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Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

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Introduction[1]

Antitrust compliance programs promote vigorous competition in a free market economy by creating a culture of good corporate citizenship. Although even an effective antitrust compliance program may not deter every violation, it should prevent many of the most egregious violations—particularly the pervasive, long-running forms of corporate misconduct that can subject executives and their companies to significant prison sentences, criminal fines, and treble damages actions. And when potential antitrust issues arise, an effective compliance program should enable a company to swiftly detect and address them, including giving the company the best chance to self-report and qualify for the Antitrust Division's Corporate Leniency policy, which confers nonprosecution protection on the company and eligible personnel in exchange for cooperation against individual and corporate co-conspirators. Effective antitrust compliance programs thereby promote individual accountability and corporate enforcement.[2]

This guidance focuses on assessing a compliance program's effectiveness in the context of criminal violations of the Sherman Act, 15 U.S.C. § 1 *et seq.*, such as price fixing (including wage fixing and conspiracies to suppress other terms of price competition), bid rigging, market allocation, and monopolization, as well as obstructive acts that imperil the integrity of antitrust investigations. The guidance aids Antitrust Division prosecutors in evaluating corporate compliance programs at two points in time: 1) making charging decisions; and 2) making sentencing recommendations (including obligations such as reporting or an independent compliance monitor). In making this evaluation, prosecutors assess a compliance program as it existed the time of the offense, as well as the company's subsequent improvements to the program. This assessment requires prosecutors to obtain information necessary to evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses. Accordingly, prosecutors should not wait for companies to offer a presentation before beginning their evaluation of a program.

While this guidance is focused on criminal risk, a well-designed antitrust compliance program should also minimize risk of civil antitrust violations. If allowed to occur, civil antitrust violations expose companies to substantial risk: civil actions resulting in equitable relief to restore competition to affected markets, treble damages actions—including federal enforcement actions on behalf of victim agencies—and monetary penalties for violations of the Hart-Scott-Rodino Act. A strong culture of compliance can allow a company to steer clear of civil antitrust violations and, if violations do occur, to promptly self-disclose and remedy them and cooperate with a civil

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[1] This guidance document offers the views of the Antitrust Division of the Department of Justice and has no force or effect of law. It is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party. Nothing in this document should be construed as mandating a particular outcome in any specific case, and nothing in this document limits the discretion of the U.S. Department of Justice or any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

[2] *See Leniency Policy*, U.S. DEP'T JUSTICE, ANTITRUST DIV., https://www.justice.gov/atr/leniency-policy.

antitrust investigation. In seeking to resolve investigations into civil antitrust violations, companies asking the Antitrust Division to take notice of existing or improved compliance efforts, including to avoid court-mandated further compliance and reporting requirements or retention of and supervision by external monitors, should expect the civil team to consider many of the same factors when assessing the effectiveness of their compliance program as criminal prosecutors do.

This document is based on the Antitrust Division's experience and expertise evaluating antitrust compliance programs, along with Department of Justice guidance on evaluating corporate compliance programs, *see* JM § 9-28.800. It is designed to be consistent with that guidance and the Criminal Division's guidance on the Evaluation of Corporate Compliance Programs, which allows companies to craft a coherent, holistic compliance program taking into account the company's lines of business and risk profile.[3]

I. <u>Evaluating a Corporate Antitrust Compliance Program at the Charging Stage</u>

When deciding whether and to what extent to bring criminal charges against a corporation, prosecutors consider the Principles of Federal Prosecution and the Principles of Federal Prosecution of Business Organizations and the Antitrust Division's Leniency Policy. *See* JM 9-27.001 *et seq.*, 9-28.300–28.400, 7-3.300. Prosecutors consider factors including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300; *see* JM 9-28.800, 9-28.1000.

Although the Department has no formulaic requirements for evaluating corporate compliance programs, the Justice Manual asks prosecutors to consider three "fundamental" questions in their evaluation:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?"
3. "Does the corporation's compliance program work in practice?"

JM 9-28.800.

This document addresses these questions in the criminal antitrust context by identifying elements of an effective antitrust compliance program. Although prosecutors should consider these factors when evaluating antitrust compliance programs, the factors are not a checklist or a formula. Not all factors will be relevant in every case, and some factors are relevant to more than one question. The Antitrust Division recognizes that a company's size affects the resources

[3] U.S. DEP'T JUSTICE, CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Sept. 2024), https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter CRIMINAL DIVISION ECCP]. It also draws on the United States Sentencing Guidelines' evaluation of effective compliance programs. *See* U.S.S.G. § 8B2.1.

allocated to antitrust compliance and the breadth of the compliance program.[4] In evaluating the design of the compliance program, prosecutors should be aware that the program may reflect efforts to meet standards across a number of areas of law and jurisdictions.

A. Preliminary Questions

At the outset of any inquiry into the efficacy of an antitrust compliance program, prosecutors should ask three preliminary questions:

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

These questions help prosecutors focus the analysis discussed below on the factors most relevant to the specific circumstances under review.

B. Elements of an Effective Compliance Program

The goal of an effective antitrust compliance program is to prevent and detect violations. While the best outcome is to prevent antitrust violations from occurring, the Antitrust Division recognizes that "no compliance program can ever prevent all criminal activity by a corporation's employees." JM § 9-28.800. According to the Justice Manual, the "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." *Id*. Indeed, "[t]he keys for successful [antitrust] compliance [programs] in general are efficiency, leadership, training, education, information and due diligence."[5]

The factors that prosecutors should consider when evaluating the effectiveness of an antitrust compliance program include: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued

[4] *See* U.S.S.G. § 8B2.1 note 2(C) ("The formality and scope of actions that an organization shall take to [implement an effective compliance program] . . . including the necessary features of the organization's standards and procedures, depend on the size of the organization. . . . A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization. . . . [A] small organization may [rely on] . . . less formality and fewer resources.")

[5] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, PROMOTING COMPLIANCE WITH COMPETITION LAW 12 (2012), http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf [hereinafter OECD COMPLIANCE PAPER].

review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[6] Questions relevant to each of these considerations are set forth below.

1. <u>Design and Comprehensiveness</u>

Although a Code of Conduct can be an effective tool for communicating a company's antitrust-related policies and procedures, the Justice Manual also requires prosecutors to evaluate whether a compliance program "is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner." JM § 9-28.800. Prosecutors should consider the design, format, and comprehensiveness of the antitrust compliance program. Key considerations are the adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees and agents (hereinafter "employees and agents" will be collectively referred to as "employees").

- □ Before becoming aware of any investigation, did the company have an antitrust compliance program establishing standards and procedures to prevent and detect criminal conduct? When was the company's antitrust compliance program first implemented? How often is it updated? Is it periodically reviewed and does it seek feedback from employees? Are compliance materials updated with recent developments and periodically refreshed so they do not become stale? Are the compliance program and compliance materials updated to account for newly developed technology and emerging risks?

- □ What is the format of the antitrust compliance program? Is it in writing? How does the antitrust compliance program fit into the company's broader compliance program? Is antitrust compliance given appropriate emphasis in light of the antitrust risks the company faces?

- □ Who is responsible for integrating antitrust policies and procedures into the company's business practices? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls? For example, does the company have a way of tracking business contacts with competitors or attendance at trade association meetings, trade shows, and other meetings attended by competitors? Is that tracking system regularly monitored?

- □ What guidance has been provided to employees who could flag potential antitrust violations (*e.g.*, those with approval authority for pricing changes and participation in industry meetings, certification responsibilities for bidding activity, or human resources/hiring authority)? Do they know what antitrust risks the company faces and what conduct potentially indicates an antitrust violation?

- □ What electronic communication channels do the company and its employees use, or allow

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[6] *See* JM § 9-28.800; CRIMINAL DIVISION ECCP; INTERNATIONAL CHAMBER OF COMMERCE, ICC ANTITRUST COMPLIANCE TOOLKIT 2 (2013).

to be used, to conduct business? How does the process vary by jurisdiction and business function, and why? What mechanisms has the company put in place to manage and preserve information contained within each of the electronic communication channels? Does the company have clear guidelines regarding the use of ephemeral messaging or non-company methods of communication including the extent to which those communications are permitted and when employees must preserve those communications? What preservation or deletion settings are available, and what is the rationale for the company's approach to what settings are permitted?[7]

- □ What guidance has been provided to employees about document destruction and obstruction of justice? Does the company have clear document retention guidelines and does it educate employees on the ramifications of document destruction and obstruction of justice?

2. <u>Culture of Compliance</u>

An effective compliance program will "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S.S.G. § 8B2.1(a). Support from the company's senior leadership—the board of directors and executives—is critical to the success of an antitrust compliance program,[8] and employees should be "convinced of the corporation's commitment to [the compliance program]." JM § 9-28.800. An effective compliance program requires leadership to implement a culture of compliance at all levels of the organization.

Prosecutors should examine the extent to which corporate management—both senior leadership and managers at all levels—has clearly articulated and conducted themselves in accordance with the company's commitment to good corporate citizenship.[9]

- □ What are the company's senior leadership and managers across the organization doing to convey the importance of antitrust compliance to company employees? How have they, through their words and actions, encouraged (or discouraged) antitrust compliance? What concrete actions have they taken to demonstrate commitment to the company's antitrust compliance and compliance personnel, including remediation efforts if relevant? Have they

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[7] CRIMINAL DIVISION ECCP at 20.

[8] Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 4-5 (September 9, 2014), https://www.justice.gov/atr/file/517796/download ("If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one.").

[9] *See* U.S.S.G. § 8B2.1(b)(2)(A)–(B) (the company's "governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[h]igh-level personnel . . . shall ensure that the organization has an effective compliance and ethics program.").

persisted in that commitment in the face of competing interests or business objectives? How do senior leadership and management model ethical behavior to employees?

- □ Has senior leadership tolerated antitrust violations in pursuit of new business, greater revenues, hiring or retaining employees, maintaining or increasing market share, or maintaining customers, territories, or markets? Was senior leadership involved in the violation(s)?

- □ Has there been personal accountability by senior leadership for failures in the company's antitrust compliance?

- □ What else is the company's senior leadership doing to set the tone from the top or bring about culture change throughout the company?

- □ How are managers at all levels demonstrating to employees the importance of compliance? What are managers doing to set the tone from the middle?

- □ How and how often does the company measure the effectiveness of its compliance program and its culture of compliance? How does the company's hiring and incentive structure reinforce its commitment to ethical culture? What steps has the company taken in response to its measurement of the compliance culture?

- □ Does the board of directors have compliance expertise? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior leadership examined in overseeing the area in which the misconduct occurred?

3. Responsibility for the Compliance Program

For the antitrust compliance program to be effective, those with operational responsibility for the program must have sufficient qualifications, autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program. *See* U.S.S.G. § 8B2.1(b)(2)(C) ("To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.")

- □ Who has overall responsibility for the antitrust compliance program? Is there a chief compliance officer or executive within the company responsible for antitrust compliance? If so, to whom does the individual report, *e.g.*, the board of directors, audit committee, or other governing body? How often does the compliance officer or executive meet with the Board, audit committee, or other governing body? How does the company ensure the independence of its compliance personnel?

- □ How does the compliance function compare with other functions in the company in terms of stature, experience and compensation levels, rank/title, reporting line, resources, and access to key decision-makers? Are compliance personnel in place long enough to be effective,

without excessive turnover? Is the compliance function sufficiently senior within the organization to command respect and adequate resources?

- ◻ Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? If so, what proportion of their time is dedicated to compliance responsibilities? Why has the company chosen the compliance structure it has in place? Has the company's size impacted that decision?

- ◻ Do compliance personnel report to senior leadership, including the board of directors and executives, on the effectiveness of antitrust compliance? What is the format of their report? *See* U.S.S.G. § 8B2.1(2)(b)(2)(C).

- ◻ Who is delegated day-to-day operational responsibility for the antitrust compliance program? Do compliance personnel responsible for antitrust compliance have adequate experience and familiarity with antitrust law? Has the level of experience and qualifications in these roles changed over time?

- ◻ Does the company allocate sufficient compliance resources to educating employees on antitrust law? Are such resources allocated efficiently by focusing on high antitrust risk areas? For example, does the compliance program identify and adequately train employees who have frequent contact with competitors?

- ◻ Has the company evaluated the appropriate level of resources to devote to the compliance function? Are there times where requests for resources from the compliance function have been denied? If so, on what grounds? How do the resources allocated to antitrust compliance compare to those devoted to other functions of the company? Is the level of technology devoted to compliance comparable to the level of technology devoted to other functions? Does the company measure the value to the organization of its investments in the compliance function?

- ◻ Who reviews the effectiveness of the compliance function and what is the review process?

4. <u>Risk Assessment</u>

A well-designed compliance program is "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM § 9-28.800. Thus, an effective antitrust compliance program should be appropriately tailored to account for antitrust risk.[10]

[10] *See* U.S.S.G. § 8B2.1, application note 7 ("If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing.").

- ▫ Is the company's antitrust compliance program tailored to the company's various industries/business lines and consistent with industry best practice? Does the compliance program provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring? What efforts has the company made to implement antitrust-related policies and procedures that reflect and address the antitrust risks it faces, including legal and technical changes in the way the company conducts business? For example, as employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?

- ▫ What information or metrics has the company collected and used to help detect antitrust violations? How has the information or metrics informed the company's antitrust compliance program, *e.g.*, through training, modifications, or internal controls? For example, if the company bids on contracts, is bid information subject to evaluation to detect possible bid rigging? Does the company evaluate pricing changes for possible price fixing?

- ▫ Is the company's antitrust risk assessment current and subject to periodic review? Is there a process to identify emerging risks as the company's business environment changes? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? Have there been any updates to antitrust policies and procedures in light of lessons learned or marketplace, legal, technological, or other developments? Do these updates account for risks discovered through prior antitrust violations or compliance incidents?

- ▫ How does the company's risk assessment address its use of technology, particularly new technologies such as artificial intelligence (AI)[11] and algorithmic revenue management

[11] The term "artificial intelligence" has the meaning set forth in the OMB Memo M-24-10 at pages 26–27, available at https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-ArtificialIntelligence.pdf, and includes the following:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.

2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.

3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.

4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.

software, that are used to conduct company business? As new technology tools are deployed by the company, does the company assess the antitrust risk the tools pose? What steps is the company taking to mitigate risk associated with its use of technology? Are compliance personnel involved in the deployment of AI and other technologies to assess the risks they may pose? Does the compliance organization have an understanding of the AI and other technology tools used by the company? How quickly can the company detect and correct decisions made by AI or other new technologies that are not consistent with the company's values?

5. Training and Communication

An effective antitrust compliance program includes adequate training and communication so that employees understand their antitrust compliance obligations. "Ideally, [antitrust compliance training] empowers employees to do business confidently insofar as they are clearer on what is and is not permissible, and can resist pressures more effectively (whether these are internal or external)."[12] For example, training can teach relevant personnel that competitor communications could signal an antitrust violation if they are not part of a legitimate joint venture or other procompetitive or competitively neutral collaboration. In addition, training should instruct employees involved in such collaboration that a legitimate collaboration between competitors can become problematic if it develops into an exchange of competitively sensitive business information or future pricing information, or if other antitrust violations occur. Training should

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5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

Additionally, the following technical context should guide the interpretation of the definition:

1. This definition of AI encompasses, but is not limited to, the AI technical subfields of machine learning (including, but not limited to, deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI.

2. This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted.

3. For this definition, no system should be considered too simple to qualify as a covered AI system due to a lack of technical complexity (e.g., the smaller number of parameters in a model, the type of model, or the amount of data used for training purposes).

This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.

[12] ICC COMPLIANCE TOOLKIT at 12.

address what to do when an employee thinks activity is potentially unlawful.

- □ How has the company communicated its antitrust policies and procedures to all employees? Did the company introduce antitrust policies in a way that promotes and ensures employees' understanding? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls?

- □ If the company has a Code of Conduct, are antitrust policies and principles included in the document? If the company has foreign subsidiaries, are there cultural, linguistic, or other barriers to implementing the company's antitrust compliance polices, and how are those barriers addressed?

- □ What mechanisms does the company have in place to ensure that employees follow its compliance program? *See* U.S.S.G. § 8B2.1(b)(5)(A). How is the compliance program distributed to employees? Are the compliance program and related training materials easily accessible to employees, *e.g.*, via a prominent location on the company's intranet? How does the company confirm that employees in practice know how to access compliance materials?

- □ Must employees certify that they have read the compliance policy? If so, how? Do the certification policies apply to all employees? Do they apply to the board of directors? How often must employees certify their antitrust compliance?

- □ Does the company provide antitrust compliance training? In what form is the antitrust training and who provides it? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? Is there a process by which employees can ask questions raised by the trainings? Has the company evaluated the employees' engagement with the training session?

- □ Who receives antitrust compliance training? What analysis has the company undertaken to determine whom to train and to tailor training to the company's lines of business and antitrust risks? Are compliance personnel and managers trained to recognize antitrust red flags?

- □ Does training include senior leadership (including the board of director)? What is the lowest level employee who must receive antitrust compliance training? Are contractors or agents included in the training?

- □ How often does antitrust compliance training occur? Is antitrust compliance training required when an employee begins work? Is antitrust compliance training required before attending trade shows or trade association or other meetings with competitors? Are employees required to certify their completion of the training program? *See* U.S.S.G. § 8B2.1(b)(4). If so, how? How is attendance at the training recorded and preserved? Who ensures that employees attended the required training and certified their attendance?

- □ How does the training test the level of employees' understanding of the antitrust laws and their engagement with the training materials? Does the training incorporate specific materials tailored to the industries the company operates in or specific antitrust violations that have occurred in those industries in the past? Is training tailored to the employee's duties and does it provide examples that could arise in the business unit he or she is a part of? For example, if the company bids on contracts, does the company's compliance program educate employees on bid rigging and market allocation? Are those with pricing authority educated about price fixing? To the extent that employees are trained on antitrust "hot" words, is the focus on detecting and deterring antitrust violations, as opposed to making violations harder to detect?

- □ How often is antitrust training updated to reflect marketplace, legal, technological, or other developments? How does the training address permissible and nonpermissible uses of new technology including AI? Has the training addressed lessons learned from prior antitrust violations or compliance incidents at the company, as well as other companies operating in the same industries?

6. Periodic Review, Monitoring and Auditing

A critical part of an effective antitrust compliance program is the effort to review the compliance program and ensure that it continues to address the company's antitrust risks. *See* U.S.S.G. § 8B2.1(b)(5). An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program. *See* U.S.S.G. § 8B2.1(b)(5)(A).[13] "Periodically assessing whether parts of [a] company's business or certain business practices are complying with antitrust laws in practice allows senior managers to know whether the company is moving closer to its antitrust compliance objectives."[14] Such periodic testing also "helps ensure that there is continued, clear and unambiguous commitment to antitrust compliance from the top down, that the antitrust risks identified or the assessment of these risks have not changed (or if they have changed, to reassess controls) and that the risk mitigation activities/controls remain appropriate and effective."[15] Review also may help "identify substantive antitrust concerns, rectify any illegal [behavior], and to assess if it is appropriate to apply to one or more antitrust agency for [leniency]."[16]

- □ What methods does the company use to evaluate the effectiveness of its antitrust compliance program? Who evaluates the antitrust compliance program? For example, is there a compliance committee that meets periodically? How often is the program evaluated? *See* U.S.S.G. § 8B2.1(b)(5)(B). Has the company revised its compliance

[13] *Id.* at 65–70.

[14] *Id.* at 68.

[15] *Id.*

[16] *Id.*

program in light of any prior antitrust violations or compliance incidents?

- □ What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? *See* U.S.S.G. § 8B2.1(b)(5)(A). For example, are there routine or unannounced audits (*e.g.*, a periodic review of documents/communications from specific employees; performance evaluations and employee self-assessments for specific employees; interviews of specific employees)? Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations? If so, what is the process for reviewing the monitored communications? What if any actions were taken as a result of issues identified through monitored communications?

- □ How do compliance personnel utilize company data to audit and monitor employees? Can compliance personnel access all relevant data sources promptly? Is the compliance program using data analytics tools in its compliance and monitoring? Does the compliance program monitor and detect decision-making by AI or other technology tools to ensure they are not violating antitrust laws?

- □ What is the company's process for designing and implementing revisions to its antitrust compliance policy, and has that process changed over time? Does the company consult business units before making changes? How do the monitoring and auditing performed by compliance personnel inform changes to the compliance policy? How does the company amend its compliance program to account for previous antitrust violations at the company or in the industry in which it participates, to avoid repetition of previous violations?

7. Confidential Reporting Structure and Investigation Process

An effective compliance program includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation. Confidential reporting mechanisms can facilitate the company's detection of an antitrust violation and are an integral element of an effective compliance program.[17]

- □ Is there a publicized system in place whereby employees may report or seek guidance about potentially illegal conduct? Are there positive or negative incentives for reporting antitrust violations?

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[17] *See* JM § 9-28.900 (requiring prosecutors to evaluate whether the company has "established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law."); U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

- □ Do supervisors or employees who become aware of a potential antitrust violation have a duty to report it to those with responsibility for compliance? What disciplinary measures does the company have for those who fail to report such conduct?

- □ How does the company determine which antitrust complaints or red flags merit further investigation? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination? Does the company periodically analyze reports or investigation findings for patterns or other red flags of a potential antitrust violation?

- □ What mechanisms does the company have in place to allow employees to report or seek guidance regarding potential criminal conduct without fear of retaliation? May employees make anonymous and confidential reports? In practice, are the company's policies encouraging reporting of antitrust violations or are the policies chilling reporting? How does the company assess whether employees are willing to report violations? Does the company have an anti-retaliation policy? Are employees, including managers and supervisors, trained regarding the anti-retaliation policy and the protections provided under the Criminal Antitrust Anti-Retaliation Act (CAARA)?[18]

- □ Is the company's use of non-disclosure agreements (NDAs) and other restrictions on current and former employee consistent with ensuring that employees can report potential antitrust violations without fear of retaliation? Are NDAs utilized or enforced in such a way that they act to deter whistleblowers or violate CAARA? Are the company's NDAs and other employee policies clear that employees can report antitrust violations internally and to government authorities?

8. <u>Incentives and Discipline</u>

Also relevant to an antitrust compliance program's effectiveness are the "systems of incentives and discipline [] that ensure the compliance program is well-integrated into the company's operations and workforce."[19]

- □ What incentives does the company provide to promote performance in accordance with the compliance program? *See* U.S.S.G. § 8B2.1(b)(6)(A).

- □ Has the company considered the implications of its incentives, compensation structure, and rewards for its compliance policy? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied, or bonuses clawed back) because of compliance considerations? Who determines the compensation, including bonuses, as

[18] 15 U.S.C. § 7a-3.

[19] CRIMINAL DIVISION ECCP at 2.

well as discipline and promotion of compliance personnel?

- □ What disciplinary measures does the company have for those who engage in antitrust violations or those who fail to take reasonable steps to prevent or detect violations? *See* U.S.S.G. § 8B2.1(b)(6)(B).

- □ Has the company disciplined anyone because of an antitrust violation? Has there been any management turnover because of the company's participation in the violation? Were the actual reasons for discipline communicated to employees? If not, why not?

- □ Are antitrust violations disciplined in the same manner as other types of misconduct? Can the company provide examples or data on this point?

- □ What is the employment status of culpable executives who have not cooperated and accepted responsibility for antitrust violations? If the company still employs culpable executives, what are their positions? What role do they have with regard to pricing, the company's compliance and internal investigation, and supervision of any potential witnesses in the government's investigation?

9. Remediation and Role of the Compliance Program in the Discovery of the Violation

Although a compliance program may not prevent every antitrust violation, remedial efforts and improvements to the company's compliance program may prevent recurrence of an antitrust violation. The Justice Manual directs prosecutors to consider "any remedial actions taken by the corporation, including . . . revisions to corporate compliance programs in light of lessons learned." JM § 9-28.800. The thoroughness of the company's remedial efforts is relevant to whether the antitrust compliance program was effective at the time of the antitrust violation.

Remedial efforts are also relevant to whether the compliance program was effective at the time of a charging decision or sentencing recommendation. Therefore, prosecutors should assess whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation. Prosecutors should also consider what modifications and revisions the company has implemented to help prevent similar violations from reoccurring, and what methods the company will use to evaluate the effectiveness of its antitrust compliance program going forward.

In addition, early detection and self-policing are hallmarks of an effective compliance program and frequently will enable a company to be a successful applicant for Type A of the Corporate Leniency Policy. Early detection and self-policing are also relevant at the charging stage of an investigation. As articulated in the Justice Manual, "the Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own." JM § 9-28.800; *see* JM § 9-28.900. "If a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was

working effectively."[20]

- □ What is the company's root cause analysis of the antitrust misconduct at issue? Were any systemic issues identified? Who in the company was involved in producing the analysis?

- □ What role did the antitrust compliance program play in uncovering the antitrust violation?

- □ Did anyone who had responsibility to report misconduct to the compliance group/officer know of the antitrust violation? If so, when was the violation discovered, by whom, and how was it uncovered? If not, why not?

- □ What controls failed? Has the company conducted an analysis to detect why the antitrust compliance program failed to detect the antitrust violation earlier, or at all?

- □ Has the company revised its antitrust compliance program as a result of the antitrust violation and lessons learned? How did the company address, and determine how to address, failures in the compliance program? Was outside counsel or an advisor involved?

- □ What role did the senior leadership play in addressing the antitrust violation, identifying and internally disciplining employees and supervisors, and revising the compliance program to better detect the conduct that resulted in the antitrust violation?

- □ Does the company believe that changes to the antitrust compliance program will prevent the recurrence of an antitrust violation? What modifications and revisions did the company make? How will the company evaluate the continued effectiveness of its antitrust compliance training?

- □ How did the company convey the changes to antitrust policies and procedures to employees? Were employees required to certify they understood the new policies?

- □ Does the antitrust compliance program provide guidance on how to respond to a government investigation? Does the program educate employees on the ramifications of document destruction and obstruction of justice?

- □ Did the compliance program assist the company in promptly reporting the illegal conduct? Did the company report the antitrust violation to the government before learning of a government investigation? How long after becoming aware of the conduct did the company report it to the government?

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[20] *Id.* at 13.

II. Sentencing Considerations

In accordance with the U.S. Sentencing Guidelines and 18 U.S.C. § 3572, when a decision is made to charge a company, prosecutors should evaluate whether to recommend a sentencing reduction based on a company's effective antitrust compliance program.

A. Guidelines Credit for an Effective Compliance Program

The Sentencing Guidelines provide several avenues for a company to receive credit for an effective compliance program. U.S.S.G. § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program. The existence and effectiveness of a compliance program also may be relevant to determining whether a company should be sentenced to probation pursuant to U.S.S.G. § 8D1.1. In addition, a compliance program may be relevant to determining the appropriate corporate fine to recommend within the Guidelines range or whether to recommend a fine below the Guidelines range. *See* U.S.S.G. § 8C2.8; 18 U.S.C. § 3572. The Sentencing Guidelines' criteria are minimum requirements. As explained above, the Department has no formulaic requirements regarding corporate compliance programs. Compliance programs are to be evaluated on a case-by-case basis and will depend on the program's implementation and operation.

The Sentencing Guidelines are clear that a sentencing reduction for an effective compliance program does not apply in cases in which there has been an unreasonable delay in reporting the illegal conduct to the government. *See* U.S.S.G. § 8C2.5(f)(2). In addition, there is a rebuttable presumption that a compliance program is not effective when certain "high-level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense." U.S.S.G. § 8C2.5(f)(3)(A)–(C). Under the Sentencing Guidelines, "high- level personnel" and "substantial authority personnel" include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts. U.S.S.G. § 8A1.2, application note 3(B)–(C).

Prosecutors should consider whether the Guidelines' presumption that a compliance program is not effective applies and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2.5 (f)(3)(C)(i)–(iv). Relevant to this inquiry is whether: (i) individuals with operational responsibility for the compliance program had direct reporting obligations to the governing authority of the company (*e.g.*, an audit committee of the board of directors if applicable); (ii) the compliance program detected the antitrust violation before discovery outside of the company or before such discovery was reasonably likely; (iii) the company promptly reported the violation to the Antitrust Division; and, (iv) no individual with operational responsibility for the compliance program "participated in, condoned, or was willfully ignorant" of the antitrust violation. U.S.S.G. § 8C2.5.

Prosecutors must assess application of the rebuttable presumption on a case-by-case basis. For antitrust violations, whether the company applied for the Corporate Leniency Policy often will be a key factor in assessing whether the presumption can be rebutted.

B. Compliance Considerations Relevant to Recommending Probation under U.S.S.G. § 8D1.1

In each criminal case in which a company will be sentenced, prosecutors must also recommend whether a corporate defendant be placed on probation pursuant to U.S.S.G. § 8D1.1. Antitrust prosecutors generally will not seek corporate probation for corporations that cooperate with the investigation and accept responsibility, except in limited circumstances, such as when a company has left culpable individuals in positions of authority, or has received a "Penalty Plus" fine adjustment for failing to report other cartel conduct at the time of a prior plea. In contrast, when a company is found guilty at trial, prosecutors may seek probation if the company does not accept responsibility and declines to take measures to implement or improve its antitrust compliance program. *See, e.g*., U.S.S.G. § 8D1.1(a)(3).

If a company did not have a pre-existing antitrust compliance program at the time of the antitrust violation, prosecutors should inquire whether the company has put in place a compliance program that meets the requirements of an effective compliance program under U.S.S.G. § 8B2.1. If the company has not established an adequate compliance program, prosecutors may recommend probation and, in appropriate cases, periodic compliance reports as a condition of probation. Prosecutors will also consider whether an external monitor is necessary to ensure implementation of a compliance program and timely reports. *See* JM 9-28.1700. Moreover, if the Antitrust Division will recommend that the company receive a "Penalty Plus" fine enhancement for the recurrence of antitrust violations, prosecutors are likely to seek probation and recommend periodic compliance reports as a condition of probation.

C. Statutory Fine Reduction for Recurrence Prevention Efforts

In addition to the Sentencing Guidelines, Title 18 of the United States Code provides a mechanism for recognizing remedial efforts and reducing a corporation's fine. In determining whether to impose a fine, and the amount and timing of that fine, courts shall consider any measure taken by a company to discipline personnel responsible for the offense and to prevent recurrence of the offense. *See* 18 U.S.C. § 3572(a)(8). Prosecutors should thus consider whether a company's extraordinary post-violation compliance efforts warrant a fine reduction.[21] A company's dedicated effort to change company culture after the antitrust violation and to prevent its recurrence are relevant to whether prosecutors should recommend such a fine reduction under 18 U.S.C. § 3572(a)(8). In making a recommendation for a fine reduction under 18 U.S.C. § 3572, prosecutors should consider:

- **Tone from the Top** – What steps has senior leadership and management across the organization taken to require and incentivize lawful behavior and participation in compliance training? Has the company demonstrated that ensuring future compliance and culture change is paramount? Has senior leadership accepted personal accountability for the

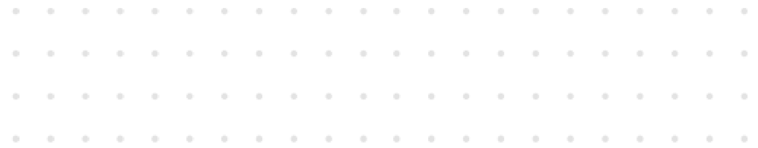
[21] *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., *Don't "Take the Money and Run": Antitrust in the Financial Sector* 12-13 (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download.

violation (*e.g.*, accepted a reduced bonus, included antitrust compliance in the company's compliance program, actively participated in and encouraged antitrust-related training)? Did senior leadership participate in the revision and implementation of a more robust compliance program in response to the antitrust violation?

- **Improvements to Pre-Existing Compliance Program** – Has the company conducted a comprehensive review of its compliance, training, monitoring, auditing, and risk control functions following the antitrust violation? How did the company modify and revise its compliance program to prevent similar conduct from reoccurring? What methods will the company use to evaluate the effectiveness of its antitrust compliance training going forward?

- **Creation of Compliance Program** – If the company had no antitrust compliance program in place before the charged antitrust violation, did the company create a robust program tailored to the company's business and aimed at preventing recurrence of an antitrust violation? Does the company's new antitrust compliance program educate employees about the illegal conduct that occurred as well as other antitrust risks? Does the compliance program provide guidance on how to respond to a government investigation? What resources are devoted to antitrust compliance? Did the company hire outside counsel or an advisor to assist the company in creating the program? What methods will the company use to evaluate the effectiveness of its antitrust compliance program going forward?

- **Disciplinary Procedure** – Did the company have or create disciplinary procedures for employees who violate the law or the company's compliance program? Did the company discipline employees who engaged in the violation?



BakerHostetler

Insights - Alert

DOJ Antitrust Division Adds to Guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

11/20/2024 | 6 minute read

Key Takeaways

- Under recent revisions to the DOJ Antitrust Division's guidelines on the Evaluation of Corporate Compliance Programs, prosecutors now consider additional criteria when making charging and sentencing decisions in criminal antitrust investigations.
- These additions are consistent with DOJ's broader guidance, including revised guidance issued by the DOJ Criminal Division in March 2023 and September 2024.
- Although the guidance is intended to be a resource for prosecutors' decision-making, it is also a tool that companies can use to consider the effectiveness of their existing antitrust compliance programs.

Background

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On November 12, 2024, the DOJ Antitrust Division updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (ECCP), which was initially issued in 2019. The ECCP provides guidance to prosecutors about how to evaluate corporate compliance programs during criminal antitrust investigations, including when deciding whether to charge a company and also when crafting sentencing recommendations. The Antitrust Division's additions to its ECCP notably track many of the recent changes made to the DOJ Criminal Division's guidelines on Evaluation of Corporate Compliance Programs, for example, by emphasizing the DOJ's continued focus on leadership oversight, emerging technologies and reporting procedures. However, there are several antitrust-focused items that are critical for companies to consider.

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Key Additions to the Antitrust Division's Updated ECCP

Several additions to the Antitrust Division's updated ECCP guidance are worth highlighting:

- **Civil Liability**: A strong culture of compliance at a company can help prevent both civil and criminal antitrust violations and allow for prompt self-disclosure if a violation occurs. The ECCP notes that although the guidance is focused on assessing criminal risk, "a well-designed antitrust compliance program should also minimize risk of civil antitrust violations."[1] Importantly, the guidance instructs that civil teams at the DOJ will be considering the same factors when assessing the effectiveness of compliance programs relating to resolving civil conduct investigations.

- **The Role of Antitrust Compliance Vis-à-vis a Company's Broader Compliance Program**: The ECCP considers how a company's antitrust compliance program fits within the company's broader compliance program and also questions whether antitrust compliance has received appropriate emphasis in light of the practical antitrust-related risks that the company is facing.[2] This emphasizes that while companies may be moving toward a more holistic, enterprise-wide view of managing compliance risk rather than in silos, the DOJ is thinking about compliance risk in the same way.

- **Antitrust Compliance Programs Should Address Electronic Communications:** The ECCP adds guidance about electronic communications, noting that when considering the design and effectiveness of a company's antitrust compliance program, prosecutors should evaluate factors such as: how antitrust policies and procedures apply to corporate "electronic communications channels"; whether these policies and procedures "vary by jurisdiction and business function, and why"; the

"mechanisms … in place to manage and preserve" such communications; and whether there are "clear" corporate antitrust policies and procedures that apply to the use of ephemeral messaging or similar noncompany communication platforms.[3] The emphasis on the preservation of such business-related electronic data is also consistent with the focus of the DOJ Criminal Division, as highlighted in its March 2023 ECCP revision,[4] and a recent joint statement from the DOJ and Federal Trade Commission.[5]

- **Risk Assessments Should Account for New and Developing Technology:** In evaluating a company's antitrust compliance program, prosecutors should consider whether the design and breadth of the program accounts for new and developing technology. The updated Antitrust Division ECCP specifically guides prosecutors to ask questions about "artificial intelligence and algorithmic revenue management software," the "antitrust risks" associated with the use of these technologies, whether a company can take steps to mitigate these "antitrust risks," and how quickly the company can recognize emerging technology decisions "made by AI or other new technologies" that are inconsistent with the company's values.[6] The ECCP guidance also adds that prosecutors should consider whether a company trains its employees on the allowable uses of such emerging technologies.[7] Addressing AI and similar technologies has been a key focus area for the DOJ since March 2024, when Deputy Attorney General Lisa Monaco announced that federal prosecutors would seek harsher sentences for crimes utilizing AI and then instructing the Criminal Division to incorporate the risks of AI into the ECCP.[8] Monaco's instructions were implemented in the September 2024 revision to the Criminal Division's ECCP by including a series of guiding questions for prosecutors relating to AI and similar emerging technologies.[9]

- **Culture of Compliance Analysis Should Focus on Individuals:** The updated ECCP guides prosecutors to focus on the behavior and accountability of individuals, including managers at all levels, individuals on Boards of Directors, and/or other senior leadership, when weighing whether a company is committed to and has created a culture of antitrust compliance. The additions to the Antitrust Division's ECCP guidance state that prosecutors should consider questions such as whether and "[h]ow … senior leadership and management model ethical behavior to employees," "tolerated antitrust violations in pursuit of new business," or demonstrated the importance of antitrust compliance throughout all levels of the company.[10]

- **Incentives Should Promote Compliance:** As with the Criminal Division's updated ECCP, the Antitrust Division's ECCP adds specific language emphasizing how prosecutors should consider whether a company's "hiring and incentive structure

reinforce[s]" and promotes a culture of antitrust compliance and the commitment to ethical culture.[11]

- **Antitrust Compliance Programs Should Be Appropriately Resourced:** The Antitrust Division's ECCP guidance now highlights that prosecutors should consider whether a company allocates an appropriate level of resources to its antitrust compliance program. The additions also guide prosecutors to consider how a company's antitrust compliance program is resourced as compared to the resources that the company devotes to other functions, and whether compliance resource requests have been denied.

- **Importance of Antitrust-Specific Training:** The updated Antitrust Division ECCP guides prosecutors to consider whether a company provides specific antitrust compliance trainings to its employees and whether, among other things, that training teaches employees to recognize antitrust "red flags" and addresses lessons learned from prior antitrust compliance incidents.[12] The guidance states that prosecutors should also consider whether there is a process through which employees can ask questions about the antitrust trainings. Reinforcing the focus on artificial intelligence and emerging technologies, the ECCP guides prosecutors to also consider whether antitrust compliance "training address[es] [the] permissible and nonpermissible uses of new technology."[13]

- **Compliance Monitoring and Auditing:** When considering how compliance personnel utilize company data to audit and monitor employees, the Antitrust Division ECCP states that prosecutors should weigh whether a company's antitrust compliance program "us[es] data analytics tools" and whether it "monitor[s] and detect[s] decision-making by AI or other technology tools to ensure they are not violating antitrust laws."[14] The guidance also directs prosecutors to consider whether and how compliance personnel amend a company's antitrust compliance program (or not) to account for any prior antitrust violations.

- **Reporting and Investigations:** The additions to the Antitrust Division's ECCP guide prosecutors to consider how antitrust violations are reported at a company, including whether concerns can be confidentially reported; which facts, issues, or items merit further investigation; and whether a company has a non-retaliation policy in place to protect employee whistleblowers. The new guidance also addresses a company's use of non-disclosure agreements (NDAs), including whether they are "utilized or enforced in such a way that they act to deter whistleblowers."[15] The updated Antitrust Division ECCP makes "clear" that it expects company NDAs and/or similar restrictions on employees to not deter those same employees from being able to "report antitrust violations internally and to government authorities."[16] Of note, this aspect of the Antitrust Division ECCP seems to go beyond the Criminal Division's ECCP, which

does not address NDAs as a possible vehicle for preventing whistleblower reporting to the government.

Should an antitrust issue arise, having an effective antitrust compliance program that conforms with DOJ expectations can greatly benefit a company by potentially reducing the monetary penalty that the DOJ might impose and allowing for resolution of the investigation short of prosecution. Companies should review their existing antitrust compliance policies and procedures, ensure that they address these key additions to the Antitrust Division's guidance, and consider updating their policies and procedures to align with this guidance, where appropriate.

The BakerHostetler Cartel and Government Antitrust Investigations Task Force is comprised of attorneys with extensive experience in proactive antitrust compliance counseling and regulatory investigations and litigation. The Task Force includes former DOJ prosecutors, as well as attorneys who are part of both the Antitrust and Competition and White Collar, Investigations and Securities Enforcement and Litigation teams. Please feel free to contact any of our experienced professionals if you have questions about this alert.

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[1] U.S. Department of Justice Antitrust Division, Guidance on Evaluation of Corporate Compliance Programs (ECCP) in Criminal Antitrust Investigations (November 12, 2024), at 2, https://www.justice.gov/d9/2024-11/DOJ%20Antitrust%20Division%20ECCP%20-%20November%202024%20Updates%20-%20FINAL.pdf.

[2] *Id*. at 5.

[3] *Id*. at 5-6.

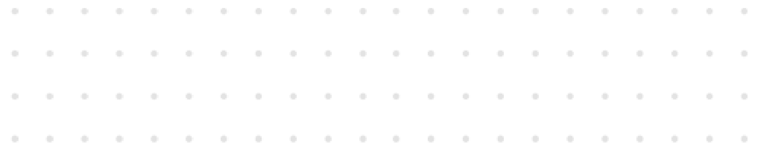
[4] U.S. Department of Justice Criminal Division, Guidance on Evaluation of Corporate Compliance Programs (ECCP) (March 2023), at 17, https://www.justice.gov/opa/speech/file/1571911/dl.

[5] Justice Department and the FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging (January 26, 2024) https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations

[6] U.S. Department of Justice Antitrust Division, ECCP, at 10.

[7] *Id*.at 9-10.

[8] Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (March 7, 2024)



https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations; See DOJ to Corporations – “Knock on Our Door Before We Knock on Yours” (March 11, 2024) https://www.bakerlaw.com/insights/doj-to-corporations-knock-on-our-door-before-we-knock-on-yours/.

[9] U.S. Department of Justice Criminal Division, Guidance on Evaluation of Corporate Compliance Programs (ECCP) (September 2024), at 3-4, https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

[10] U.S. Department of Justice Antitrust Division, ECCP, at 7.

[11] *Id*.

[12] *Id*. at 11.

[13] *Id*. at 12.

[14] *Id*. at 13.

[15] *Id*. at 14.

[16] *Id*.

Related Services

Services

Litigation

Antitrust and Competition

White Collar, Investigations and Securities Enforcement and Litigation

21-md-02981-JD
United States District Court, Northern District of California

In re Google Play Store Antitrust Litig.

664 F. Supp. 3d 981 (N.D. Cal. 2023)
Decided Mar 28, 2023

Case No. 21-md-02981-JD

2023-03-28

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

JAMES DONATO, United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CHAT PRESERVATION

During discovery in this multidistrict litigation (MDL) case, plaintiffs obtained information indicating that Google did not adequately preserve communications that were exchanged internally on its Chat message system. Plaintiffs say that this shortfall was intentional and deprived them of material evidence. They have requested sanctions under Federal Rule of Civil Procedure 37(e). Dkt. No. 349.[1] After substantial briefing by both sides, and an *982 evidentiary hearing that featured witness testimony and other evidence, the Court concludes that sanctions are warranted.

982

[1] Unless otherwise stated, all docket number references are to the ECF docket for the multidistrict litigation case, Case No. 21-md-02981-JD. This order will be filed in unredacted form on the public docket, except for certain employee names which are redacted below. Other sealing requests made in connection with these proceedings will be resolved by a separate order.

BACKGROUND

The MDL action involves multiple antitrust cases challenging Google's Play Store practices as anticompetitive. The plaintiffs are Epic Games, Inc., Case No. 20-cv-05671-JD; the consumer plaintiffs, Case No. 20-cv-05761-JD; the Attorneys General of 38 states and the District of Columbia, Case No. 21-cv-05227-JD; and the Match Group plaintiffs, Case No. 22-cv-02746-JD.[2] An action by software developers was filed and is in the process of settling on a class basis, Case No. 20-cv-05792-JD, and the developer plaintiffs are not part of these proceedings. Plaintiffs allege that Google illegally monopolized the Android app distribution market by engaging in exclusionary conduct, which has harmed the different plaintiff groups in various ways.

[2] The Match Group plaintiffs are Match Group, LLC; Humor Rainbow, Inc.; PlentyofFish Media ULC; and People Media, Inc.

Even before the MDL was instituted, the Court directed the parties to coordinate discovery with an eye toward containing costs and burdens. This was largely successful and the parties have managed to work things out, with one major exception. In April 2021, plaintiffs asked Google about a curious lack of Chat messages in its document productions. In October 2021, Google said that Google Chats are typically deleted after 24 hours, and that Google had not suspended this auto-deletion even after this litigation began. Google chose instead to let employees make their own personal choices about preserving chats.

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This decision raised obvious questions that were presented to the Court in a joint statement in May 2022. Dkt. No. 258. With the Court's consent, plaintiffs filed a motion for sanctions under Rule 37 in October 2022, which resulted in substantial briefing by each side, including the filing of declarations and other written evidence. *See* Dkt. Nos. 340, 349, 367, 373.

The parties disagreed about a number of factual issues, and the Court was unwilling to resolve the disputes on a dry record. Consequently, the Court held an evidentiary hearing over two days in January 2023. Dkt. Nos. 375, 384, 420. The Court received documentary evidence, heard testimony by Google employees Genaro Lopez, Jamie Rosenberg, and Andrew Rope, and took closing arguments by the parties. Dkt. Nos. 415, 440. This record was supplemented by a transcript of the deposition of former Google employee Tian Lim, Dkt. No. 449, and many follow-up submissions, *see*, *e.g*., Dkt. Nos. 428, 429, 431, 432. At the Court's direction, Google produced to plaintiffs in February 2023 approximately 52,271 additional chats, after which both sides filed supplemental briefs addressing this new evidence. Dkt. Nos. 454, 463, 464. Overall, the Court has obtained a thorough and highly detailed record with respect to Google's Chat preservation conduct.

The Court makes the ensuing findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). The findings and conclusions are based on the evidence admitted at the hearing and filed on the docket by the parties; the Court's observation of the demeanor, credibility, and candor of the witnesses; and the arguments of the parties at the hearing and in their post-hearing filings.

FINDINGS OF FACT

I. GOOGLE IS A FREQUENT AND SOPHISTICATED LITIGATION PARTY

1. Google is a well-known and "really big" company that is "in the public eye." It *983 is frequently a party to government proceedings and private litigation. Dkt. Nos. 418 & 446 (Hrg. Tr.) at 70:9, 102:11-22.

2. Google employees are no strangers to document production and discovery obligations. At any given time, Google has thousands of employees who are under a litigation hold for document preservation. Hrg. Tr. at 60:23-61:2, 102:17-22.

3. Google employee Jamie Rosenberg testified that he had been "placed under many litigation holds over [his] time at Google," and he did not recall a time in his last five or six years there when he personally was not under at least one litigation hold. Hrg. Tr. at 99:4-10.

4. Former employee Tian Lim, who worked at Google for over five years through early January 2023, testified that the litigation hold he received for this case "was probably one of at least ten or more other litigation holds that I was on." Dkt. No. 449-1 (Lim Depo. Tr.) at 6:25-7:9, 20:22-21:3.

II. GOOGLE TRAINS EMPLOYEES TO "COMMUNICATE WITH CARE"

5. Google employees receive training to "Communicate with Care." Hrg. Tr. at 101:23-25. These are live group trainings to teach Google employees how to handle written communications. The trainings are presented by lawyers, with presentation slides. *Id*. at 99:24-100:13.

6. One set of training slides was received into evidence. Hrg. Exh. PX-120. The interactive training was titled, "You Said What?!: 10 Things to Ensure You Are Communicating With Care." The first slide stated, "At Google, We are constantly in the public eye . . . and the courthouse. We often have to produce employee communications as evidence, which means your communications can become public at any time.

Our communications can hurt or embarrass us as a company, or as individuals. We need to be cautious in our communications to avoid unnecessary harm. [¶] This is not about 'hiding stuff' or not pointing out something that may need fixing. Speaking up is a core company value. This is about being thoughtful in your communication in order to reduce the risk of unintended harm to Google and/or you." *Id*. at GOOG-PLAY-005029850.

7. "Rule 03" in the training was to "Avoid Communicating When Angry or Tired." *Id*. at GOOG-PLAY-005029855. It gives the example of a fictional Google employee, Echo, who, after "working all night" on a new product, has decided to write an email to the team lead "before calling it a night[,] and wants you to take a look at it before sending it." *Id*. at GOOG-PLAY-005029856. The team lead "took the night off to attend a basketball game," and Echo's draft email ends with the line, "Could have really used your help tonight. Hope you enjoyed the game." *Id*. The training asks, "What do you think you should tell Echo to do?" It gives four possible options: (1) "Send the email"; (2) "Don't send the email now. Send it in the morning"; (3) "Talk to the team lead in the morning"; and (4) "Don't send the email. Chat 'off the record' via Hangouts instead." *Id*.

8. In a later slide, Option 4 ("Don't send the email. Chat 'off the record' via Hangouts instead.") is marked red as a discouraged option, rather than green, like Options 2 and 3. *See id*. at GOOG-PLAY-005029858. A pop-up box provides this commentary about Option 4: "Better than sending the email, but not without risk. While 'off the record' Hangout chats between individual corporate accounts are not retained by Google as emails are, any chat participant may save the conversation by simply copying and pasting it into a doc *984 or email - something Echo's team lead might choose to do in order to discuss the appropriateness of that middle-of-the-night chat with Echo and HR in the morning." *Id*. at GOOG-PLAY-005029860. The apparent concern is that the chat might then be retained for a much longer period of time than off-the-record chat messages usually are.

9. The "Communicate with Care" training gave specific instructions to Google employees about strategies for seeking to make their emails and other communications "protected by the attorney-client privilege." *Id*. at GOOG-PLAY-005029877. Employees were advised that "You must include an attorney in the address" of an email, and, "In addition to addressing it to an attorney and labeling it as such, for the email to be attorney-client privileged, it must be for the purposes of getting legal advice." *Id*. at GOOG-PLAY-005029882.

10. To complete the training, Google employees were required to certify that "you have fully reviewed, understand and are responsible for applying the advice and guidelines provided in this training to your interactions, responsibilities, and work at and for Google." *Id*. at GOOG-PLAY-005029900.

11. Google employees took the Care training to heart. In multiple instances, internal communications actively expressed concerns about the possibility of disclosure in litigation and the risks of preserving Chats. *See*, *e.g*., Hrg. Exh. PX-9 at GOOG-PLAY-007653956 ("Comment freely but please be aware that this doc is not privileged. For anything sensitive, please move to Chat / video call."); Dkt. No. 468, Ex. 8 ("are we allowed to talk about Runway here?," "that's a good question. i would say, if you talk about it, communicate with care - assume anything you say here will be subject to discovery if there are any regulatory or legal proceedings at some point in the future. group chats (like this one) aren't transient and you can't turn off history (unlike 1:1 chat threads where you can turn off history and they disappear in 24 hours)"); *id*., Ex. 19 ("should we have history off for this? . . . I think our chats about google products are more likely to come up in court"; "Right now it doesn't _feel_ risky. But

just communicate with care."); *id*., Ex. 20 ("Since history is turned on, be mindful of putting anything discoverable here"); *id*., Ex. 23 ("just a reminder if you use privileged and confidential in emails an attorney must be in the To line"; "wondering what is the best way to update the team about confidential topics without having to include an attorney in all comms"; "History has to be off I believe"; "yes with history off everything gets wiped . . . but it does exist for 24-48 hrs so if super sensitive you need to use GVC because they could look at your recent ping history and that could go into court[,] also hopefully it won't come to this for any of us."); *id*., Ex. 27 ("please do not share sensitive information here where possible . . . Until we fix the room architecture, content here is searchable/discoverable within the corp."). At Google, the terms "history on" and "on the record" were used interchangeably to mean the same thing. Hrg. Tr. at 29:8-12.

III. GOOGLE CHAT

12. Google Chat is a "communications instant messaging tool" that allows users to send each other text messages. Hrg Tr. at 18:23-19:3. In effect, it is Google's in-house IM platform. This order focuses on Google's internal use of Chat, and its preservation practices for Chat messages sent on the platform by Google employees.

13. Google Chats can take the form of one-on-one chats, Hrg. Tr. at 20:8-11; group chats involving three or more people, *id*. at 21:14-16; or "rooms and spaces," *985 which are "topic-or project-based type[s] of conversations that are specifically oriented around a particular item or subject matter," *id*. at 23:5-11. A "threaded room" is a room with a general topic, where its members can have "threaded" conversations about various sub-topics. *Id*. at 23:17-24:3; Hrg. Exh. DXCH-106.

14. Google Chat is an essential tool used daily by Google employees. Jamie Rosenberg testified that he "use[s] Chat every day." Hrg. Tr. at 99:23. Tian Lim also testified that he used Chat "probably every working day." Lim Depo. Tr. at 8:22-25.

15. There are no restrictions on the content and topics on Chat. Hrg. Tr. at 47:2-10 (Chat can be used for "[a]nything under the sun that [employees] want to communicate."). Messages are not limited by size or number of characters. Chat is a versatile tool that allows users to attach lengthy documents to a message. *Id*. at 63:19-23.

16. "History" can be turned "on" or "off" by users for a particular Chat. *See*, *e.g*., Hrg. Exh. DXCH-107. History is off by default for all Chats among Google employees with the sole exception of threaded rooms. Hrg. Tr. at 53:21-23.

17. Different types of Chats have different default retention periods. Under Google's standard retention policy, one-on-one Google Chats with history off are retained for 24 hours only. Hrg. Tr. at 26:21-27:8; Hrg. Exh. DXCH-1. After the 24 hours, the Chats are deleted forever and cannot be recovered. Hrg. Tr. at 52:25-53:6. One-on-one chats with history on are retained for 30 days. *Id*. at 27:9-17; Hrg. Exh. DXCH-1. History-on chats in a group conversation or "flat (non-threaded) room" are retained for 18 months. *Id*.; Hrg. Tr. at 31:11-13. For chats in a threaded room, history is "always on and can't be turned off," and these messages are also retained for a period of 18 months. Hrg. Tr. at 31:14-23; Hrg. Exh. DXCH-1.

18. Each Google employee has a corporate Gmail account for email, and if a litigation hold is not in place, emails in an employee's Gmail account are retained for 18 months unless the user has tagged them for "Indefinite" retention. Hrg. Tr. at 17:22-18:22.

19. An employee has several options to preserve a Chat for longer than its default retention period. She can "turn on history" for a Chat in a menu option. The "history on" setting applies to all messages sent in a Chat after the history button has been toggled, and that Chat's history will stay on until manually turned off. Hrg. Tr. at 28:11-29:21; Hrg. Exh. DXCH-107.

20. A Google employee can also retain Chat messages with the "Forward to inbox" feature. The feature "allows a user to select an individual message and up to four preceding messages and send those to their e-mail inboxes for longer-term archiving." Once in the user's personal Gmail inbox, the chats would be "subject to the 18-month default retention period." Hrg. Tr. at 29:23-31:2; Hrg. Exh. DXCH-108.

21. Another preservation option entails copying and pasting the chat into a document saved to the employee's Google Drive. Items in an employee's Google Drive remain on Google's systems "indefinitely unless removed by the Googler themselves." Hrg. Tr. at 17:3-8, 55:16-21.

22. Google's information governance lead, Genaro Lopez, testified that the retention policy for Google Chats is animated by the goals of protecting privacy, reducing the cost of storage, guarding against cybersecurity risks, and promoting employee productivity and efficiency. Hrg. Tr. at 25:17-26:20. But with respect to storage, Lopez was not aware of "any kind of an analysis or study to figure out how expensive *986 it would be or how burdensome it would be to preserve chats," even just for this case. *Id*. at 76:25-77:8.

23. Lopez testified that Google Chat was "typically" used for "quick, one-off" questions like an invitation to grab coffee, or for "sensitive," personal topics like "birth announcements" or "promotion[s]." Hrg. Tr. at 19:8-25. Google has generally pressed the suggestion in its briefs that Chat was primarily a social outlet akin to an electronic break room.

24. The record demonstrates otherwise. An abundance of evidence establishes that Google employees routinely used Chat to discuss substantive business topics, including matters relevant to this antitrust litigation. *See*, *e.g*., Hrg. Tr. at 92:19-93:4 (Rosenberg email stating to another Google employee, "You mentioned in our IM chat yesterday that Samsung broached the topic of asking for rev share on the Play Store."); Hrg. Exh. PX-16 (Rosenberg chat thread with other Google employees discussing, vis-à-vis-Samsung, issues such as "get[ting] sample builds for all the configurations contemplated in our waiver so we can validate placement," "start[ing] the [MADA] signing process" with Samsung; and "CTS approval and device approval"); Hrg. Tr. at 97:16-18 (Rosenberg acknowledging that the conversation he had over Google Chat in Exhibit PX-16 "includes discussions about business topics"); Lim Depo. Tr. at 9:2-10:11 ("[o]ccasionally there were some more substantive conversations" over Google Chat); *id*. at 26:22-25 (Lim "most likely" personally used Google Chat for "substantive business communications"); *id*. at 27:22-29:4 ("many of the colleagues that [Lim] discussed business with over chat had responsibility over Google Play and Android"); *see also* Dkt. No. 468 (plaintiffs' supplemental brief) at 2-5 (providing numerous examples of Chats discussing "topics at the heart of this case," such as Revenue Share Agreements, Mobile App Distribution Agreements (MADAs), and Google Play Billing and Google's supracompetitive commission).[3]

[3] MADAs and their importance to the claims in the MDL are discussed in Paragraph 34.

IV. GOOGLE'S CHAT PRESERVATION PRACTICES IN THIS CASE

25. When Google becomes involved in a lawsuit, it undertakes "an investigation to understand what the case generally deals with and identify individuals that may possess potentially relevant information," and then it "issue[s] a legal hold." Hrg. Tr. at 109:11-18.

26. While a legal hold is in place, "email data or Gmail data is preserved," as are "Google Workspace files, which includes Docs, Sheets, Slides; and also Google Drive content, which can include other file types." Hrg. Tr. at 110:3-8.

27. For this case, the "initial notice and hold was put in place in September of 2020," and four reminders have been sent since then. Hrg. Tr. at 113:9-15. It is Google's standard practice to "send reminders about every six months." *Id*.

28. Approximately 360 individuals are subject to the legal hold for this case, about 40 of whom have been designated as custodians. Hrg. Tr. at 113:16-21.

29. Google has the technical ability to set Chat history to "on" as the default for all employees who are subject to a legal hold, but it chooses not to. Hrg. Tr. at 43:22-43:4, 58:19-24. Google has preserved all Chat messages that had history toggled on, *id*. at 44:12-17, 55:2-4, but for any Chat where history was off, Google left it up to each individual hold recipient to decide which, if any, of those one-on-one or group chats should be preserved, *id*. at 45:20-46:7, 55:11-15. *987

30. The litigation hold recipients were (1) instructed not to use Google Chat to "discuss any topics that are related to their legal hold," and (2) told that "if they do find themselves in a conversation that strays into a topic related to the legal hold, they're asked to turn history on at that point to make sure that those messages are properly preserved." Hrg. Tr. at 43:4-20.

31. A "Google Chat Retention FAQs" document that is internally available to all Google employees also advises that the "History ON setting" should be used "[w]hen you are discussing a topic identified in any legal hold notice you've received." Hrg. Exh. DXCH-2; Hrg. Tr. at 34:7-35:1.

32. Google did not check to see if custodians were actually preserving relevant Chats as directed by the hold notice, and did nothing in the way of auditing or monitoring Chat preservation. Hrg. Tr. at 46:8-17. There is no evidence establishing that Google did any individualized follow-up on Chat preservation with the hold recipients, including those designated as custodians. *See*, *e.g*., *id*. at 121:17-20.

V. HOW EMPLOYEES RESPONDED

33. Overall, the record demonstrates that Google employees who received a litigation hold in this case were unable or unwilling to follow the Chat preservation instructions, and sometimes disregarded the instructions altogether.

34. Jamie Rosenberg is now a part-time advisor at Google but was previously a vice president "running a strategy team for [Google's] platforms and ecosystems organization." Hrg. Tr. at 78:20-79:3. He received a hold notice for this case and was deposed. *Id*. at 103:11-21. He testified that he had Chat history off during his entire time at Google, including when he was deposed, and has "not done anything to preserve chats for this litigation." *Id*. at 103:8-17. When asked if he knew if "MADAs are at issue in this case or not," he responded that he is "not familiar with the specific details of the case," and he cannot say "in detail" "what topics are and are not relevant to this case." *Id*. at 89:18-23. A MADA is a Mobile App Distribution Agreement, and it is, according to plaintiffs, a "principal subject" of their claims. Dkt. No. 468 at 3. "The MADAs are contracts that Google requires OEMs to enter into to license Google Mobile Services, a suite of proprietary Google applications and APIs that includes the Google Play Store, Google Search, Gmail, YouTube, and Google Maps, among others." *Id*. Epic's complaint alleges, for example, that " [t]hrough its MADAs with Android OEMs, Google requires OEMs to locate the Google Play Store on the 'home screen' of each mobile device. Android OEMs must further pre-install up to 30 Google mandatory apps and must locate these apps on the home screen or on the next screen, occupying valuable space on each user's mobile device that otherwise could be occupied by competing app stores and other services. These

requirements ensure that the Google Play Store is the most visible app store any user encounters and place any other app store at a significant disadvantage." Case No. 20-cv-05671-JD, Dkt. No. 166 ¶ 91.

35. Rosenberg's testimony highlighted a fundamental problem with Google's approach to Chat preservation. Google left employees largely on their own to determine what Chat communications might be relevant to the many critical legal and factual issues in this complex antitrust litigation. A lawyer working on this case would know that MADAs are relevant. Jamie Rosenberg did not.

36. Tian Lim, who worked in the Google Play product area during the entire period *988 of his 5-year employment with Google, also received a legal hold notice for this litigation. Lim Depo. Tr. at 20:9-16, 25:21-24. Lim believed that he understood the document preservation instructions in the hold notice, and his "interpretation was that if there was substantive information in chat that I should ensure the information was preserved." *Id*. at 20:17-21:18. He thought that he had complied with this instruction by cutting and pasting chat messages into his own personal document, "but probably more often I would make sure that the information was funneled into the right documents, the right comments in other documents, to make sure that the right stakeholders would actually see it, integrate those thoughts, and action on them." *Id*. at 21:19-22:8. In effect, Lim believed that he could comply with Google's document preservation obligations by creating and preserving a summary of a substantive business communication rather than preserving the actual communication itself. *Id*. at 36:5-19, 37:25-38:15.

37. Lim knew that his chats were not going to be automatically preserved because Google employees "were generally aware that chats would disappear after 24 hours," but he did not "ever turn history on in the chat program to save any chat conversations." *Id*. at 22:9-12, 38:16-39:6. Lim testified that the thought process that he might need to save something that was said because he was subject to a legal hold simply "doesn't occur because, as I said, I'm under so many legal holds, it's impossible to think that way." *Id*. at 40:23-41:6.

38. Chats produced by Google in February 2023 pursuant to the Court's order provided additional evidence of highly spotty practices in response to the litigation hold notices. The ensuing Chat exchange between two Google employees, Dkt. No. 468, Ex. 4, is representative. The Court has anonymized the exchange to spare the employees undue attention. It is Google's preservation obligation and conduct that is the focus here. *989

Image materials not available for display. *990

Image materials not available for display.

39. In another chat, an employee said he or she was "on legal hold" but that they preferred to keep chat history off, Dkt. No. 468, Ex. 24: *991

Image materials not available for display.

VI. GOOGLE IS NOW PRESERVING GOOGLE CHATS FOR THIS ACTION

40. Google represented to the Court in a filing on February 7, 2023, that it "will turn the history setting to 'on' for Google Chat, on an interim basis, for all 383 employees who have received a legal hold in this case. These employees will not have the ability to change history to 'off.' Google will meet and confer with Plaintiffs regarding which of these 383 legal hold recipients are the 'core set of relevant custodians' for which this setting should remain and then report back to the Court." Dkt. No. 448 at 1.

CONCLUSIONS OF LAW

The new version of Rule 37(e), which was added to the Federal Rules of Civil Procedure in 2015, and the Advisory Committee Notes to the 2015

Amendment (Comm. Notes), are the touchstones guiding the Court's conclusions. Rule 37(e) provides:

> **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or
>
> 992 *992
>
> replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

The Committee Notes for Subdivision (e) state that the rule embodies the "common-law duty" of "potential litigants . . . to preserve relevant information when litigation is reasonably foreseeable." The parties do not dispute that Google bore that duty as of August 2020, when the first constituent lawsuit in the MDL was filed by Epic Games. *See* Case No. 20-cv-05671-JD, Dkt. No. 1.[4]

[4] Plaintiffs made some effort at the evidentiary hearing to move this date forward by referencing document requests issued in other cases that are not a part of this MDL. *See* Hrg. Tr. at 127:17-128:4. The Committee Notes advise that "[t]he fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case." The Court focuses on the August 2020 time period for this MDL.

At the heart of this dispute is a simple question: did Google do the right thing with respect to preserving Chat communications in this case? There is no doubt that Google was perfectly free to set up an internal IM service with any retention period of its choosing for employees to use for whatever purposes they liked. The overall propriety of Chat is not in issue here. What matters is how Google responded after the lawsuits were filed, and whether it honored the evidence preservation duties it was abundantly familiar with from countless prior cases.

The record establishes that Google fell strikingly short on that score. Several aspects of Google's conduct are troubling. As Rule 37 indicates, the duty to preserve relevant evidence is an unqualified obligation in all cases. The Court's Standing Order for Civil Cases expressly spells out the expectation that "as soon as any party reasonably anticipates or knows of litigation, it will take the necessary, affirmative steps to preserve evidence related to the issues presented by the action, including, without limitation, interdiction of any document destruction programs

and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material." Standing Order for Civil Cases Before Judge James Donato ¶ 8.

Google clearly had different intentions with respect to Chat, but it did not reveal those intentions with candor or directness to the Court or counsel for plaintiffs. Instead, Google falsely assured the Court in a case management statement in October 2020 that it had "taken appropriate steps to preserve all evidence relevant to the issues reasonably evident in this action," without saying a word about Chats or its decision not to pause the 24-hour default deletion. Case No. 20-5761, Dkt. No. 45 at 11. Google did not reveal the Chat practices to plaintiffs until October 2021, many months after plaintiffs first asked about *993 them. *See* Dkt. No. 429 (Google's response to Court's questions) at 3 ("Google informed Plaintiffs on October 21, 2021, that it had not suspended the 24-hour retention policy for history 'off' chats."). The Court has since had to spend a substantial amount of resources to get to the truth of the matter, including several hearings, a two-day evidentiary proceeding, and countless hours reviewing voluminous briefs. All the while, Google has tried to downplay the problem and displayed a dismissive attitude ill tuned to the gravity of its conduct. Its initial defense was that it had no "ability to change default settings for individual custodians with respect to the chat history setting," Dkt. No. 427-3 ¶ 25, but evidence at the hearing plainly established that this representation was not truthful.

Why this situation has come to pass is a mystery. From the start of this case, Google has had every opportunity to flag the handling of Chat and air concerns about potential burden, costs, and related factors. At the very least, Google should have advised plaintiffs about its preservation approach early in the litigation, and engaged in a discussion with them. It chose to stay silent until compelled to speak by the filing of the Rule 37 motion and the Court's intervention. The Court has repeatedly asked Google why it never mentioned Chat until the issue became a substantial problem. It has not provided an explanation, which is worrisome, especially in light of its unlimited access to accomplished legal counsel, and its long experience with the duty of evidence preservation.

Another major concern is the intentionality manifested at every level within Google to hide the ball with respect to Chat. As discussed, individual users were conscious of litigation risks and valued the "off the record" functionality of Chat. Google as an enterprise had the capacity of preserving all Chat communications systemwide once litigation had commenced but elected not do so, without any assessment of financial costs or other factors that might help to justify that decision.

This is in sharp contrast to Google's handling of email. When a litigation hold is in place, Google automatically preserves all emails from relevant custodians without requiring any individual action. Custodians cannot override the automated preservation of their emails. *See* Hrg. Tr. at 54:12-55:1. Google took the opposite course with Chat, and gave each employee carte blanche to make his or her own call about what might be relevant in this complex antitrust case, and whether a Chat communication should be preserved. The obvious danger of this approach was captured in Rosenberg's testimony about not really knowing the issues in this litigation, and not preserving his communications. Google aggravated the situation by intentionally deciding not to check up on employee decisions to ensure that relevant evidence was being preserved. In effect, Google adopted a "don't ask, don't tell" policy for Chat preservation, at the expense of its preservation duties.

Consequently, on the record as a whole, the Court concludes that Google did not take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation. Fed. R. Civ. P. 37(e). The

record demonstrates that the deleted Chat evidence "cannot be restored or replaced through additional discovery." *Id*. The record also establishes intentionality for purposes of Rule 37(e)(2). The Court concludes that Google intended to subvert the discovery process, and that Chat evidence was "lost with the intent to prevent its use in litigation" and "with the intent to deprive another party of the information's *994 use in the litigation." Comm. Notes, Subdivision (e)(2).

A prejudice finding under Rule 37(e)(1) is not strictly necessary because the finding of intent under subdivision (e)(2) supports "not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position." Comm. Notes, Subdivision (e)(2). It is clear in the record that relevant, substantive business communications were made on Chat that plaintiffs will never see, to the potential detriment of their case. Google says that the prejudice is limited because there are only "21 custodians for which the parties agreed to conduct limited post-Complaint discovery," and "[f]or only 21 of the total 44 custodians, the parties agreed that Google would search for documents dated *after* August 13, 2020. With respect to the remaining 23 custodians, the cut-off date was on or before August 13, 2020." Dkt. No. 429 at 5-6 (emphasis in original; internal citation omitted). The point is not well taken. The agreements between the parties were made while plaintiffs were completely in the dark about Google's Chat practices, and the Court declines to give Google any benefit from deals made on incomplete information. In addition, prejudice for Rule 37 purposes is a matter of fairness and equity, which is why Rule 37(e) "leaves judges with discretion to determine how best to assess prejudice in particular cases." Comm. Notes, Subdivision (e)(1). It is also not plaintiffs' burden to prove prejudice, *see id*., but the plaintiffs' supplemental briefs and evidence, Dkt. No. 468, certainly did so.

The remaining question is about the remedy. Proportionality is the governing concept here. To that end, the Committee Notes advise courts to "exercise caution," and state that "[f]inding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision(e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." Comm. Notes, Subdivision (e)(2).

The Court has already declined to issue terminating sanctions against Google. This antitrust case will not be decided on the basis of lost Chat communications. The determination of an appropriate non-monetary sanction requires further proceedings. The Court fully appreciates plaintiffs' dilemma of trying to prove the contents of what Google has deleted. Even so, the principle of proportionality demands that the remedy fit the wrong, and the Court would like to see the state of play of the evidence at the end of fact discovery. At that time, plaintiffs will be better positioned to tell the Court what might have been lost in the Chat communications.

For monetary sanctions, it is entirely appropriate for Google to cover plaintiffs' reasonable attorneys' fees and costs in bringing the Rule 37 motion, including the joint statement that preceded the motion and the evidentiary hearing and related events. Plaintiffs are directed to file by April 21, 2023, a statement of proposed attorneys' fees and costs with adequate documentation.[5] The parties will meet and *995 confer on the proposal, and file a statement by May 12, 2023, indicating an agreement or identifying specific areas of disagreement for the Court to resolve.

5 As with counsel fee requests in the class settlement context, declarations of counsel as to the number of hours spent on various categories of activities related to the proceedings by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. The same goes for costs. Counsel should be prepared to submit copies of detailed billing and costs records if the Court orders.

IT IS SO ORDERED.

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United States v. Coburn

Decided Apr 27, 2022

Civ. 2:19-cr-00120 (KM)

04-27-2022

UNITED STATES OF AMERICA, v. GORDON COBURN and STEVEN SCHWARTZ, Defendants.

KEVIN MCNULTY, U.S.D.J.

SEALED

MEMORANDUM AND ORDER

KEVIN MCNULTY, U.S.D.J.

Cognizant Technology Solutions Corp. ("Cognizant") moves for “clarification” of my prior opinion resolving various motions regarding the subpoenas of Defendants Steven Schwartz and Gordon Coburn concerning investigative outsourcing, the "Category A subpoenas." In that opinion, which seems clear enough, I held that Cognizant had waived attorney-client privilege and work product protections over a substantial set of documents and communications concerning its investigation of Defendants because it had provided detailed summaries of that investigation to the government in the so-called “DLA downloads.” (*See* Op. at 13-14.)[1] Cognizant now moves for clarification, arguing that my prior opinion authorized it to extensively redact interview memoranda made during its investigation and to withhold notes used by its attorneys in preparation for its disclosures to the government. Defendants maintain that Cognizant should disclose these interview *2 memoranda and notes in full or, at a minimum, provide an explanation of their redaction process. For the reasons set forth below, I will order Cognizant to produce the interview memoranda and the notes used to prepare the DLA downloads without resort to redaction.

1 “DE ” refers to the docket entry numbers in this case. “Op.” refers to my Opinion filed on January 24, 2022. (DE 263.) “Def. Letter” refers to Defendants' letter submitted on April 6, 2022. (DE 332.) “Mot.” refers to Cognizant's letter-brief in support of its Motion for Clarification. (DE 333-1.) “Cognizant Letter” refers to Cognizant's letter submitted on April 13, 2022. (DE 337.) “Reply” refers to Defendants' joint reply to Cognizant's Motion for Clarification. (DE 338-1.)

DISCUSSION

I assume familiarity with the underlying procedural history as outlined in my prior opinion. (*See* Op. at 1-4.) On January 24, 2022, in the opinion currently at issue, I delineated the scope of Cognizant's waiver of attorneyclient privilege and work product protections over three categories of materials related to Cognizant's internal investigation, finding that: (1) “to the extent that summaries of interviews were conveyed to the government, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves”; (2) “to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver”; and (3) “the waiver extends to documents and communications that were reviewed and formed any part of the

basis of any presentation, oral or written, to the DOJ in connection with this investigation." (*Id.* at 14; DE 264.)[2]

[2] This is Cognizant's second motion for reconsideration. The Government, Defendants, and Cognizant all filed motions for reconsideration of my earlier opinion, though on subjects unrelated to the motion currently before me. On March 23, 2022, I granted the Government's motion and the Defendants' motion in part but denied Cognizant's motion. (DE 319, 320.)

Following further discovery, Defendants and Cognizant again dispute the scope of Cognizant's waiver and thus the scope of discovery to which Defendants are entitled. Cognizant has extensively redacted numerous portions of its 44 witness interviews and has withheld notes that its attorneys used to prepare the DLA downloads, arguing that these materials were never conveyed to the government and so remain shielded from discovery by attorney-client and work product protections. (Mot. at 2-5; Cognizant Letter at 3-5.) Defendants counter that the interview memoranda and attorney notes fall *3 squarely within the scope of the waiver outlined in my prior opinion and thus request that Cognizant either disclose these materials in full or provide a redaction log and fuller explanation of how it delineated discoverable and privileged materials. (Reply at 2-5, Def. Letter at 3-5.)

Reviewing the parties' briefing in this dispute, I must agree with Defendants that Cognizant's latest attempt to limit the reach of discovery ordered by this Court should be rejected. Defendants originally urged a very broad subject matter waiver, a position the Court did not accept. I narrowed the scope of the waiver but held that Cognizant could not assert attorney-client privilege or work product protections over "memoranda, notes, summaries, or other records of the interviews" where it conveyed detailed summaries of those interviews to the government. (Op. at 14; *see also* DE 264 at 1 (ordering disclosure of "interview summaries and their underlying documents, communications, or records to the extent that these summaries or the contents of these materials [] were conveyed by Cognizant to DOJ").)

Nor can Cognizant redact the documents based on this or that sentence or paragraph being privileged or nonprivileged, viewed in isolation. The basis for the Court's decision was not that such items could not have been privileged as an original matter, but rather that the disclosure to the government waived any privilege as to documents actually disclosed and certain related documents pertaining to the same subject matter. *See Shire LLC v. Amneal Pharms.*, LLC, No. 2:11-CV-03781, 2014 WL 1509238, at *6 (D.N.J. Jan. 10, 2014) (providing that a party's waiver extends to undisclosed documents and communications if "1) the waiver is intentional; 2) the disclosed and undisclosed communications or information concern the same subject matter; and 3) they ought in fairness be considered together" (citing Fed.R.Evid. 502(a))). Both my prior opinion and basic fairness mandate that Cognizant disclose the 44 interview memoranda underlying the DLA downloads.

Further, my opinion specified that Cognizant's waiver "extends to documents and communications that were reviewed and formed any part of the basis of any presentation" to the government. (Op. at 14.) Cognizant's waiver *4 thus clearly encompassed both the interview memoranda in their entirety and the notes used by Cognizant's attorneys in preparing for the DLA downloads. Cognizant does not appear to deny that both sets of materials were reviewed and formed part of the basis of Cognizant's presentations to the government, even if they were not conveyed to the government verbatim and in their entirety. More fundamentally, Cognizant's disclosures to the government undermined the purpose of both attorney-client and work product protections, waiving those privileges as to the

information actually conveyed to the government and to the documents so related to that information that they "ought in fairness be considered together." (*See* Op. at 8, 14 (citing *In re Chevron Corp.*, 633 F.3d 153, 165 (3d Cir. 2011) and *Shire LLC*, No. 2:11-CV-03781, 2014 WL 1509238, at *6.) Requiring these materials' disclosure ensures that Defendants do not suffer undue prejudice at trial, *Shire LLC*, No. 2:11-CV-03781, 2014 WL 1509238, at *6, and prevents the use of attorney-client privilege or work product protections "to present a one-sided story to the court, " *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991).

I close by reemphasizing that this is not a discovery dispute between parties to a civil lawsuit; it is a valid attempt to obtain by subpoena evidence relevant to the defense of criminal charges. I also consider the situation in which Cognizant found itself. The government was investigating allegations of bribes paid by high officials of Cognizant, on behalf of Cognizant to obtain necessary approvals for a Cognizant project. Cognizant signed a declination agreement with DOJ that cited Cognizant's voluntary disclosure, its "thorough and comprehensive investigation, " and its "full and proactive cooperation" with the government. Cognizant agreed that it would continue to cooperate fully and provide the government with "*any information*" requested. It could not have anticipated, at least vis-a-vis the government, that it could shield anything. It is not surprising that Cognizant waived its privilege; by doing so, it dodged a bullet. The materials at issue here fall within this waiver thanks to Cognizant's *5 own intentional conduct and must in fairness be disclosed to Defendants. Moreover, since these documents were foundational to Cognizant's presentation to the government and privilege over them was waived, Cognizant is not entitled to redact them. Cognizant's exhaustively-briefed objections to disclosure I have already considered; they now serve only to delay this case. In that spirit, I reject this motion for "clarification" and will require full compliance with the subpoenas, as narrowed by my prior decisions, within 14 days.

ORDER

Accordingly, and as already detailed in my opinion dated January 24, 2022, Cognizant has waived its privilege over "all memoranda, notes, summaries, or other records" of interviews "to the extent that summaries of interviews were conveyed to the government" and over "documents and communications that were reviewed and formed any part of the basis of any presentation" to the government. Both the unredacted interview memoranda and the notes used by Cognizant's attorneys in preparation for presentations to the government fall squarely within this waiver's ambit and as such, must be disclosed to Defendants within 14 days.

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