



## ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

### -- Note by the United States --

1. This paper responds to the Chairman's invitation for written submissions on the topic of promoting compliance with competition law. The Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("Division") (collectively "the agencies") are pleased to provide our perspective on this important issue. The paper addresses the topic in three parts. The first part offers various agency enforcement perspectives on the topic. The second part looks into the role private antitrust enforcement plays in promoting compliance. Finally, the third part provides agency perspectives on antitrust compliance programs. The agencies note that the agencies are not best placed to answer some of questions suggested in the invitation for submissions. Private companies are in a better position to explain what factors determine their decision to comply or not comply with competition laws.

### **1. Promoting better compliance: Agency perspectives**

#### *1.1.1 Transparency of enforcement actions*

2. The agencies complement their enforcement actions by providing detailed guidance to consumers, the business community, and the private antitrust bar that counsels it. Robust transparency promotes compliance because it informs antitrust enforcement's stakeholders of the boundaries between legitimate conduct and conduct that runs afoul of the antitrust laws.

3. The agencies provide the public with substantial information about all aspects of antitrust (policy, enforcement, history, statutes, agency operations) through their public websites.<sup>1</sup> In our legal system, administrative litigation at the FTC and litigation in federal court by both agencies result in written judicial and agency opinions that form a body of legal precedent that can guide private compliance with the antitrust laws. The agencies similarly make this jurisprudence available through our websites.<sup>2</sup>

4. Parties in most of our cases settle matters instead of litigating. Settlements generally do not result in a substantive judicial opinion. Nevertheless, they form an important body of precedent with broad influence in the private antitrust bar, the business community, and consumers at large. In accordance with the Tunney Act,<sup>3</sup> when the Division files its complaint and proposed consent decree in federal court, it also files a competitive impact statement and invites comment from interested parties. Before the FTC accepts a consent order, it follows a similar practice, inviting public comment by issuing a draft complaint, a press

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<sup>1</sup> See, for example, the FTC Competition Policy Guidance gateway page available at <http://www.ftc.gov/bc/guidance.shtm>

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the business community knows about what the agencies do, the more effective our enforcement program will be, and the greater its deterrent effect.

10. The agencies devote considerable resources to antitrust enforcement, but our resources are limited and our mandate is broad. The U.S. economy is so large that the agencies cannot review all private economic behavior. Hence, private antitrust counseling and private antitrust lawsuits play an important role in deterring anticompetitive conduct before it occurs. Such preemptive deterrence significantly occurs. Such pror12.5 (at s3MCID 1 BDC 0.0015 Tc 0.0881 Tw 0.00425 TD(1.2.415jEM1 /LBody MCID 5 BDC 7.85

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setting up a website where complaints could be submitted and for serving as a central clearinghouse for complaints submitted by third parties, the Division, the state plaintiffs, and the committee of technical

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information about the cartel, early cooperation can result in plea agreements that recommend reduced penalties under the Sentencing Guidelines.<sup>21</sup>

28. The U.S. Sentencing Guidelines contemplate a reduction in a corporate fine for an effective compliance program. As applied by the Division, a reduction will be available so long as there was no involvement of high-level personnel (defined broadly) in the illegal activity, and no delay in reporting the activity. Recent guideline amendments permit a limited exception for the involvement of high-level personnel, in circumstances where four criteria are met, including that (1) the compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely;” and (2) “the organization promptly reported the offense to appropriate governmental authorities.”<sup>22</sup> A company meeting the latter criteria may also qualify for leniency, making any fine reduction irrelevant. To date, no antitrust defendant has qualified for a sentencing reduction based on its compliance program.<sup>23</sup>

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<sup>21</sup> United States Sentencing Commission, Guidelines Manual (2010), supra note 8, § 8C4.1.

<sup>22</sup> *Id.* § 8C2.5(f)(3)(C).

<sup>23</sup> Further information on anti-cartel compliance programs can be found in the U.S. Sentencing Guidelines, supra note 8, § 8B2.1; Gary Spratling, former Deputy Assistant Attorney General, Antitrust Division, *Corporate Crime in America: Strengthening the “Good Citizen” Corporation, The Experience and Views of the Antitrust Division*, Remarks Presented at a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), available at <http://www.justice.gov/atr/public/speeches/speech1grs.htm>.