing criminal charges, targets had traditionally been granted an opportunity to be heard at the front office level. This layer of prosecutorial oversight benefited all parties and resulted in fairer outcomes. Staff may spend many years sifting through large amounts of evidence potentially implicating an array of companies and individuals believed to be part of sometimes vast conspiracies. Understandably, certain biases — including confirmation bias — can develop, and front office meetings provided defense counsel with an opportunity to point out to Division leadership deficiencies in the government's case that may have been overlooked or undervalued by staff that is living in the weeds of an investigation. At the same time, even unsuccessful pre-indictment front office meetings provided defense lawyers with the opportunity to communicate to their clients that they had done everything possible to prevent an indictment but that the prosecution was still bent on moving forward. This final "moment of truth" situation often led clients to conclude that they were better served by pleading guilty rather than being indicted.

But recently, front office meetings have become the exception rather than the rule. As Powers stated:

the Justice Manual [] provides, '[i]n investigations handled by the Antitrust Division, a target's counsel is usually afforded an opportunity to meet with staff and the office or section chief regarding the recommendation being considered.' But that is far from absolute. If the target and counsel have declined to engage throughout the investigation, or made apparent to staff that further engagement will not be productive, then the Division will not continue to spend its valuable time and resources on pointless meetings — and if we have decided not to notify the target of its status, of course there will not be an opportunity for a meeting.[24]

Recently, we have seen no-notice or minimal-notice indictments in the broiler chicken cases, which resulted in two hung juries followed by an acquittal. By refusing meetings with counsel that would provide prosecutors with an informed, big-picture understanding of the facts of the case and give targets the opportunity to negotiate pleas with cooperation, the Division is doing its own investigations a great disservice. And at what cost? These front-office meetings are not resource-intensive for the Division. The costs of such meetings are quite low compared to the benefits of meaningful review and overall fairness.

II. SCOPE OF CRIMINAL CONDUCT INCREASINGLY UNCLEAR

In addition to recent breaks in practice, the Division has created additional uncertainty around the actual conduct it intends to investigate and prosecute criminally. For example, on February 25, 2022, DOJ surprised many when, in a Statement of Interest it filed in a Nevada State court

21 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

22 U.S. Department of Justice Antitrust Division, Frequently Asked Questions about the Antitrust Division's Leniency Program, at 8 (Update published April 4, 2022.

23 *Id.*

24 Press Release, U.S. Dep't of Justice Antitrust Division, Acting Assistant Attorney General Richard A. Powers Delivers Remarks at the Symposium on Corporate Enforcement and Individual Accountability Hosted by the University of Southern California Gould School of Law (July 21, 2021).

lawsuit,[25] it argued that non-compete restrictions could be considered *per se* violations of Section 1 of the Sherman Act.[26] While DOJ does not make reference to criminal liability or prosecutions in its Statement of Interest, DOJ's position that in certain situations non-compete agreements can be per se unlawful could be a first-step towards criminal scrutiny of non-competes, which would be a significant expansion of criminal liability related to a common business arrangement. Without more explicit guidance from the Division, defense lawyers are left wondering whether a few sentences in a Statement of Interest should be interpreted as the Division announcing a major shift towards targeting non-compete agreements as per se violations of the antitrust laws.

The Division has also made good on its commitment to pursue criminally violations of Section 2 of the Sherman Act, having brought the first two criminal Section 2 cases in over 40 years. In October 2022, DOJ announced that the president of a Montana paving and asphalt contractor pled guilty to one count of violating Section 2 for attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming. Because of the structure of the market in this case, the Division was able to use Section 2 to allege that if the defendant's efforts to secure a market allocation agreement with his competitor had been successful, the two companies would have been monopolists in their alleged regional markets. And in December 2022, the DOJ brought criminal charges pursuant to Section 2 against 12 individuals in Los Indios, Texas, alleging that they conspired to monopolize the industry for transporting used vehicles and other goods from the U.S. through Mexico for resale in Central America.[27]

These cases followed public commitments in early 2022 by Kanter and Powers that the agency was prepared to bring criminal charges against individuals who violate the prohibition against market monopolization in Section 2.[28] However, these commitments by agency officials did not come with any practical guidance for practitioners as to how to effectively advise clients about their potential exposure to criminal Section 2 charges. Despite his pledge for there to be "no unwritten rules to enforcement"[29] at the Division, Kanter advised lawyers seeking concrete guidance on criminal monopolization enforcement to review the century of case law related to criminal antitrust enforcement of Sections 1 and 2.[30] Powers also encouraged practitioners to look at what's on the books — noting that courts have issued opinions supporting the Division's Section 2 cases over the years, and promising that the Division will be guided by the facts and law in front of it.[31]

DOJ's recent application of antitrust law, without guidance or engagement with interested parties, is neither transparent nor predictable. It is impractical and unrealistic for companies and individuals to make critical business decisions on the basis of vague and underdefined policy pronouncements made by Division leaders that, if taken at face value, would lead to a major shift in the criminal antitrust enforcement landscape. Antitrust policy should be accompanied by concrete guidance stemming from a robust and open dialogue between the government and defense counsel who are attempting to counsel clients, the vast majority of whom want to do the right thing. Confidence in the justice system — a stated goal of Division leadership[32] — would be significantly diminished if the Division moves ahead with prosecuting more Section 2 cases and criminalizing noncompete agreements without first publishing written guidance outlining the basis for and detailing the intended execution of this shift in policy. As of today, the scope of conduct the Division considers criminal in these two areas is entirely unclear.

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25 In *Beck v. Pickert Medical Group et al.*, CV21-02092, plaintiffs provided anesthesiology services to Renown Regional Medical Center pursuant to an exclusive Professional Services Agreement (PSA) that allegedly contained a provision prohibiting plaintiffs from providing anesthesiology services for two years at any facility within 25 miles of Renown's facilities or any other facility where the anesthesiologist worked before terminating of their employment (the non-compete provision). Plaintiffs alleged that the PSA violated a Nevada state law limiting noncompetition covenants. In its statement of interest, DOJ first argued that the non-compete provision qualified as a horizontal restraint between competitors because the individual board-certified and licensed anesthesiologists were "actual or potential competitors of Pickert when they agreed to the non-competes." Viewed in that light, per DOJ, the non-compete provisions "could be characterized" as agreements "to allocate to Pickert the area within 25 miles of Renown or at any other facility where the anesthesiologists employed by Pickert worked. Thus, they would constitute horizontal agreements to allocate territories subject to the per se rule unless the ancillary-restraints defense applies."

26 Statement of Interest of the United States, *Beck v. Pickert Medical Group, et al.*, CV21-02092, Second Judicial District Court of the State of Nevada in and for the County of Washoe (Feb. 25, 2022).

27 Press Release, U.S. Dep't of Justice Antitrust Division, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border" (Dec. 6, 2022).

28 At the Federal Trade Commission (FTC) and DOJ Spring Enforcers Summit on April 4, 2022, Kanter warned that the Division will "not hesitate to enforce the law" if it determined that a Section 2 criminal charge was warranted.

29 *Id.*

30 2022 ABA Spring Meeting, Enforcers Roundtable.

31 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

32 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

III. LACK OF CLARITY ON HOW TO INTERPRET THE DIVISION'S OWN STATEMENTS

Finally, it is also currently unclear exactly how to interpret Division leadership's public statements about the agency's policy priorities. Kanter has said that the Division is talking about its views in "real time" and advises the antitrust bar to "look at what [the Division is] saying and writing" for guidance as to the agency's enforcement objectives.[33]

As examples of such guidance, Kanter cites to "important amicus briefs"[34] filed by the Division and open conversations with the public and stakeholders about its enforcement objectives. However, in contrast, Powers told an audience at the 2022 ABA Antitrust Spring Meeting that the Division does not "make or change policy via speech."[35] This leads stakeholders to wonder what weight to give recent statements by agency leadership that, if taken at face value, indicate a significant shift in criminal antitrust enforcement priorities and procedures.

Heeding Kanter's suggestion that the criminal antitrust bar "look at what [the Division] is saying and writing" to deduce the agency's enforcement agenda leads to more questions than answers. Through short public statements and briefing, the Division is merely providing vague suggestions — instead of clear, unambiguous written guidance — about what type of conduct will trigger criminal antitrust scrutiny.

Criminal antitrust cases are not like criminal fraud cases — jurors do not always intuitively know that the charged conduct is wrongful. As a result, criminal antitrust trials are usually much more complex, nuanced, and difficult for the Division to prove beyond a reasonable doubt, and prosecutors' tactics that are successful in fraud prosecutions don't always translate to antitrust prosecutions. The significant uncertainty perceived by the antitrust bar as to the Division's intentions does a disservice to potential targets who face life-altering consequences as a result of the Division's enforcement decisions, and makes the Division's investigations and prosecutions less effective and ultimately less successful.

33 2022 ABA Spring Meeting, Enforcers Roundtable.

34 See Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *State of New York v. Facebook, Inc.* (D.C. Cir. Jan. 28, 2022) https://www.justice.gov/atr/case-document/file/1467321/download; Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc. and Make-Up Artists & Hair Stylists Union*, 10-RC-276262; 371 NLRB No. 45 (Feb. 10, 2022) https://www.justice.gov/atr/case-document/file/1470846/download; and Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.* (9th Cir. Nov. 19, 2020) https://www.justice.gov/atr/case-document/file/1338731/download.

35 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

U.S. ANTITRUST CRIMINAL PROSECUTIONS ARE UNCONSTITUTIONAL

BY ROXANN E. HENRY[1]

1 Ms. Henry, a former Chair of the Antitrust Section of the American Bar Association, has handled criminal antitrust matters for over 40 years, often in the context of multiple investigations, including, administrative and civil actions in the United States and other countries. Individuals and corporations, large and small, across the globe have entrusted her with their defense. Her curriculum vitae can be accessed at www.RoxannHenry.com.

Current initiatives of the U.S. Department of Justice Antitrust Division ("Antitrust Division" or "Division") invite scrutiny of the constitutionality of criminal prosecutions under Sections One and Two of the Sherman Act.[2] Constitutional challenges are becoming routine, and should they reach the Supreme Court, it is highly likely that such challenges will be successful. The result would be to deprive the Antitrust Division of any criminal enforcement powers under the antitrust laws with little other effect.

Below I note key points of the Antitrust Division's new enforcement initiatives then briefly explain the fundamental constitutional principles at stake: the due process void-for-vagueness doctrine, the separation of powers, and the right to trial by jury. These principles apply directly to show how antitrust prosecutions are constitutionally infirm, and particularly in the context of the current Court's textualist approach to reading statutes. The void-for-vagueness doctrine renders invalid prosecutions under both Section One and to Section Two of the Sherman Act. Separately, even were the use of some criminal prosecutorial power to withstand scrutiny, the current use of the per se concept fails constitutional requirements. Lastly, as the difficulty of predicting what could constitute a violation is increasing and the Division seeks presumptions with more attenuated reach, it is important to recognize that the loss of criminal antitrust enforcement powers would have little effect as other forces provide similar or greater ability to deter and punish injurious anticompetitive behavior.

I. THE ANTITRUST DIVISION'S NEW AGENDA

While in the past, the Antitrust Division applied prosecutorial discretion to limit criminal prosecutions to hard-core cartel behavior, the Division has now discarded that policy. Instead, the Division is pushing the envelope into new realms. No longer does the Division claim that it only prosecutes individuals who know they have violated the law. No longer does the Division claim that the conduct they prosecute constitutes hard-core fraudulent conduct. The most dramatic illustrations of the new criminal prosecution agenda are non-compete agreements[3] and Section Two criminal enforcement for monopolization offenses,[4] and especially the Division's statements regarding these issues.[5]

More dramatic departures from past practice that foretell even further extension of criminal prosecutions into unknown territory appear on the horizon. The Division has announced new initiatives to focus on information exchanges that the Supreme Court has placed squarely outside the category of those restraints traditionally understood to be inherently anticompetitive,[6] and further has stated the intention to disclaim earlier guidances that were drafted to allow businesspeople to understand how the Division sees the law.[7]

II. CONSTITUTIONAL PRINCIPLES

The void-for-vagueness doctrine invalidates criminal prosecutions where the statute does not make the boundary clear on what is illegal. Most recently, the Supreme Court in *Ruan v. United States*,[8] reinforced "that consciousness of wrongdoing is a principle "as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[9] The first step in that process is the ability to understand what is proscribed. As stated in *Connally v. Gen. Constr. Co.*:[10]

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

2 15 U.S.C. §§1 & 2.

3 Much has been written about the Antitrust Division's leap into criminal prosecution of non-compete agreements. There were no prosecutions prior to October 2016 when the Division released guidance that it would criminally investigate naked no poach agreements. Today, however, the limitation of "naked" has become seriously ambiguous or simply disregarded as the Division has indicted defendants engaged in complicated vertical outsourcing arrangements involving non-compete agreements with the court refusing to dismiss finding the allegations meet per se standards. See *United States v. Patel* et al., Case No. 3-21-220 (VAB) (D. Conn. Filed Dec. 15, 2021).

4 The Antitrust Division has proudly proclaimed pursuing criminal enforcement for monopolization offenses and, as with non-compete agreements, has already garnered pleas but no successful jury verdicts. History, however, does not support the stretch to extend modern penalties for monopolization offenses. See Daniel A. Crane, Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment, 84 ANTITRUST L.J. 753 (2022) (collecting cases). Moreover, the reach for criminal charges under § Two seems somewhat contrived as the conduct could easily have been charged under other criminal statutes.

5 The Antitrust Division unabashedly has proclaimed that it is not bound by prior practices and will apply the laws as now, and differently, interpreted.

6 *United States v. US Gypsum Co.*, 438 U.S. 422, 441, n.16 (1978).

7 Press Release, Antitrust Div., U.S. Dep't of Just., Press Release, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023) https//www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statement.

8 597 U.S. __ (2022).

9 *Id.* slip op. at 5 (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

10 296 U.S. 385, 391 (1926).

meaning and differ as to its application violates the first essential of due process of law."[11] Justice Gorsuch recently explained "that the void-for-vagueness doctrine guards against arbitrary or discriminatory law enforcement….[and] is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[12]

Also implicated in the constitutional scrutiny of the antitrust laws are the Sixth Amendment mandate protecting the defense right to trial by jury.[13] If jurors cannot understand what is legal and what is illegal, they cannot make the fact-finding required to provide a fair trial. Moreover, presumptions of illegality, even those couched as judicial interpretation, deprive the defense of the right to a jury trial.[14]

III. THE LANGUAGE OF THE SHERMAN ACT IS UNCONSTITUTIONALLY VAGUE

Given the text of the statute, the Supreme Court repeatedly has acknowledged that the language cannot mean what it says on its face.[15] Even Senator Sherman observed:

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law.[16]

Thus, the implementation of antitrust law has proceeded as the development of a common law regulating competition in a process similar to constitutional law interpretation, with antitrust law evolving with dramatic changes and reversals and strong arguments on both sides of attempting to determine what might constitute a violation.[17] Moreover, the Court, Congress and the Antitrust Division have recognized that overenforcement would chill beneficial conduct. As the Court noted in *United States v. U.S. Gypsum Co.*,[18] "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." [19]

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11 *Id.* at 391 (first citing *Int'l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914); and then Collins v. Kentucky, 234 U.S. 634, 638 (1914)); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (citing *Champlin Refin. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 242–43 (1932)).

12 *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-24 (2018).

13 U.S. Const. amend. VI.

14 See *Morrisette*, 342 U.S. at 275; *Apprendi v. New Jersey*, 530 U.S. 466, 494-95 (2000); *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004); *United States v. Booker*, 543 U.S. 220,243-44 (2005); *Alleyne v. United States*, 570 U.S. 99, 117-18 (2013).

15 *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63 (1911) (without the standard of reason to limit the language, "the statute would be destructive of all right to contract or agree or combine in any respect whatever"); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *U.S. Gypsum*, 438 U.S. at 438 ("The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits[.]" (footnote omitted)).

16 21 Cong. Rec. 2456, 2460 (1890).

17 Congress intended the term "restraint of trade" to have "changing content" and authorized courts to oversee the term's "dynamic potential." See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731–32 (1988), abrogated on other grounds by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). The Sherman Act's broad prohibitions "turn over exceptional law-shaping authority to the courts," for which reason the Court has "felt relatively free to revise [its] legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 461–62 (2015); see also *Leegin*, 551 U.S. at 899 ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act." (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("[T]he [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

18 438 U.S.422 (1978).

19 *Id.* at 441 (first citing 2 Phillip E. Areeda & Donald F. Turner, Antitrust Law 29 (Little, Brown 1978)); then citing Robert H. Bork, The Antitrust Paradox 78 (Basic Books 1978); and then citing Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 441–442 (1963)). See also Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Guidelines for Collaborations Among Competitors 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; https://perma.cc/PX3F-HCXY ("In order to compete in modern markets, competitors sometimes need to collaborate. . . . Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations."). Congress felt so acutely the need to avoid chilling certain beneficial competitor collaborations from full antitrust liability that it passed the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301–05), and the National Cooperative Research and Production Act of 1993, Pub. L. No. 103-42, 107 Stat. 117 (codified as amended at 15 U.S.C. §§ 4301–06) (amending the National Cooperative Research Act of 1984).

While this lack of clarity may function in a civil context which requires proof of anticompetitive injury, it cannot withstand constitutional scrutiny as a criminal statute. As the Court stated in *Bouie v. City of Columbia*,[20] "[i]n order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear." [21]

IV. CURRENT CRIMINAL APPLICATION OF THE PER SE CONCEPT IS UNCONSTITUTIONAL

The *per se* concept not only entails a changing and complex legal standard that lacks the required definitional clarity to withstand scrutiny under the constitutional void-for-vagueness doctrine, as currently applied by the Antitrust Division *per se* illegality substitutes a judicial presumption for jury fact-finding in violation of due process, the right to trial by jury, and the separation of powers. Used as a screen for prosecutorial discretion the *per se* concept has no constitutional infirmity, but the Antitrust Division weaponizes *per se* illegality to deny jury consideration of the key criminal elements of intent and whether the conduct constitutes an unreasonable restraint of trade. Supreme Court precedent demonstrates that this substitution of judicial fact-finding or presumption deprives the defense of its constitutional rights.[22]

The Division claims that by alleging a per se violation of the Sherman Act, the only issue for the jury is whether the defendant knowingly agreed to engage in the alleged conduct and that it is solely for the judge to determine whether the conduct constitutes a *per se* offense. This effectively removes from the jury elements of intent and unreasonable restraint of trade. In *US Gypsum Co*. the Supreme Court unequivocally established that when applied criminally the antitrust laws require the element of intent, distinguishing the elements of a criminal offense from those of a civil violation.[23] The Supreme Court has long and recently recognized that Section One requires some level of fact-finding to determine whether conduct constitutes an unreasonable restraint of trade.[24] That the fact-finding for every element that is an ingredient of an offense must be submitted to the jury has lengthy and strong Supreme Court precedent.[25] Likewise, Supreme Court precedent explicitly requires that the Government bear the burden of proof beyond a reasonable doubt on each element, including intent.[26] Thus, jury instructions that take away from the jury the question whether the defendant understood that the alleged conduct was a unreasonable restraint of trade defeats the defendant's rights to trial by jury and violates the separation of powers as well as fundamental due process.

V. THE ANTITRUST DIVISION'S OVERREACHING PROVIDES A TRIGGER FOR CHANGE

Until recently, constitutional attacks in criminal antitrust prosecutions surfaced relatively rarely, likely largely because the hard-core cartel conduct alleged may have suggested little sympathy and other factual defenses were of greater importance. But in the last year constitutional arguments have become almost routine. To date lower courts have not accepted the unconstitutionality of the statute or of per se instructions, generally on the basis of past practice and long ago and questionable precedent.[27] But as the Division pushes into ever more complex and novel areas of prosecution it is likely that constitutional issues may finally find the way to the Supreme Court.[28] The Court has not addressed the constitutionality

20 378 U.S. 347 (1964).

21 *Id.* at 362n.9 (internal quotation marks omitted) (quoting Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 540 (1951)).

22 For a more detailed discussion, see Roxann E. Henry, *Per Se Antitrust in Criminal Cases*, 2021 COLUM. BUS.L.REV. 114; see also Robert Connolly, Per Se Rules Notches Another Labor Market Pretrial Win, But…," Cartel Capers (Dec. 14, 2022) http://cartelcapers.com/blog/per-se-rules-notches-another-labor-market-pretrial-win-but/.

23 438 U.S. at 437.

24 *National Collegiate Athletic Assoc. v. Alston*, 594 U.S. __ (2021) (noting spectrum of trade restraints from reasonable to unreasonable and requiring factual evaluation to determine whether price fixing in civil action was unreasonable restraint); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (*per se* analysis demands fact-finding even in price-fixing cases).

25 See *supra* note14.

26 *Ruan*, 597 U.S. at __(also rejected the government's argument that the mens rea for the non-antitrust criminal statute in question should turn "on the mental state of a hypothetical "reasonable" [person], not on the mental state of the defendant himself or herself.").

27 E.g. *United States v. Patel et al.*, No.3-21-cr-220 (D. Conn. Dec. 2, 2022).

28 A Ninth Circuit panel member noted regarding the *per se* rule that "if it's going to get straightened out it's going to have to require an en banc panel of the court or more likely the Supreme Court itself." Joshua Sisco, In Foreclosure Auction Appeal, Court Questions Applicability of Per Se Standard, MLex (Jan. 16, 2019).

issues under the current felony statute,[29] but the Division is paving the way for an attractive and sympathetic case and the precedent for finding unconstitutionality is compelling . There have already been petitions for certiorari on constitutional grounds, and we should expect to see more consistent and routine constitutional challenges.[30]

VI. THE LOSS OF CRIMINAL ANTITRUST PROSECUTORIAL POWER WILL HAVE NO EFFECT

Ultimately, the loss of U.S. criminal antitrust power would have little effect because of the availability of civil enforcement and other criminal statutes, although it might detract from the enthusiasm of other countries to criminalize antitrust conduct.[31] Considering the basic justifications for criminal enforcement, restitution, retribution, rehabilitation, and deterrence, only deterrence has significant meaning for antitrust prosecutions.

Restitution is today routinely handled through civil process. Victims are amply provided with the means for retribution and restitution through civil treble damage actions. With no real history of recidivism, there appears to be little need for rehabilitation.[32] Moreover, civil consent decrees requiring compliance and monitoring can be imposed without any criminal action. Thus, the principal issue for consideration is deterrence and whether other criminal statutes, combined with civil enforcement, would provide the same deterrent effect without criminal antitrust enforcement.

There can be no doubt that criminal sanctions provide a strong measure of deterrence, particularly when individuals face the prospect of jail. Deterrence has two parts: the level of the penalty and the likelihood of discovery by enforcers. With regard to jail, other statutes that could serve as the basis for prosecuting antitrust conduct provide for even greater prison time.[33] For example, the maximum penalties for wire and mail fraud can reach 20-30 years in jail,[34] whereas for the Sherman Act statutory maximum is only 10.[35] With regard to the monetary penalty, the statute that permits penalties to rise to double-the-loss or double-the-gain, which has been the basis for all of the largest antitrust fines, is not an antitrust law and can apply to other criminal conduct.[36]

With regard to the likelihood of discovery, for years after the 1993 change to the Division's leniency policy, that policy proved exceptionally effective to increase the likelihood of discovery of antitrust violations. That policy was unique to the Antitrust Division. But the luster of that policy has diminished, and, perhaps more importantly, the basics of that policy no longer appear unique to the Antitrust Division in light of the recent adoption of criminal policies applicable at all types of criminal enforcement by the U.S. Department of Justice.[37]

Moreover, the new criminal policies that apply to all federal criminal enforcement also directly address the issues of corporate deterrence.[38] From the standpoint of a corporation, as an artificial entity, deterrence is about compliance training, monitoring, and reporting. The new policy gives clearer guidance to promote corporate compliance conduct to bolster not just direct deterrence but also the reporting disclosure of illicit conduct.[39] Civil treble damage claims also provide ample incentive to create compliance programs and routinely cost more than fines for Sherman Act violations.

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29 In Nash v. United States, 229 U.S. 373 (1913), the Court rejected the "proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable,'" finding "no constitutional difficulty in the way of enforcing the criminal part of the act." Id. at 377–78 (citing *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 109 (1909)). But *Nash* should not be considered controlling precedent as it involved a misdemeanor not the current felony statute with its extraordinarily severe penalties; the analysis at the time was questionable; and the evolution and history of both constitutional and antitrust laws in the last 110 years would dramatically affect the evaluation.

30 E.g. *United States v. Lischewski*, No. 21-852 (May 2, 2022), *cert. denied*, __U.S.__, case no. 20-10211 (Dec. 8, 2022).

31 Invalidating the use of *per se* presumptions would also have no meaningful effect if, indeed, juries would view the charged conduct as inherently unreasonable, which is purportedly required to deem conduct *per se* illegal.

32 Repeated instances of corporate guilt have either not involved the same individuals or concerned conduct that was ongoing at the same time.

33 E.g. Press Release, Antitrust Div., U.S. Dep't of Just., Municipal Employee Pleads Guilty to Wirefraud Conspiracy (Feb. 3, 2023) (alleged conspiracy to thwart competitive bidding process) https//www.justice.gov/opa/pr/municipal-employee-pleads-guilty-wirefraud-conspiracy.

34 18 U.S.C. § 1341 (setting maximum penalty for mail fraud at 20 years or, under certain circumstances, 30 years); *id.* §1343 (providing similar terms for wire fraud).

35 15 U.S.C. §§ 1 & 2.

36 18 U.S.C. §.3571(d).

37 See Stewart Bishop, DOJ Adds New Incentives to Corporate Enforcement Policy, Law360 (Jan. 17, 2023); Lisa O. Monaco, Deputy Attorney General US Department of Justice Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022) https//www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delievers-remarks-corporate-criminal-enforcement/.

38 *Id.*

39 *Id.*

VII. CONCLUSION

Current enforcement initiatives of the Antitrust Division are focusing attention on the constitutionality of criminal antitrust enforcement. The antitrust laws do not meet fundamental constitutional requirements for the imposition of criminal sanctions. The face of the statutes does not inform ordinary people of the conduct for which they can be prosecuted. Neither the changing tides of prosecutorial discretion or judicial interpretation can substitute for congressional clear description of conduct deemed criminal; instead, the fact of these executive and judicial changes, and even full reversals, regarding the conduct considered illegal pointedly illustrate the unconstitutionality. Today, justifications for criminal antitrust prosecutorial power do not currently exist other than to duplicate governmental resources and target conduct that has no effect on competition, and the Division's new agenda is likely to lead to the elimination of its criminal powers.

THE U.S. APPROACH TO CARTEL ENFORCEMENT IN PUBLIC PROCUREMENTS

BY CARSTEN REICHEL[1]

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Public procurements long have been a focus of antitrust enforcement. The large amount of taxpayer dollars spent in public procurements, frequent opportunities for competitors to communicate through teaming agreements and subcontracting arrangements, iterative nature of many government procurement processes, and limited number of viable competitors due to the technical specificity of certain bids all combine to create opportunities for competitors to agree to rig bids. And because public procurements are attractive opportunities for would-be colluders, they are also logical places for antitrust authorities to apply heightened scrutiny.

Competition agencies around the globe in recent years have innovated new approaches and engaged in greater collaboration in their enforcement efforts regarding public procurements, raising the stakes for businesses and individuals engaged in government contracting. This article examines the evolution of one of those developments – the United States Department of Justice Antitrust Division's Procurement Collusion Strike Force (PCSF) initiative – and analyzes a number of trends that have influenced the growth of the PCSF, which has become central to U.S. cartel enforcement efforts.

I. THE PCSF INITIATIVE

In the United States, bid rigging is a *per se* violation of the Sherman Act and investigated by the Antitrust Division as a criminal offense. While the Antitrust Division's pursuit of bid rigging and related offenses impacting procurement is nothing new, the way that the Division has organized and institutionalized its efforts to combat procurement fraud is one of the most notable developments in U.S. cartel enforcement from the last several years.

In November 2019, the Division launched the PCSF to better detect and deter bid rigging and related collusive conduct that impacts public procurements.[2] Styled as a "virtual strike force," the PCSF is, in essence, an ongoing interagency partnership between the Antitrust Division, 22 U.S. Attorney's Offices, and 11 national law enforcement agencies that commits agency resources to the investigation and prosecution of potential procurement violations at the federal, state, and local levels.

The PCSF takes a two-pronged approach, reflecting its "detect and deter" mission.

First, through the PCSF, Antitrust Division prosecutors and their federal law enforcement partners engage in outreach to all stakeholders in public procurements. PCSF prosecutors and agents meet regularly, share best practices, and discuss areas of concern. They also prioritize efforts to train agents, contracting officials, and others to understand the harms from and spot the indicators of potential antitrust violations in public procurements.

To date, the PCSF has trained over 23,000 individuals representing over 500 agencies, at all levels of government.[3] Through these efforts, it has built a network of procurement stakeholders who are aware of and looking for the warning signs of antitrust offenses and reporting to law enforcement agents any suspicious behaviors that may signal bid-rigging, thereby enhancing the Antitrust Division's capacity to detect these violations or deterring them in the first instance.

Second, leveraging this platform, law enforcement agents and the PCSF's prosecutors – including those from both the Antitrust Division and partner U.S. Attorney's Offices – coordinate in the investigation and prosecution of any potential problems. Backed by the institutional commitments from law enforcement partners (who themselves have been better trained to spot and develop evidence of bid rigging) to investigate vigorously and pairing the subject matter expertise of Antitrust Division prosecutors with the Assistant United States Attorneys' command of district-level procedures and practices, the PCSF model purports to deploy more efficiently and effectively to combat procurement violations, from the inception of any investigation to the completion of any resultant litigation.

As with its outreach and education function, data suggest that the PCSF has made progress in this part of its mission. In September 2022, the Antitrust Division's Assistant Attorney General ("AAG") testified to Congress that the PCSF's work has led to over 60 criminal investigations, which in turn have resulted in the criminal prosecution of more than 30 individuals and companies.[4] In cases involving both domestic and international procurements, the Division has secured numerous convictions across several matters, leading to prison sentences for individuals between from 12-27 months, as well as corporate fines and multiple criminal indictments awaiting trial.

2 https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

3 https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

4 *Id.*

II. THE COSTS OF PROCUREMENT FRAUD

The costs for companies and individuals found guilty of violating the antitrust laws in public procurements can be high.

First, because these violations are criminal in the United States, individuals can be sent to prison and courts can impose significant fines on corporate offenders found guilty of violations. Second, *in addition to possible criminal penalties*, corporations may face parallel civil investigations or litigation that could impose further penalties and restitution obligations. For instance, if a company has certified to the government an independent price determination that later is determined to be untrue because bid rigging took place, a company could be liable under the False Claims Act.[5] Third, investigation of or a conviction for bid rigging or another antitrust violation can lead to an agency-level suspension or debarment of companies from future procurements.

The possibility of temporary suspension during the pendency of an investigation or debarment from government contracting for a set period of time following a conviction stands out as a unique and critical consideration with respect to violations affecting public procurements. These actions impact a company's ability to engage in procurements and conduct business on an ongoing basis. While a criminal penalty for past conduct will hurt, subsequent debarment as a result of an antitrust offense can amount to a corporate death sentence for businesses that depend on obtaining future government contracts.

In the United States, suspension or debarment as a consequence of an antitrust violation is subject to an independent inquiry and decision by the agency that is considering suspension or debarment, not the Antitrust Division. But a criminal conviction – which is subject to a finding of wrongdoing at the law's highest burden of proof – exceeds the applicable standards in the administrative proceeding and therefore can be dispositive proof for an agency considering debarment.

Recognizing this, the Division can and does advise agencies considering debarment of the fact, manner, and extent of a defendant's cooperation with its investigation,[6] which often leads to a decision not to suspend or debar the defendant. This can happen because U.S. debarment is a forward-looking inquiry that focuses on whether, having committed a violation, a contractor is likely to commit future violations. DOJ's input on this question can be – and in the past has been – persuasive to other agencies' decisions not to debar.

III. RIGHT PLACE, RIGHT TIME

One reason for the success of the PCSF has been that, at several points, it has been favorably positioned vis-à-vis external factors that were not anticipated at its inception. The PCSF consistently has proved to be suited to its moment, finding itself in contexts that were favorable to its reception and growth at several points, from the COVID-19 pandemic to the recent surge in infrastructure spending.

A. COVID-19

The "virtual strike force" model wasn't created in anticipation of a global pandemic, but it proved resilient when, just months after announcing the creation of the PCSF, COVID-19 shut down the U.S. government along with the rest of the world. While the PCSF became more "virtual" than anyone intended for it to be, because (i) its first-year plan focused on outreach to various law enforcement agencies and other procurement stakeholders and (ii) its intended structure did not depend on members being located in the same place, the pandemic disrupted the PCSF's work far less than it impacted litigation and investigations.

In a speech delivered at the one-year anniversary of the PCSF, the then-AAG of the Antitrust Division said that "the first year was about proving the concept, and about standing up the in-district teams, building relationships, and getting the word out." He noted that the PCSF's virtual nature rendered it "uniquely well-positioned to deploy interactive technology" and reported that the PCSF "didn't miss a beat" during the pandemic, with over 8,000 individuals from over 500 agents trained through PCSF efforts.[7]

5 See, e.g. https://www.justice.gov/opa/pr/seven-south-korean-companies-agree-pay-approximately-31-million-settle-civil-false-claims-act#:~:text=Seven%20South%20Korea-based%20companies%20have%20agreed%20to%20pay,work%20on%20U.S.%20military%20bases%20in%20South%20Korea.

6 See Antitrust Division Model Corporate Plea Agreement at ¶ 23, available at https://www.justice.gov/atr/page/file/1490321/download.

7 https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-future-antitrust.

The COVID-19 pandemic proved advantageous to the PCSF in another way, by bringing into starker relief the potential impacts of procurement collusion. While the antitrust world was familiar with crisis cartels, the immediacy, urgency, and scale of the pandemic – along with the vast amounts of public expenditures that it prompted – focused the attention of other stakeholders on the antitrust risks in procurements. The PCSF leaned in to the situation, specifically directing training and outreach related to procurement officials overseeing CARES Act funding at agencies on the front lines of the American pandemic response, including the Centers for Disease Control and Federal Emergency Management Agency.[8]

B. Biden Executive Order on Competition

The original conception of the PCSF proved useful again in the early years of the Biden Administration, when the PCSF found itself in a position to benefit from – and to transition easily across presidential administrations due to – its interagency structure.

More than any recent administration, the Biden Administration has prioritized aggressive antitrust enforcement. In July 2021, President Biden's Executive Order on Competition in the American Economy[9] directed a "whole of government" approach to competition and said that all federal agencies "should further the polices set forth in [the] order by, among other things, adopting pro-competitive regulations and approaches to procurement and spending."[10]

The PCSF therefore again found itself flying with a tailwind, benefiting from both its organization, which always contemplated interagency collaboration, and from the White House's direction that all agencies pay attention to competition issues, specifically in their procurements.

C. Infrastructure Spending

The PCSF once again appears well positioned to meet the moment and to lead enforcement efforts related to the recent surge in U.S. infrastructure spending.

The Biden Administration has signed into law legislation – including the Inflation Reduction Act and the bipartisan Infrastructure Investment and Jobs Act – that provides more than a trillion dollars in federal funding for infrastructure projects, spanning a wide range of administration priorities: highways and bridges; public transit systems; a nationwide network of electric vehicle charging stations; improving ports and deepening waterways; repairs to and development around airports; and technologies for the generation, transmission, and storage of clean energy. In other words, projects that all rely on public procurements. During the first year since the passage of the bipartisan Infrastructure Act, the administration already has announced nearly $200 billion in funding for almost 7,000 separate projects,[11] and there are hundreds of millions of dollars more that will be spent on infrastructure under the Infrastructure Act and Inflation Reduction Act.

Seizing on this, Antitrust Division officials have singled out infrastructure spending as a focus of the Division's criminal antitrust enforcement efforts due to "its impact for Americans and the vast amount of government resources currently devoted to infrastructure."[12] Additionally, in November 2022, the PCSF added four additional national-level enforcement partners, expressly identifying their roles overseeing allocating financing for procurements and grants to fund infrastructure projects: the inspectors general (IGs) of the Departments of Transportation, Energy, and Interior, as well as the Environmental Protection Agency IG.[13]

IV. EXPANSION PLANS

When it started in late 2019, the PCSF was in many ways a pilot project. It had just five law enforcement partners and focused its work in its thirteen original partner districts. It has expanded rapidly since then. Not only has it expanded its membership and more than doubled its partner law enforcement agencies (including the most recent additions in November 2022) and added nine additional U.S. Attorney Offices, but the PCSF

8 *Id.*

9 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

10 *Id.*

11 https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/15/fact-sheet-one-year-into-implementation-of-bipartisan-infrastructure-law-biden-%E2%81%A0harris-administration-celebrates-major-progress-in-building-a-better-america/.

12 https://www.justice.gov/opa/speech/director-procurement-collusion-strike-force-daniel-glad-delivers-remarks-aba-section.

13 https://www.justice.gov/opa/pr/justice-department-s-procurement-collusion-strike-force-announces-four-new-national-law.

also has claimed a broader enforcement mandate, expanded its geographic focus and mission through its PCSF Global initiative, and is working to expand its toolkit with new and more advanced detection techniques.

A. An Expanded Mandate?

Like the bid-rigging offense, charging non-antitrust, criminal offenses that impact public procurements is nothing new for the Antitrust Division. It always has had the ability and authority, as a matter of prosecutorial discretion, to investigate and prosecute "Title 18" offenses (so called because of their location in the U.S. Code) such as fraud and bribery, either alongside or in place of antitrust charges. The Division, for example, was an active participant in the prosecution of various offenses relating to military procurements conducted in Iraq and Afghanistan in the early and mid-2000s. As part of those war zone-related efforts, Division prosecutors charged numerous individuals and companies in cases that did not include Sherman Act charges. These offenses included conspiracy to defraud the government,[14] bribery,[15] money laundering,[16] and tax crimes.[17]

But the Division's appetite for charging Title 18 offenses has not been consistent over time, and there have been more recent stretches in which the Division charged these crimes in far fewer cases.

Under the PCSF, however, Title 18 offenses are back at the Antitrust Division, which has read its enforcement mandate relating to procurements to extend beyond the antitrust laws. In an October 2021 speech, the PCSF's director confirmed that in addition to Sherman Act offenses, "our focus also includes prosecuting other competition-corrupting crimes uncovered during our investigations."[18] In support of this position and reading of its mandate, the Division has noted the similarities between cartel offenses and other fraud-based crimes: perpetrators of both seek to garner illicit profits, and both frequently involve elements of deceit or concealment.[19]

The Division's actions speak louder than its words in this regard. PCSF cases have charged a wide variety of other crimes, including major fraud and conspiracies to defraud the federal government,[20] violations relating to federal set-aside programs and wire fraud,[21] and paying bribes relating to procurements.[22] In some cases, these Title 18 violations were not paired with any antitrust charge.

B. An Expanded Footprint: PCSF Global

As noted, the PCSF began as a domestic initiative, focused on a limited number of federal judicial districts. But its roots always ran deeper than these local districts. Indeed, it was an overseas case – the Korean fuels investigation[23] – that provided the earliest example of what the PCSF could be. In the Korea fuels matter, an investigative team with agents from multiple law enforcement agencies worked with prosecutors to investigate a decade-long conspiracy to rig bids for fuel supply contracts to U.S. military facilities on the Korean peninsula. As a result of the investigation, five Korean companies agreed to pay over $150 million in criminal fines and over $200 million in separate civil settlements and seven individuals were indicted for bid rigging and conspiring to defraud the government.

14 *United States v. Christopher West et al.*, Case No. 08-cr-00669 (N.D. Il. Jun. 18, 2009) (Indictment), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/06-18-09christopher-west-superseding-indictment.pdf; *United States v. Charles Finch et al.*, Case No. 10-cr-00333 (D. Hi. Jun. 8, 2010) (Indictment), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/06-18-10charles-finch-superseding-indictment.pdf.

15 *Id.*

16 *United States v. Finch et al., supra* note 14.

17 *United States v. Tijani Saani*, Case No. 08-cr-00203 (D.D.C. May 16, 2008) (Indictment), available at https://www.justice.gov/atr/case-document/indictment-121.

18 See fn. 2.

19 Philip Andriole & Chris Maietta, "The PCSF: A Global Presence for a Global Problem," DOJ J. Fed. L. and Practice, Dec. 2022, available at https://www.justice.gov/usao/page/file/1559136/download.

20 *United States v. Envistacom*, Case No. 22-cr-00197 (N.D. Ga. May 25, 2022) (Indictment), available at https://www.justice.gov/opa/press-release/file/1538326/download.

21 *United States v. Padron*, Case No. 21-cr-00124 (W.D. Tx. Mar. 17, 2021) (Indictment) available at https://www.justice.gov/opa/press-release/file/1377051/download.

22 *United States v. Miller*, Case No. 22-cr-00206 (E.D. Ca. Oct. 6. 2022) (Indictment) available at https://www.justice.gov/opa/press-release/file/1558641/download.

23 *United States v. Hyundai Oilbank Co., Ltd. et al.*, Case No. 18-cr-00152 (S.D. Oh. Sep. 27, 2018) (Superseding Indictment), *see* https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense.

In some ways, therefore, it was less surprising when, in late 2020, the PCSF got into the export business through its PCSF Global initiative.[24] The PCSF Global program represents a variation on the PCSF theme. Identical to the PCSF's domestic efforts, it works with U.S. law enforcement personnel stationed outside of the United States to detect and investigate possible collusion impacting federal funds spent outside of the country, such as at U.S. military bases and embassies. Likewise, PCSF Global has an outreach mission. In addition to training U.S. personnel stationed abroad, PCSF Global programs also train personnel at other competition and procurement authorities as part of efforts to create an overall culture of procurement compliance, as well as to enhance the capacity to detect potential violations. PCSF Global programs already have reached enforcers in Europe, Asia, and Africa.[25]

By mid-2021, the Division obtained proof of concept on the PCSF Global initiative, obtaining guilty pleas[26] and indictments[27] from its investigation of antitrust offenses relating to contracts for security services at U.S. military bases and installations in Belgium. In March 2022, the Division brought an additional case under the PCSF Global umbrella, charging two South Korean nationals with rigging bids and fixing prices for subcontract work done at U.S. military bases in South Korea, as well as several counts of wire fraud.[28]

C. An Expanded Toolkit: The Data Analytics Project

The PCSF also has worked to expand its toolkit to combat collusive offenses that impact procurements.

The use of screening tools against public bidding datasets long has been a topic of interest to competition enforcers. Historically, few jurisdictions have developed their capacity to perform these screens effectively.[29] With developments in technology, however, "there is a generalized increasing interest in the use of technology and artificial intelligence to support competition enforcement," with several competition authorities in the process of developing data screens that can enhance the detection of possible cartel conduct in public procurements.[30]

The United States is among these jurisdictions, and one of the focus areas of the PCSF has been its Data Analytics Project. DOJ acknowledges that the nature of government procurement in the United States – characterized by decentralized agency procurements across multiple levels of government – limits its ability to detect procurement collusion, and that "[t]o detect procurement-related crime, the PCSF needs cutting edge analytics tools."[31]

In the face of this reality, the approach of the PCSF has differed from many other jurisdictions. Rather than attempting to build a one-size-fits-all data analytics program, the Antitrust Division has put itself forward as a subject matter expert for other federal agencies interested in developing their own data analytics tools.[32] By training data scientists, auditors, and investigators at other agencies, encouraging good "bid data hygiene" across federal agencies, and facilitating the sharing of expertise, the PCSF hopes to spur multiple federal agencies in the United States to develop their own screening tools for better detection of anomalies that may suggest collusion in the procurements that those agencies oversee.

The Data Analytics Project has also placed itself in learning mode and looked to other competition authorities for experience, expertise, and guidance. Data screens have already been credited in successful cartel enforcement actions in several jurisdictions, including Mexico, Brazil,

24 See https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-future-antitrust/.

25 See Andriole & Maietta, fn 19, at 96.

26 *United States v. G4S Secure Solutions NV*, Case No. 21-cr-00432 (D.D.C. Jun. 25, 2021), available at https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting; *United States v. Bart Verbeeck*, Case No. 21-cr-00574 (D.D.C. Sep. 13, 2021), see https://www.justice.gov/opa/pr/former-security-services-executives-plead-guilty-rigging-bids-department-defense-security.

27 *United States v. Seris Security NV et al.*, Case No. 21-cr-00443 (D.D.C. Jun. 29, 2021), available at https://www.justice.gov/opa/pr/belgian-security-services-company-and-three-former-executives-indicted-bid-rigging-us.

28 *United States v. Hyuk Jin Kwon and Hyun Ki Shin*, Case No. 22-cr-00049 (W.D. Tx. Mar. 16, 2022, https://www.justice.gov/opa/pr/contractors-indicted-rigging-bids-subcontract-work-and-defrauding-us-military-bases-south.

29 OECD (2022), Data Screening Tools in Competition Investigations, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/data-screening-tools-in-competition-investigations-2022.pdf.

30 *Id.*

31 OECD (2022), Data Screening Tools for Competition Investigations, Note by United States, Nov. 28, 2022, available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2022)35/en/pdf.

32 *Id.*

Korea, Italy, and Switzerland,[33] and international cooperation to continue the development and refinement of screens as a cartel detection tool is a prime example of soft cooperation that can enhance enforcement across several jurisdictions as well as individual authorities' detection capabilities.

The progress that the PCSF and its partner agencies in the Data Analytics Project make in the coming years could be a driver of efficiency and efficacy in procurement investigations. A key first step will be developing workable datasets across federal agencies. In this regard, President Biden's Executive Order on Competition bolstered the PCSF's efforts with its "whole of government" mandate and emphasis on improving procurement practices to enhance competition.

V. IS IT WORKING?

The PCSF and procurement cases have become mainstays of the Antitrust Division's criminal cartel enforcement efforts. Through a combination of its durable design, favorable circumstances for its growth, and the Antitrust Division's own diligence in building a network that spans the procurement landscape and prioritizes procurement cases, the PCSF is poised to play a prominent role in U.S. cartel enforcement and maintain the Division's enforcement focus on public procurements in the coming years.

But other than marking its progress and noting its growth and ambition, are there signs that the PCSF is succeeding in its "detect and deter" mission?

At a minimum, beyond the numbers that the Antitrust Division cites as metrics of its success, its enforcement record provides some important proof of concept. Consider just two examples.

The antitrust world paid attention to *United States v. Zito*[34] because of the nature of the charge: the Division's first criminal prosecution under Sherman Act § 2 in nearly fifty years. But past that headline, the record of the case showed the value of the resources the PCSF has committed to outreach across the procurement ecosystem.

The case record demonstrated that every step in the procurement chain worked as the PCSF hoped it would: The contractor who was approached by the defendant to allocate the market for state procurements reported the offer to collude to the Federal Highway Administration. FHA officials in turn reached out to agents at the Department of Transportation IG. DOT IG agents in turn reached out to prosecutors. And all of this happened in a short-enough span of time that the original informant then could cooperate with the government investigation by recording a number of subsequent calls with the defendant, on which critical evidence was captured to substantiate a criminal charge and induce a plea agreement that relied heavily on intent evidence.

The fact pattern of *Zito* shows the value of enhanced awareness and that increased alacrity by investigators can lead to more effective enforcement against procurement violations. This is the PCSF model of building connections, and it played out in a textbook fashion to the Antitrust Division's benefit in the case. Zito demonstrates the value of PCSF outreach efforts to both enhance detection of these offenses and send the key deterrent message to would-be colluders: you never know when you're being recorded.

With respect to the PCSF's goals of deterring procurement fraud, in January 2023, in *United States v. Padron*,[35] a judge sentenced the former owner of a construction company to 27 months in prison plus a fine of $1.75 million after a jury earlier convicted him of conspiracy to defraud the government and multiple counts of wire fraud. The sentence followed the defendant's conviction for his role in a scheme to obtain over $240 million worth of government contracts under a federal program intended to benefit service-disabled veterans.

The *Padron* case is perhaps the best example to date that PCSF-driven enforcement efforts can result in deterrence. The sentence is impressive by any measure and particularly in the context of Antitrust Division prosecutions. It is also notable that the defendant was not charged with an antitrust violation in the case, which would appear to validate the PCSF's pursuit of criminal charges beyond the Sherman Act § 1 offense.

33 See D. Pachnou & D. Westrik, "Interest In Cartel Screens is Increasing,": Competition Policy International, Jan 10, 2023, available at https://www.competitionpolicyinternational.com/developments-in-cartel-screening/.

34 Case No. 22-cr-00113 (D. Mt. Sep. 19, 2022) (Information); available at https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

35 Case No. 21-cr-00124 (W.D. Tx. Mar. 17, 2021) (Indictment) available at https://www.justice.gov/opa/press-release/file/1377051/download; see also https://www.justice.gov/opa/pr/construction-company-owner-sentenced-fraud-securing-millions-dollars-contracts-intended.

Finally, defendants cannot be sentenced before they are found guilty. Division prosecutors secured the defendant's conviction on multiple counts after a six-day jury trial, showing that Antitrust Division prosecutors can win these cases and that procurement violations resonate with lay jurors.

Whether other PCSF initiatives will produce similar results remains to be seen.

Amidst thousands of ongoing government procurements at the federal, state, and local level, the progress of the Data Analytics Project could be a key driver of PCSF efficiency in case selection and deployment of Antitrust Division and law enforcement resources. The Data Analytic Project's success will depend not only on the development of more effective screens but also on the PCSF's efforts to promote the adoption of better data collection, retention, and normalization across procuring agencies. Examples from international cartel enforcers suggest the possibilities of this investigative tool, but the nature of public procurements in the United States differs significantly from these jurisdictions, so their adaptability to the U.S. context and ability to produce similar results domestically is not yet known.

Similarly, what will be the PCSF Global program's impact? Will the Antitrust Division's outreach to other competition enforcers create a stronger enforcement web across the globe and lead to more cross-border cartel investigations like the Korea fuels case? Do foreign contractors working with U.S. government procurements abroad need to be on heightened notice that the likelihood of detection and effective prosecution has increased? To be determined.

Perhaps most importantly, in an era of significant spending on U.S. infrastructure, will we see more and bigger cases from the PCSF? With over a trillion dollars in spending authorized by the Biden Administration, there is no question that this will be a focus of the PCSF, which has signaled in both word and deed that its partners have eyes on procurements related to these funds. The number and nature of cases that the Antitrust Division brings relating to infrastructure will be key indicators of both the PCSF's scale and sophistication in its fourth year.

VI. CONCLUSION

Now more than three years into its existence, the PCSF appears to be entrenched as a central component of the Antitrust Division's criminal enforcement efforts, and its work has proved to be a bright spot on DOJ's prosecutorial record. There are no signs that the Division will move away from either the PCSF concept or its focus on crimes affecting public procurements, and future developments may see the PCSF grow even more as a focus of U.S. criminal antitrust enforcement.

THE 2022 MONACO MEMORANDUM: CHANGES TO DOJ CORPORATE ENFORCEMENT POLICY

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In September 2022, Deputy Attorney General ("DAG") Lisa Monaco announced a series of revisions to the Department of Justice's (the "Department" or "DOJ") policies addressing how federal prosecutors will evaluate and treat corporate defendants.[2] In tandem with that policy announcement, the Department published a memorandum setting out the new policies in further detail (the "Monaco Memorandum").[3] The September 2022 announcement and related Monaco Memorandum build upon and clarify policies DAG Monaco initially announced approximately one year earlier.[4]

Incorporating feedback from the Corporate Crime Advisory Group, the September 2022 announcements underscore this Justice Department's stated focus on corporate crime enforcement, and generally reflect a concerted effort to provide transparency and predictability for corporate defendants considering self-disclosures.[5] The revisions also highlight a stated commitment to the pursuit of charges against culpable individuals — and not merely the companies for whom they work.

These changes come at a time when DOJ's Antitrust Division ("Antitrust Division" or "Division") is, as Assistant Attorney General Jonathan Kanter ("AAG Kanter") has described, "firing on all cylinders." Both before and after DAG Monaco's September 2022 announcements, AAG Kanter has touted the Division's increased enforcement activity as of late. Specifically, the Antitrust Division has been litigating more than ever and pursuing criminal charges at a rate not seen since the 1980s.[6] Even then, according to AAG Kanter, the Division "[is] just getting started."[7]

With such an active Antitrust Division, and the new Department-wide changes to corporate enforcement policies, it is important for practitioners and compliance professionals to shift resources into the antitrust space while also staying on top of what to expect for companies that find themselves in the Division's crosshairs. This article summarizes core aspects of the Antitrust Division's Leniency Program and summarizes particularly relevant updates to DOJ corporate enforcement policy. We also consider how the new mandates may affect the Division and what the business community can do to prepare.

I. BACKGROUND ON THE ANTITRUST DIVISION'S LENIENCY PROGRAM FOR SELF-DISCLOSURES

For decades, the Division has maintained a Leniency Program under which "[c]orporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program."[8] AAG Kanter views the program as "one of the [D]ivision's most important enforcement tools for rooting out cartels because it incentivizes corporations involved in wrongdoing to do the right thing by self-reporting."[9]

The Division's Leniency Program, which applies to criminal conspiracy cases involving violations of Section 1 or 3(a) of the Sherman Antitrust Act, provides for two different levels of corporate leniency: Type A and Type B.[10] Type A leniency "is available before the Division has

2 Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

3 Memorandum from Deputy Attorney General Lisa O. Monaco, Dep't of Justice, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download.

4 Memorandum from Deputy Attorney General Lisa O. Monaco, Dep't of Justice, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf.

5 DAG Monaco announced the formation of the Corporate Crime Advisory Group in her October 2021 remarks. *Id.* at 2. Corporate Crime Advisory Group members included leaders and experienced prosecutors from all Department components that handle corporate criminal matters, including the Antitrust Division. Monaco, *supra* note 3, at 1 n.1

6 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Virtual Remarks for the 2022 International Bar Association Competition Conference (Sept. 10, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-virtual-remarks ("[W]e have indicted 20 criminal cases since November, more than any time since the 1980s. We ended FY 2021 with 146 pending grand jury investigations, the most in 30 years."); Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., "Assistant Attorney General Jonathan Kanter Recognizes Antitrust Division Employees and Others at Annual AAG Awards Ceremony" (Oct. 26, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-recognizes-antitrust-division-employees-and ("We litigated the most civil antitrust cases in over 20 years. We are currently litigating an additional 19 criminal cases, and we continue to initiate more grand jury investigations than we have in decades.").

7 Kanter, *supra* note 6.

8 Leniency Program, U.S. Dep't of Justice, Antitrust Div., https://www.justice.gov/atr/leniency-program (last visited Jan. 15, 2023).

9 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

10 U.S. Dep't of Justice, Just. Manual §§ 7-3.300, 7-3.310, 7–3.320, https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.300.

opened an investigation, provided the Division has not received information about the illegal activity from any other source and the other criteria for Type A Leniency are met."[11] Under this category, the self-reporter's "current directors, officers, and employees will not be charged criminally for the illegal activity if they provide timely, truthful, continuing, and complete cooperation to the Division throughout its investigation of the illegal activity."[12] Type B leniency may be available even after the Division has opened an investigation into the illegal activity, provided, *inter alia*, the Division does not already have sufficient evidence against the applicant likely to result in a conviction.[13] With Type B leniency, however, non-prosecution protection for current directors, officers, and employees is "not guaranteed" and is available only at the Division's "sole discretion."[14]

Under both categories, the self-disclosing corporate applicant must provide timely and continuing cooperation.[15] "Noncooperating individuals will not be protected . . . and the Division is free to prosecute them[.]"[16]

II. HIGHLIGHTS OF THE SEPTEMBER 2022 UPDATES TO DOJ CORPORATE ENFORCEMENT POLICY

Department leadership have not shied away from the fact that core aspects of the recent updates to the DOJ policies on corporate enforcement were modeled on existing programs, such as the Division's Leniency Program. In fact, when announcing the new policies, Department leaders used examples from the Leniency Program to demonstrate the advantages of self-disclosures.[17]

What follows immediately below is a summary of key aspects of the Department's corporate enforcement policy updates from September 2022. Because many of topics addressed in the Monaco Memorandum are already addressed to a lesser extent in Division-specific policies, the Monaco Memorandum's are best understood as "supplement[ing] and clarify[ing] existing guidance."[18]

· Greater Adoption and Consistency of Voluntary Self-Disclosure Programs. Citing success with voluntary self-disclosure programs historically employed by certain DOJ components such as the Antitrust Division's Leniency Program, the Monaco Memorandum commits to rolling out similar voluntary self-disclosure programs throughout the Department.[19] The Department is also now requiring that all voluntary self-disclosure programs throughout the Department adhere to two core principles, which aim to incentivize corporate participation: First, absent aggravating factors, DOJ will not seek a guilty plea if a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct. Second, DOJ will not require an independent compliance monitor for cooperating self-disclosers that, at the time of the resolution, can demonstrate that they have implemented an effective compliance program.[20]

· New Timing Constraints for Corporate Disclosures and Prosecutor Charging Decisions Concerning Potentially Culpable Individuals. The Department will now require prosecutors to condition full cooperation credit on certain disclosures being made more quickly than may have been required — or even expected — in the past. In particular, the cooperating company must prioritize disclosures of information and communications that may be relevant to assessing individual culpability. Moreover, "in connection with every corporate resolution," DOJ is mandating that "prosecutors specifically assess whether the corporation provided cooperation in a timely fashion," including whether the cooperating company

11 U.S. Dep't of Justice, Antitrust Div., Frequently Asked Questions About the Antitrust Division's Leniency Program 7 (updated Jan. 3, 2023) ("FAQs"), https://www.justice.gov/atr/page/file/1490311/download.

12 Just. Manual, *supra* note 10, § 7-3.310.

13 *Id.* § 7-3.320.

14 *Id.*

15 *Id.* §§ 7-3.310, 7-3.320.

16 FAQs, *supra* note 11, at 12.

17 See, e.g. Miller, *supra* note 27 ("For many years, the Antitrust Division's voluntary self-disclosure policy has granted leniency to the first company to self-report, cooperate fully and meet the policy's requirements. In a prototypical investigation into criminal price-fixing involving the canned tuna market, one company voluntarily self-disclosed, received leniency, was not prosecuted, and paid no fine. Meanwhile, Bumble Bee Foods pleaded guilty and paid a $25 million fine, while StarKist pleaded guilty and paid the statutory maximum: $100 million.").

18 Monaco, *supra* note 3, at 2.

19 Department components without formal self-disclosure policies have been directed to adopt them. Because the Division's Leniency Program applies only to certain laws that the Division is empowered to enforce, most particularly the nation's antitrust laws, it remains to be seen whether the Division will formally adopt new policies to address non-antitrust criminal conduct, or merely rely on the broader policies announced under the Monaco Memorandum.

20 Monaco, *supra* note 3, at 7.

"promptly notified prosecutors of particularly relevant information once it was discovered," or if the company "delayed disclosure in a manner that inhibited the government's investigation."[21] Should prosecutors identify any "undue or intentional delay" in a cooperator's production of information or documents, particularly where the information impacts the assessment of individual culpability, the company's cooperation credit "will be reduced or eliminated."[22]

In addition, prosecutors must complete investigations and seek any criminal charges against individuals prior to, or simultaneously with, the corporate resolution. In cases where it makes strategic sense or where it is otherwise advantageous to the government to resolve the corporate action prior to an individual action, the prosecutor must first prepare a full investigative plan and timeline and secure the approval of the supervising United States Attorney or Assistant Attorney General to move forward in that fashion.[23]

· New Standards for Assessing Prior Misconduct. Consistent with guidance DAG Monaco first announced back in October 2021, the Department's September 2022 policy revisions confirm that charging and resolution decisions should be made after considering all "the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions, both domestically and internationally."[24] In addition, the September 2022 Monaco Memorandum explains that not all prior misconduct should carry the same weigh and identifies several relevant considerations for the assessment:

- Prosecutors will assign the most significance to "recent" U.S. criminal resolutions and prior misconduct involving the same personnel or management. By contrast, "dated conduct," meaning criminal resolutions reached at least 10 years before the conduct at issue, and civil or regulatory resolutions reached at least five years before the conduct at issue, will "generally be accorded less weight."[25]

- The revised policy instructs prosecutors to consider the nature and circumstances of the prior misconduct, identifying several considerations related to the facts of the previous misconduct and similarities to the more recent issue under investigation. Among other factors, the Department has directed prosecutors to consider: the pervasiveness of the misconduct associated with the prior resolution; its similarity to the misconduct at issue in the more recent period; whether, at the time of the previous misconduct, the corporation was subject to some obligation imposed by the prior resolution (e.g. a corporate monitor); and whether the misconduct "reflects broader weaknesses in a corporation's compliance culture or practices." Notably, "[o]verlap in involved personnel — at any level — could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level."[26]

- Helpfully for companies operating in highly regulated sectors, the new guidance reminds prosecutors that comparisons to the compliance track records of other companies should focus on similarly situated companies from the same industry.

- Recognizing the importance of healthy M&A activity, previous misconduct by an acquired entity may carry less weight if the acquirer has implemented an effective compliance program and the prior conduct's root cause was addressed before the new misconduct began.[27]

· Disfavoring Successive Non-Prosecution or Deferred Prosecution Agreements. The Department has taken the position that it "generally disfavors" non-prosecution or deferred prosecution agreements with companies that have been subject to such an agreement in the past — "especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities."[28] Under the revised policies, before offering a corporate resolution that would result in multiple non-prosecution or deferred prosecution agreements for a corporation (including its affiliates), prosecutors must secure special approval and notify the Office of the DAG. At the same time, given the Department's heavy emphasis on voluntary and timely self-disclosure, the policy revisions make an express exception in the case of a company

21 *Id.* at 3 (emphasis added).

22 *Id.*

23 *Id.* at 4.

24 *Id.* at 4–5.

25 *Id.* at 5.

26 *Id.* at 5–6.

27 *Id.* at 5.

28 *Id.* at 6.

self-disclosing misconduct to the government.[29] Moreover, in public remarks following the release of the Monaco Memorandum, Department leadership has clarified that while "while this Department will disfavor successive probationary agreements for the same company, [it is] not foreclosing their use."[30]

· New Factors to Assess Compliance Programs: Compensation Issues and Personal Devices. Consistent with the announcement's theme of individual accountability, the Monaco Memorandum supplements existing Department guidance for the assessment of corporate compliance programs.[31] In particular, the new guidelines supplement the Division's existing guidance on the topic, which focuses on "the evaluation of compliance programs in the context of criminal violations of the Sherman Act such as price fixing, bid rigging, and market allocation."[32]

Under the revised policies, prosecutors assessing corporate compliance programs should now consider whether a company's compensation program has been structured to reward compliance and impose financial sanctions on personnel who contributed to criminal misconduct. That assessment will include "what companies say and what they do," meaning whether, in practice, a company has actually sought to claw back compensation — not merely whether its agreements would allow for it.[33] Among other considerations, prosecutors must assess whether the company uses or has used non-disclosure agreements or other contractual language that would "inhibit the public disclosure of criminal misconduct by the corporation or its employees."[34]

The Monaco Memorandum also directs Department prosecutors to consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure the preservation of business-related data and communications. Under the new policy, "[h]ow companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation."[35]

· Enhanced Transparency Regarding Compliance Monitors. DAG Monaco also announced several changes to Department policy concerning the selection and use of independent compliance monitors. First, after reiterating guidance originally announced a year earlier that prosecutors should not apply any presumptions for or against requiring an independent compliance monitor as part of a corporate criminal resolution, the Memorandum sets out ten new, non-exhaustive factors to guide prosecutors in the assessment of whether a monitor is necessary.[36]

Second, the Department has directed prosecutors to ensure that monitorships are tailored in scope to the misconduct and compliance deficiencies of the company at issue. The monitor's responsibilities and scope of work must be memorialized in a written workplan. Prosecutors are also now required to remain involved throughout the term of the monitorship — essentially to monitor the monitor. The policy contemplates that this may result in the shortening or lengthening of the monitor's term, depending on the pace of improvements at the company and whether there is a continuing need for the monitor.

Under the new policies, monitor selections also must be made pursuant to documented selection processes subject to several controls. In the antitrust sphere, the Division has maintained a monitor selection policy that tracks the requirements set out under the Monaco Memorandum.[37]

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29 *Id.*

30 Marshall Miller, Principal Assoc. Deputy Att'y Gen., U.S. Dep't of Justice, Keynote Address at Global Investigations Review (Sept. 20, 2022), https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-live-keynote-address.

31 Monaco, *supra* note 3, at 9.

32 U.S. Dep't of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

33 Monaco, *supra* note 2; see also Monaco, *supra* note 3, at 10 ("If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.").

34 Monaco, *supra* note 3, at 10.

35 *Id.* at 11.

36 *Id.* at 12–13.

37 Memorandum from Deputy Assistant Attorney General Richard Powers, Dep't of Justice, Antitrust Div., "Selection of Monitors in Criminal Cases" (July 2019), https://www.justice.gov/atr/page/file/1514456/download.

III. SOME REMAINING TENSION REGARDING THE TREATMENT OF DIRECTORS, OFFICERS, AND EMPLOYEES

Although most of the Divisions existing policies are generally consistent with the Monaco Memorandum, there is arguably one noteworthy outlier: the treatment of directors, officers, and employees of a self-reporting corporation. Under the Monaco Memorandum, the Department's focus plainly is on enticing corporate self-disclosures with the goal of facilitating the prosecution of potentially culpable individual actors. The clearest example is that cooperation credit is now more expressly conditioned on the company prioritizing self-disclosures that would allow prosecutors to weigh individual culpability, and the instruction to those prosecutors to make charging decisions regarding individuals earlier in the process.

By contrast, in the Antitrust Division, a hallmark of Type A leniency has long been that, where the relevant qualifications are met, the self-disclosing corporate "applicant's current directors, officers, and employees will not be charged criminally for the illegal activity if they provide timely, truthful, continuing, and complete cooperation to the Division throughout its investigation of the illegal activity."[38] It remains to be seen whether the tension between the Monaco-era Department focus on prosecuting individuals can comfortably co-exist with a program that ostensibly guarantees immunity to individuals who may well otherwise have exposure to criminal prosecution. Ultimately, we think the Department's revised corporate enforcement policies can — and will — accommodate the Division's longstanding leniency policy as it applies to executives. Given the Division's exceedingly successful track record (going back some three decades) of encouraging corporate self-disclosure and cooperation to "bust up" cartel activities, we think it unlikely that the DAG's Office will strip (or even limit) the Antitrust Division of one of its most effective and important tools that encourages the very disclosure and cooperation posture that the Department seeks to replicate across its other components. That said, before making any self-disclosure under the Antitrust Division's Leniency Program, counsel for any disclosing company would do well to confirm that the Division's treatment of directors, officers, and employees that has not changed under the Monaco regime.

IV. CONSIDERATIONS FOR THE BUSINESS COMMUNITY MOVING FORWARD

It is clear from both DAG's Monaco's speech and the Monaco Memorandum that DOJ understands that when evaluating whether to self-disclose and whether and how to cooperate, companies do best when DOJ has articulated the "rules of the road" with clarity and precision. As such, with greater transparency and standardization of the self-disclosure process, the Department's recent announcement represents DOJ's "carrot" for companies facing potential enforcement exposure. But DAG Monaco's announcement was also not shy about previewing the "stick," warning: "resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose." Only months into the new revised corporate enforcement policies, and with at least some two years left in the current Administration, time will certainly tell how fastidiously the Department will implement its policies moving forward.

Whether the latest revisions to DOJ corporate enforcement policy will result in more self-disclosures throughout the entire Department remains to be seen. Clearly, though, that is one of the main goals — if not *the* main goal — of the just-announced policy. Thus, with a Justice Department so focused on pursuing corporate misconduct and seeking to hold individuals accountable, companies should carefully consider the latest Monaco Memorandum sooner rather than later. This is especially so for business organizations that operate in a heavily regulated environment with meaningful enforcement risks.

Should reportable issues come to light, the latest guidance may affect whether and when self-disclosure should occur. If nothing else, the Memorandum also contains important guidance that companies can and should use now (not later) when assessing existing policies, executive compensation agreements, and compliance programs. Doing so can only help put companies in the best position possible should they learn about potentially reportable issues in the future. Channeling the great Benjamin Franklin, companies would do well to remember two of his quite famous and insightful observations, namely, "an ounce of prevention is worth a pound of cure" and "don't put off until tomorrow what you can do today."

38 Just. Manual, *supra* note 10, §§ 7-3.300, 7-3.310, 7–3.320.

IS PRIVILEGE AGAINST SELF-INCRIMINATION APPLICABLE TO BRAZILIAN INTERNAL INVESTIGATIONS?

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I. INTRODUCTION

Brazilian practitioners face a dilemma regarding conflicting labor and criminal provisions *arguably* applicable to employees under internal investigations. Applicability is indeed *arguable* since there are no specific statutory provisions or robust case law regarding internal investigations in Brazil. Local practitioners must therefore abide by general rules, principles, and international best practices.

On one hand, labor and civil law provide that employees must cooperate with internal investigations[2] (e.g. due to the good faith principle[3] which applies to employment contracts[4] and employee information duties)[5] and that employers have the right and duty to request employees for relevant information on activities related to the company, including information regarding alleged misconduct.[6]

One the other hand, constitutional[7] and criminal[8] provisions set forth the privilege against self-incrimination pursuant to which individuals are entitled to remain in silence when compelled to self-incrimination by the state.

Against this backdrop, are employees obliged to provide self-incriminatory statements or evidence to their employers when targeted by internal investigations?

Those who are not truly aware of Brazilian internal investigations' dynamics could argue that internal investigations are organized and conducted by companies and individuals, related attorney communications and work-product are privileged, and companies are not obliged to reveal or discuss findings with state agents. In such case, considering internal investigations' private nature, the privilege against self-incrimination should not apply.

When taking a closer look to internal investigations involving alleged violations carried out in Brazil and the interplay between resolution applicants and authorities, law practitioners hit a grey area. Could private investigative measures be attributed to public authorities? In such case, should the privilege against self-incrimination apply?

II. THE BRAZILIAN EXPERIENCE

Many internal investigations carried out in Brazil alter investigations' private nature when they take place concurrently with resolutions with authorities and their investigative measures are affected or influenced by the state; or are initiated due to cooperation obligations entered with authorities.[9]

2 Lack of cooperation could entail labor disciplinary measures, including termination for cause. Article 484 of the Labor Code.

3 Article 422, Civil Code.

4 ARNALDO SUSSEKIND, DÉLIO MARANHÃO, SEGADAS VIANNA, LIMA TEIXEIRA, *INSTITUIÇÕES DE DIREITO DO TRABALHO* (2 ed. São Paulo: LTr, 2005, pg. 257-258).

5 JUDITH MARTINS-COSTA, op. cit. (2018, pg. 308).

6 See, for instance, Brazil. Superior Court of Justice. *Recurso Especial No. 1.410.246/PR* (2013/0343503-6). Judge: Minister Paulo de Tarso Severino. Adjudication date: 05/12/2015; Brazil. Superior Court of Justice. *Agravo em Recurso Especial No. 284.518* (2013/0010128-7). Judge: Minister Raul Araújo. Adjudication date: 08/19/2013; Brazil. Regional Labor Court of the 3rd Region. *Recurso Ordinário No. 590607.01079.2006.037.03.00.0*. Judge: Maria Cecília Alves Pinto. Adjudication date: 05/12/2007; Brazil. Superior Labor Court. *Agravo de Instrumento em Recurso de Revista No. 405-23.2012.5.06.0002*. Judge: Minister Maria Helena Mallmann. Adjudication date: 06/24/2016; and Brazil. Regional Labor Court of the 2nd Region. *Ação Trabalhista Rito Ordinário No. 1001930-27.2017.5.02.0465*. Judge: Gabriel Callado de Andrade Gomes. Adjudication date: 11/22/2021. Also, ALICE MONTEIRO DE BARROS. CURSO DE DIREITO DO TRABALHO (5 ed. São Paulo: LTr, 2009, pg. 582).

7 Article 5, LXIII, of the Brazilian Federal Constitution.

8 Articles 186, 198, 478, II of the Code of Criminal Procedure.

9 Information regarding Brazilian practice is based on field research (i.e. interviews with expert attorneys and members of the Federal Prosecutors' Office, Comptroller General's Office, and Brazilian Antitrust authority), Brazilian legislation, doctrine, and case law. Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação*. Fundação Getulio Vargas, Escola de Direito de São Paulo (October 10, 2022). Available at https://bibliotecadigital.fgv.br/dspace;commle/handle/10438/32786.

For instance, leniency agreements entered with the Federal Prosecutors' Office ("MPF"),[10] Comptroller General's Office ("CGU")[11] and Brazilian antitrust authority ("CADE")[12] typically encompass obligations regarding internal investigations such as: (i) general cooperation pursuant to which settling parties must provide data on relevant facts and/or individuals (e.g. evidence gathered under internal investigations); and (ii) specific provisions to deepen ongoing internal investigations or alter their scope.

Also, under resolutions, law practitioners conducting internal investigations are typically expected to provide internal investigations' reports (e.g. oral reports, presentations, or written reports) to such public authorities during the negotiation process and/or after the signing of resolutions.

In addition, public authorities most frequently request applicants for evidence gathered in internal investigations. For instance, CGU usually requests internal investigations' plans, reports with findings and interview memoranda to settling parties; CADE typically requests an executive summary on the reports produced in such investigations and findings; and MPF usually requests all documents classified as hot (i.e. the most relevant documents gathered in document reviews) and internal investigations' final reports.

Also, even though many authorities have expressed concern with the lawfulness of evidence submitted by settling parties as such evidence must be admissible under criminal and administrative proceedings, in practice, only few examine internal investigation's interview methodology. Examination methods include asking settling parties how they conducted individuals' interviews which interview memoranda were provided to the authority matter, such as if interviewees were provided with UpJohn warnings[13] and cooperated voluntarily.

Finally, criminal and administrative proceedings encompassing evidence obtained during internal investigations rarely address employee interview's methodology in the case files, hindering potential challenges to such methodology in court or before administrative authorities.

10 See, for instance, excerpt of the MPF's Chamber of Corruption Prosecution's leniency agreement template: "Item 5. THE APPLICANT and related individual applicants or future individuals that adhere to this agreement agree to provide the Federal Prosecutor's Office with facts and evidence gathered in internal investigations and that may assist in the investigation of the violations provided under item 3 above with the objective of obtaining the benefits set forth in this Leniency Agreement" (free translation). Available at http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/arquivos/Modelo-Leniencia-MPF.pdf.

11 See, for instance, excerpts of the leniency agreement executed between CGU, the Attorney General's Office ("AGU"), Camargo Corrêa Construções e Participações S.A and MOVER Participações S.A.: "4.2. The RESPONSIBLE APPLICANTS acknowledge, as they acknowledged hereby, the duty of full and permanent cooperation with the investigations of the violations under this Leniency Agreement"; and "6.1. The FIRST RESPONSIBLE APPLICANTS represent that they have adopted the following measures to remediate the misconduct hereunder described and prevent their continuity […] Investigated misconducts referred to in ANNEXES I and II under internal investigations with the objective of gathering information on the total value of illicit payments directly or indirectly offered or paid to authorities" (free translation). Available at https://www.gov.br/cgu/pt-br/assuntos/combate-a-corrupcao/acordo-leniencia/acordos-firmados/camargo-correa.pdf.

12 See, for instance, excerpt of CADE's leniency agreement template: "Item 20. Given that the Reported Violation was targeted by an internal investigation conducted by the Applicants, they may identify current or former employees whose involvement was unknown on the signing date and who may wish to adhere to the Leniency Agreement. Such individuals may adhere to the Leniency Agreement when admitted as applicants by CADE according to convenience and opportunity criteria and such adhesion shall have the same effect as a joint execution provided that the thresholds set forth under Law No. 12,529/2011 and Article 198 of CADE's Internal Rules are met." (free translation). Available at https://cdn.cade.gov.br/Portal/assuntos/programa-de-leniencia/modelo-de-acordo-e-documentos-relacionados/MODELO_Acordo-de-Leniencia.pdf.

13 *United States Court of Appeals for the Sixth Circuit. Upjohn Co. et. al. v. United States et. al.*, 1981.

III. THE PRIVILEGE AGAINST SELF-INCRIMINATION'S SCOPE OF APPLICATION

The privilege against self-incrimination is set forth under the Brazilian Federal Constitution (Article 5, LXIII) and Code of Criminal Procedure (Articles 186, 198, 478, II) and its origin has been largely debated. For instance, it has been associated with the right to due process,[14] principle of human dignity,[15] informative self-determination, and rule of law.[16]

Such privilege protects individuals from being compelled by the state to self-incriminate and its main legal consequences are the right: (i) to remain silent during coercion, which right may not be used against such individual; and (ii) to not produce self-incriminatory evidence. Its scope of application is therefore related to state coercion, which may take place by legal means (e.g. depositions and warrants) and physical means (e.g. mistreatment).

The Brazilian Superior Court of Justice ("STJ") has found that the privilege in question applies to all criminal actions, its *core sphere of protectio*n, and adopted an extensive view as to its reach, having understood that administrative actions also entail such protection should they be related to administrative offenses that also constitute criminal offenses.[17] For instance, investigative measures adopted by CADE when investigating cartel practice and by CGU when investigating bribery and bid rigging, both of which are part of the Federal Government and have administrative powers, should comply with individuals' privilege against self-incrimination since such wrongdoings are also a crime in Brazil.[18]

Anyhow, the privilege against self-incrimination has only been enforced against state coercion. Since internal investigations are conducted by individuals on behalf of legal entities rather than the state, the privilege against self-incrimination would only be enforceable within internal investigations should: (i) the privilege against self-incrimination be deemed applicable to private actions; or (ii) actions occurred within internal investigations be attributable to the state.[19]

IV. EXTENSION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO PRIVATE COERCION

Foreign scholars argue that privilege against self-incrimination applies to internal investigations even though investigations are not public in nature since they place employees in a position equivalent to defendants investigated by the state ("extension theory").[20] Hence, the extension theory is based on the similarity between internal investigations and public investigations regarding inequality of arms and the vertical relationship among parties (i.e. employee and employer).

Pursuant to such scholars, the extension of the privilege against self-incrimination is in accordance with employee's right to dignity and should only take place in specific circumstances: (i) when employees are subject to legal coercion in internal investigations (i.e. by being invited

14 See, for instance, LUIS GRECO, *Internal investigations e o princípio da não auto-incriminação* in JOSÉ DANILO TAVARES LOBATO, JOÃO PAULO ORSINI MARTINELLI, HUMBERTO SOUZA SANTOS (Orgs.), *COMENTÁRIOS AO DIREITO PENAL ECONÔMICO BRASILEIRO*. Belo Horizonte: D'Plácido, 2017, pg. 817), PAULO PINTO DE ALBUQUERQUE, *COMENTÁRIO DO CÓDIGO DE PROCESSO PENAL: À LUZ DA CONSTITUIÇÃO DA REPÚBLICA E DA CONVENÇÃO EUROPEIA DOS DIREITOS DO HOMEN* (4 ed. Lisboa: Universidade Católica Editora, 2011, pg. 982).

15 See, for instance, ASENCIO GALLEGO, *EL DERECHO AL SILENCIO COMO MANIFESTACIÓN DEL DERECHO DE DEFENSA* (2017, pg. 258); MORENO CATENA, *Los elementos probatorios obtenidos con la afectación de derechos fundamentales durante la investigación* in GÓMEZ COLOMER (Coord.), *PRUEBA Y PROCESO PENAL (2008, pg. 81); ROGALL, DER BESCHULDIGTE ALS BEWEISMITTEL GEGEN SICH SELBST* (1977); BEATRIZ GOENA VIVES, *Responsabilidad penal de las personas jurídicas y nemo tenetur: análisis desde el fundamento material de la sanción corporativa* in *REVISTA ELECTRÓNICA DE CIENCIA PENAL Y CRIMINOLOGÍA* (2021, No. 23-22, pg. 6-7). Available at http://criminet.ugr.es/recpc/23/recpc23-22.pdf.

16 See, for instance, *Allan v. The United Kingdom*; Brazil. Superior Court of Justice. *Recurso Especial No. 1.677.380/RS*. Judge: Minister Herman Benjamin. Adjudication date: 10/16/2017. Brazil. Superior Court of Justice. *Agravo Interno no Recurso Especial No. 1.719.584-RJ*. Judge: Minister Herman Benjamin. Adjudication date: 11/29/2018. Spain. Constitutional Court. Romeo Edgardo Vargas Romero 197/1995. Adjudication date: 12/21/1995. Ruiz Vadillo, FJ 6º. JAMES D. WING, Corporate Internal Investigations and the Fifth Amendment. BUSINESS LAW TODAY, 2014, pg. 3. CHRISTOPH DANNECKER, *Der nemo tenetur-Grundsatz: prozessuale Fundierung und Geltung für juristische Personen*, ZStW 2015, (127), pg. 370-409. Available at https://d-nb.info/1217598944/34; PETER KASISKE, *Mitarbeiterbefragungen im Rahmen interner Ermittlungen: Auskunftspflichten und Verwertbarkeit im Strafverfahren*, NZWiSt, n. 7, 2014, pg. 15; MARTIN BÖSE, *Die verfassungsrechtlichen Grundlagen des Satzes "Nemo tenetur se ipsum accusare."* Berlin: Geburtstag, 2003, pg. 98.

17 Brazil. Superior Court of Justice. *Recurso Especial No. 1.677.380-RS*. Judge: Minister Herman Benjamin. Adjudication date: 10/10/2017. Brazil. Superior Tribunal de Justiça. *Agravo Interno no Recurso Especial No. 1.719.584-RJ*. Judge: Minister Herman Benjamin. Adjudication date: 11/29/2018.

18 Articles 337-L and 333 of the Criminal Code and 4 of Law No. 8,137/1990.

19 There are other theories regarding the matter such as the *labor law response and the criminal finality* theories. Further information available at Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação*. op. cit., (2022).

20 HANS THEILE, StV, 2011, 381, 385. ZERBES, ZStW 125, 2013, pg. 551 and 567. PETER KASISKE, NZWiSt 2014, pg. 262.

to take part in interviews and being bound to "talk of walk" rules); and (ii) when internal investigations potentially concern criminal misconduct, are organized in a "systematic" manner[21] and make use of human and financial resources "equivalent to those employed in criminal proceedings by the state."[22,23]

From a Brazilian standpoint, the enforceability of the privilege against self-incrimination against private coercion is a bold solution to the problem at hand as it challenges the established legal paradigm's[24] fundamental premises[25] – i.e. the scope of protection of the privilege matter. Such innovative approach should only be adopted to solve a legal problem should there be no other adequate legal solution.

Also, the extension theory's rationale is not compatible with the Brazilian labor framework since it is based on the premise that internal investigations are responsible for altering the equilibrium among employees and employers. Conversely, in Brazil the vertical nature and lack of equilibrium among employees and employers are inherent to employment relationship.

In addition, inequality of arms among employees and employers in internal investigations could be addressed by alternative methods allowed for in the Brazilian statutory regime. For instance, employees could request access to documents related to them held by the employer directly or before judicial courts in light of the right to a complete defense[26].

Finally, regarding the second circumstance under which the privilege against self-incrimination allegedly applies to internal investigations (e.g. those organized in a "systematic" manner and that make use human and financial resources "equivalent to those employed in criminal proceedings by the state"), theorists assume that such privilege would only apply to well-organized and robust internal investigations into criminal misconduct. Such assumption leads to the wrong impression that the extension of the scope of applicability of the privilege against self-incrimination is related to the size or the way internal investigations are conducted rather than nature of the misconduct under investigation and of the coercion involved.

V. ATTIBUTION OF PRIVATE COERCION TO THE STATE

The *attribution theory*[27] warrants the enforceability of the privilege against self-incrimination within internal investigations whenever the legal and/or factual coercion matter is attributable to the state.

There are some intermediate positions among scholars regarding the reasoning behind the attribution of actions to the state,[28,29] all of which seem to point to one direction: whenever there is an *active influence* of authorities over actions conducted within internal investigations, such actions are attributable to the state. Therefore, the individuals targeted by such actions are entitled to the privilege against self-incrimination.

Active influence should be deemed as state actions that give rise to the commencement of internal investigations or interfere in measures that shall be adopted under such investigations (e.g. under resolution with authorities or related to notification duties before authorities). Such concept must not be interpreted *lato sensu* as comprising all actions that may give rise to the opening of an internal

21 For instance, such as an internal investigation comprised of various stages and encompassing a work plan.

22 For instance, when an internal investigation is conducted by individuals specialized in compliance who are fully dedicated to the investigation. ALBERT ESTRADA I. CUADRAS, *CONFESIÓN O FINIQUITO: EL PAPEL DEL DERECHO A NO AUTOINCRIMINARSE EM LAS INVESTIGACIONES INTERNAS* (Barcelona: InDret, 2020, pg. 257 and 266).

23 See, for instance, Spain. Supreme Court. *Sentencia* No. 489/2018. *Sala Penal*. Adjudication date: 10/23/2018.

24 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3 ed. Chicago: University of Chicago Press, 1996, pg. 23).

25 LUIS GRECO, op. cit., pg. 816.

26 Article 5, LV, of the Brazilian Federal Constitution.

27 See, for instance, LUIS GRECO, op. cit., pg. 792. PETER KASISKE, op. cit. 2014, pg. 262. ZERBES, ZStW, n. 125, 2013, p. 563. KASPAR, *Strafprozessuale Verwertbarkeit nach rechtswidriger privater Beweisbeschaffung*, GA, n. 160-4, 2013, pg. 213.

28 For instance, such conclusion is based on the criminal offense intervention theory [*teoria da intervenção do delito*]; strict liability attribution theory [*teoria da imputação objetiva*]; and the theory that deems the state as individuals' or companies' co-principal whenever there is a joint decision to initiate the internal investigation matter and a relevant contribution by each party [*coautoria*]. Respectively, WOLTER, *Staatlich gesteuerte Selbstbelastungsprovokation mit Umgehung des* Schweigerechts: Zur objektiven Zurechnung im Strafprozess, ZIS, n. 5, 2012, pg. 240-244; and KOTTEK, *Die Kooperation von deutschen Unternehmen mit der US-amerikanischen Börsenaufsicht* SEC, 2012, pg. 161.

29 Some foreign theorists also argue that the right against self-incrimination applies when authorities postpone the opening if investigations to wait for information and evidence gathered in internal investigations that shall be submitted by applicants under resolutions. Nonetheless, such postponement would be deemed illegal in Brazil since the state does not have prosecutorial discretion (Articles 5, 6 and 257, II, of the Code of Criminal Procedure). See, for instance, LUIS GRECO, op. cit., pg. 814.

investigation (e.g. becoming aware of the opening of an investigation by authorities into misconducts related to the company matter by the press).

The *attribution theory* is a more reasonable solution to address the problem at hand since it does not significantly alter the privilege against self-incrimination's traditional scope of application (i.e. state coercion), and is based on attribution theories already put in practice by local practitioners (e.g. criminal offense intervention theory [*teoria da intervenção do delito*], strict liability attribution theory [*teoria da imputação objetiva*] and theory pursuant to which the state acts as individuals' and/or companies' co-principal [*teoria da coautoria*]).

It also seems to suit the Brazilian experience since many internal investigations into administrative and/or criminal misconduct are directly influenced by authorities under settlement agreements and therefore challenge internal investigations' private nature.

Examples of *active influence* that most frequently takes place in internal investigations carried out in Brazil regarding alleged criminal or administrative misconduct disclosed under resolutions to authorities[30],[31] include: (i) requests from authorities to the settling parties to deepen the investigation generally or into specific topics; (ii) decisions by authorities as to which independent third party shall be hired by companies to conduct internal investigations; (iii) definition of the internal investigation's scope (e.g. by including provisions in the resolution regarding the facts that must be investigated by the settling party); (iv) requests by authorities to the settling parties to conduct certain employee interviews; (v) requests by authorities to run specific key word lists against companies' data; and (vi) monitoring internal investigation's activities (e.g. by means of periodic meetings with settling parties to obtain information and assess internal investigation's development).

Finally, the state's *active influence* over internal investigations within resolutions does not transform settling parties into authorities' investigative tools, since such resolutions must be reached voluntarily among parties.

VI. CONCLUDING REMARKS

Brazilian internal investigations encompass legal coercion from a labor and civil law standpoint and many of such investigations into criminal and administrative misconduct are initiated or affected by authorities under resolutions. Pursuant to the *attribution theory*, which best suits the Brazilian experience and statutory regime and does not significantly alter the privilege against self-incriminations' traditional scope of application, the privilege matter should apply to employees targeted by internal investigations into criminal misconduct whenever private and state action are present and entwined.

Thus, law practitioners should err on the side of caution and inform interviewees that they are entitled to the privilege against self-incrimination and/or to remain silent. Although there are no provisions setting forth warning duties within internal investigations such as those provided for the state[32] during hearings (Article 186 of the Criminal Code of Procedure) and arrests (Article 5, LXIII, of the Federal Constitution), the adoption of such measure could prevent the annulment by courts[33] of evidence gathered based on employee cooperation. However, the privilege against self-incrimination's protection should only apply to evidence gathered concurrently to or after coercion attributable to the state takes place.

30 Further information available at: Ana Gabriela da Costa Carvalho Forsman. *A prática das investigações internas no Brasil e a aplicabilidade do direito à não autoincriminação.* op. cit., (2022).

31 "A close nexus of state action exists between a private entity and the state when a governmental actor (i) exercises coercive power; (ii) is entwined in the management or control of the private actor; (iii) provides the private action with significant encouragement, either over or covert; (iv) engages in a joint activity in which the private actor is a willful participant; (v) delegates a public function to the private actor; or (vi) entwines the private actor in governmental policies." *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F. 3d 178, 187, 2d Cir., 2005. Also, see, *United States v. Matthew Connoly and Gavin Campbell Black*, 2022; *Stein II*, 541 F. 3d at 147; *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 2001; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee and International Olympic Committee, 1987, 483 U.S.* 522, 547, 107, S.Ct. 2971, 97 L.Ed.2d 427; *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350 n. 7, 95 S.Ct. 449.

32 See for instance, Brazil. Federal Supreme Court. *Habeas Corpus No. 80.949/RJ*. Judge: Minister Sepúlveda Pertence. First panel. Adjudication date: 12/14/2001.

33 EUGÊNIO PACELLI, *CURSO DE PROCESSO PENAL* (24 ed. São Paulo: Atlas, 2020, pg. 437). Also, Brazil. Federal Supreme Court. *Habeas Corpus No. 80.949/RJ*. Judge: Minister Sepúlveda Pertence. First panel. Adjudication date: 12/14/2001.

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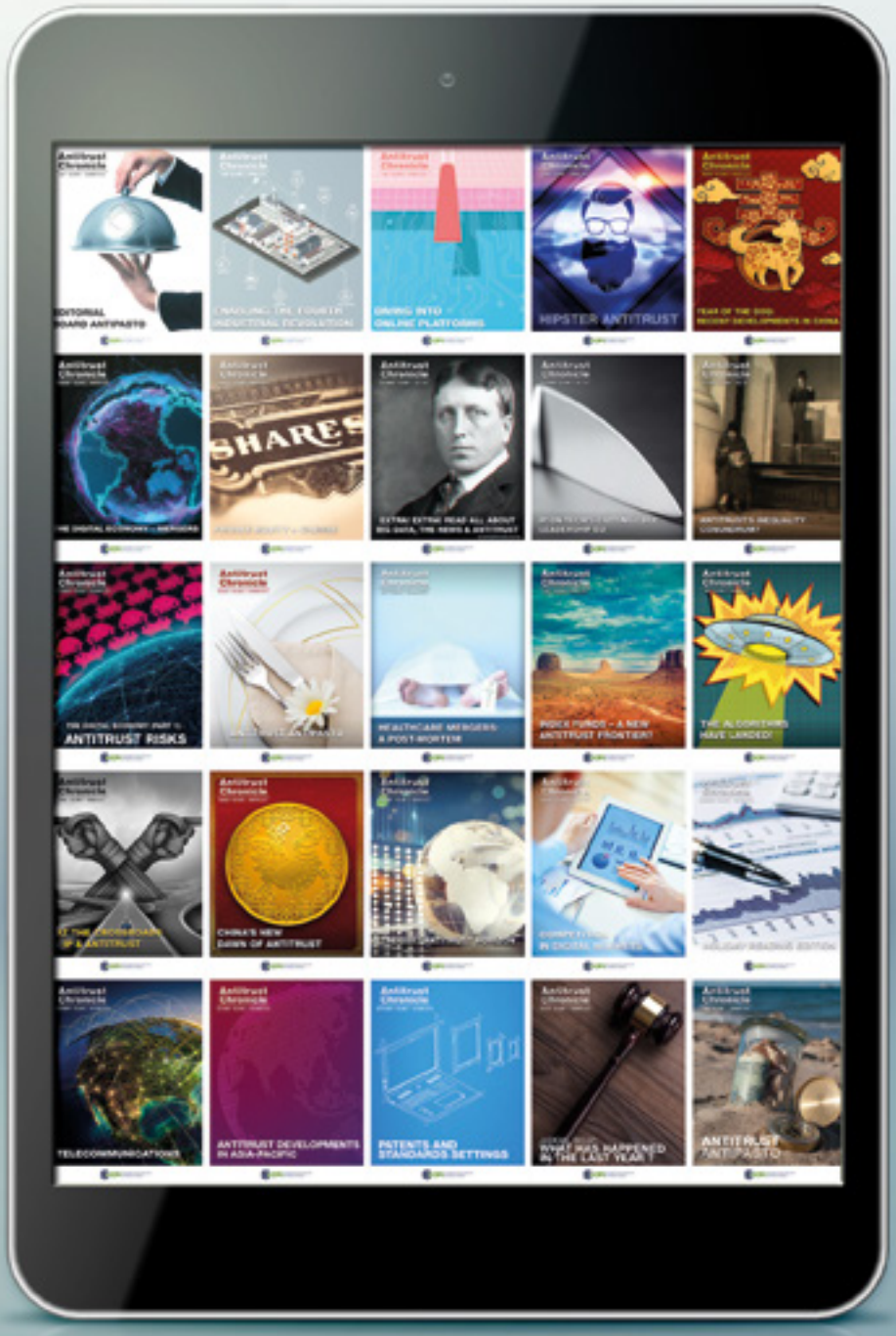


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