

ACPERA Roundtable Executive Summary

On April 11, 2019, the Department of Justice Antitrust Division held a public roundtable to discuss the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA). ACPERA was enacted on June 22, 2004, creating greater incentives for corporations to self-report illegal conduct to the Department's Antitrust Division. In initially enacting ACPERA, Congress recognized the serious harm antitrust cartels pose to American businesses and consumers. Among other provisions that supported and enhanced the Antitrust Division's criminal enforcement efforts, section 213 of ACPERA created incentives for corporations to self-report illegal price-fixing, bid-rigging, and market allocation conduct by limiting the civil damages exposure of a company granted leniency under the Antitrust Division's Leniency Policy¹ to actual damages if the company provides civil plaintiffs with timely and satisfactory cooperation. *See* ACPERA, Section 213(b) & (c), 15 U.S.C. § 1 notes.

ACPERA's limitation on recovery serves a dual purpose. First, it strengthens criminal enforcement by addressing the concern that the threat of treble damages will serve as a "disincentive to self-repor[t]" criminal antitrust violations to the Antitrust Division and provides "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the [Antitrust Division]."² Second, it strengthens private, civil enforcement by encouraging cooperation with plaintiffs in private civil lawsuits, which can increase compensation to victims of antitrust crimes.³ These detrebling provisions, contained in Sections 212 through 214 of ACPERA, had an original 5-year sunset in Section 211 that was extended twice to 6 and then 16 years; ACPERA's detrebling provisions will sunset on June 22, 2020 without Congressional action.

The ACPERA roundtable provided the Antitrust Division with the opportunity to hear the views of interested stakeholders, including judges, attorneys, academics, and the business community, regarding the efficacy of ACPERA and its impact on the Division's criminal enforcement efforts. The Division held three sessions summarized below (Agenda attached). There was general consensus among participants that ACPERA provides important benefits to leniency applicants and civil plaintiffs. Panelists' views differed on whether reforms were needed to help ACPERA achieve its goals of self-disclosure to the Division and cooperation in civil cases.

Session One: Views from Stakeholders

During the first session, the Division heard views from various stakeholder groups. Panelists included Senior Circuit Judge Douglas Ginsburg representing the Global Antitrust Institute, and representatives from the U.S. Chamber of Commerce (the Chamber), Antitrust Section of the American Bar Association (the Antitrust Section), and Business Industry Advisory Committee (BIAC) to the Organization for Economic Cooperation and Development (OECD).

¹ U.S. Dep't Justice, Antitrust Div., Corporate Leniency Policy, <https://www.justice.gov/atr/file/810281/download>.

² [150 Cong. Rec. S3614](#) (Apr. 2, 2004) (statement of Sen. Hatch).

³ *Id.*

The Global Antitrust Institute (Judge Douglas Ginsburg) discussed the importance of ACPERA's detrebling and increased penalty provisions as well as post-ACPERA criminal enforcement trends. (Tr. at 18-31). Judge Ginsburg discussed the importance of context and data, and suggested that more analysis is required to ascertain whether ACPERA should be modified. (Tr. 31:9-18).

The Antitrust Section discussed its past positions on ACPERA, and recommended that the Division (1) "explore whether [the] decline [in criminal antitrust cases] represents a failure of ACPERA to incentivize self-reporting to the leniency program" (Tr. 42:6-9); (2) "explore how actual damages should be defined" (Tr. 42:18-43:4); (3) consider "how ACPERA can be implemented and, if necessary, amended to facilitate settlements agreements at an early stage, consummated without delay, to be co-extensive with timely and fulsome cooperation by the leniency applicant." (Tr. 43:18-44:1).

The Chamber acknowledged the benefits of ACPERA (Tr. 59), but it also suggested reforms it claimed would make ACPERA's benefits to leniency applicants more certain, including that (1) "the [c]ourts . . . examine the leniency recipient's cooperation earlier in the litigation, which may help resolve the litigation more quickly" (Tr. 60:10-20); (2) courts and Congress "clarify both what constitutes satisfactory cooperation and what constitutes timely cooperation under ACPERA" (Tr. 62:19-63:2); and (3) Congress amend ACPERA to address "the risk of litigation from State enforcers," observing that a State is not a "claimant" under ACPERA, and "a leniency recipient may receive no discount for providing cooperation to State Attorneys General, who assert civil claims on behalf of their State." (Tr. 63:3-12). Similarly, BIAC opined that ACPERA's civil liability limitations are beneficial and could be strengthened "to provide even more enhanced protection from civil damage actions and more certainty to entities considering leniency so that cartels can be exposed and stopped." (Tr. 55:4-8).

Session Two: Litigating ACPERA and Lessons Learned⁴

In Session 2, participants discussed lessons learned from litigating cases in which disputes over ACPERA's detrebling provisions arose. Panelists indicated that there have been few litigated cases defining ACPERA's cooperation requirements, Tr. 72:7-16, 74: 20-76:3; (Manning) (discussing guidance), but disagreed as to whether statutory changes were needed to clarify the obligation to provide "timely" and "satisfactory cooperation." Panelists with experience representing civil plaintiffs generally opposed changes. *See* Tr. 91:11-12 (Simon) ("[I]f it ain't broke, don't fix it, and it's not broken."); Tr. 110:19-12:8; Tr. 116:3-5 (Sweeney) ("I don't think the statute is broken. I don't think it needs to be fixed. I think that the problems that have been identified by some of the participants can be addressed within the litigation context . . ."). One panelist opined that it is "impractical" to legislate cooperation requirements, and "if there is this genuine difficulty in understanding the statute or if it's believed that the plaintiffs are overreaching, there are remedies for that that exist today." Tr. 112:1-8 (Sweeney). Another panelist agreed that the system is working, although imperfectly, and predicted that

⁴ Panelists were Bonny Sweeney (Hausfeld); Peter Halle (University of Miami Law School); Amy Manning (McGuire Woods); Bruce Simon (Pearson Simon & Warshaw), and Jeffrey Kessler (Winston & Strawn).

trying to change it will create “chaos” and “that . . . is bad for antitrust enforcement, both from a private plaintiff’s perspective and a public perspective.” Tr. 91:13-92:11 (Simon).

In contrast, other panelists thought ACPERA lacks “clarity,” Tr. 76:18-21 (Manning), and some suggested improvements, such as adding standards by which a court could rule on cooperation “in a way that is more predictable.” Tr. 84:15-18; 105:16-19 (Halle). Some panelists suggested that leniency applicants should be required to provide cooperation by a specific time in the litigation, for example, before the motion to dismiss or before the consolidated amended complaint, “and there should be a time put in.” Tr. 116:20-117:3 (Simon); Tr. 118:10-14 (Kessler). Panelists also discussed at what point in the civil proceeding a court should determine whether the leniency applicant has met its cooperation obligations. One panelist pointed out the lack of consistency. Tr. 76:11-17 (Manning) (“Courts have looked at it and said we’re not going to do that until we get to damages in the very end of the case. Some Courts have done it at the summary judgment phase and some have done it on a motion of the parties.”). Another panelist indicated that a lesson learned from litigating ACPERA is to involve the court early so that it can opine on “what is expected and when it should occur.” Tr. 87:14-18 (Halle). Some panelists urged that a court should rule whether ACPERA’s cooperation requirements were met at least before trial. Tr. 106:5-8 (Halle) (“Nobody should go to trial, either the plaintiff or the defendant, wondering whether the trial will be about single damages, or treble damages and joint and several liability.”); Tr. 118:15-17 (Kessler) (“I also think there should be a determination by the Court, for example, prior to trial. Because no one should go to trial not knowing whether ACPERA benefits apply.”)

Panelists also discussed the scope of cooperation, and some suggested that ACPERA should have a bright-line rule that the leniency applicant satisfies its cooperation obligations by providing civil plaintiffs “at a minimum” the same or “just as complete” as the cooperation provided to the government. Tr. 81:9-13 (Sweeney); Tr. 112:14-113:2 (Halle). Another panelist argued that if the required cooperation is limited to the extent of the cooperation provided to the Division, “then all the damages that related to the broader conspiracy that we prove should be trebled for the [leniency] applicants.” Tr. 117:4-9 (Simon). This same panelist suggested that ACPERA should provide for an “antitrust bounty, like in *qui tam* action[s],” to incentivize employees and companies to race to come in first and be the cooperating witness. Tr. 117:10-17 (Simon).

Panelists also offered suggestions for streamlining damages, including further defining actual damages, Tr. 86:16-87:1 (Halle) (“There is no statutory standard for calculation of single damages and I think that is often an impediment to settlement”), or creating a restitution fund for antitrust victims in lieu of damages, Tr. 99:11-100:13 (Kessler). Several panelists strongly disagreed with a restitution fund due to, inter alia, the expense and complexity of claims administration, at which the plaintiffs’ bar has experience. Tr. 102:3-103:1 (Simon); Tr. 116:7-15 (Sweeney); Tr. 164:15-167:13, *see also* 168:4-14 (Saver). If the Department were to administer the fund, one panelist opined that its resources are better allocated to enforcement. Tr. 103:2-8 (Halle) (“DOJ doesn’t have the resources and unless the resources are added, more money, to have a restitution section, I would be against that because I think the DOJ needs to be out there investigating and prosecuting.”).

Session 3: Research and views on ACPERA⁵

Session 3 covered how ACPERA protections could be improved. Panelists discussed proposals from Session 2 and suggested other reforms. Panelists supported reauthorization, but some panelists with experience representing leniency applicants agreed there should be more “clarity” for the leniency applicant. Tr. 170:7-171:3. Panelists suggested there should be more focus on “the decision in the boardroom [on] whether to seek leniency.” Tr. 170:22-171:3 (Talisay); Tr. 172:14-20 (Henry). One panelist explained that ACPERA benefits sound good “on paper,” but in reality, a company probably will not know whether it will have ACPERA benefits until very late in the process. Tr. 132:18-133:19 (Taladay); *see also* Tr. 130:15-131:9 (Terzaken) (noting boards “take [ACPERA] off” the scales in deciding whether to seek leniency “when they learn how it actually operates in practice”). With respect to potential reforms, one panelist agreed with a suggestion from Session 2 that ACPERA could define “actual damages” to address concerns that civil complaints go well beyond the scope of admitted cartel conduct. Terzaken Tr. 171:12-172:8. Some panelists supported a rule “that if the leniency applicant provides to the plaintiff in a timely fashion at least everything they provided to the DOJ, then there should be a rebuttable presumption going forward that they’ve met their ACPERA obligations.” Tr. 150:11-17 (Taladay); Tr. 153:15-22 (supporting presumption) (Terzaken). One panelist also agreed with the suggestion from Session 2 to “hook” cooperation “to a date specific” such as “before a consolidated and amended complaint or before the response to the motion to dismiss.” Tr. 154:15-20. Finally, a panelist offered suggestions to the Division on how it can promote the goals of ACPERA, by for example, being “more proactive” in ACPERA cases in support of the leniency applicant consistent with intentions of Congress. Tr. 160-1:6 (Hammond), and take care not to draft an overly “narrow” leniency letter which increases the applicant’s exposure. Tr. 160:7-13 (Hammond).

Written Submissions

In connection with the public roundtable, the Division asked for written comments on the efficacy of ACPERA and received several submissions. These submission generally supported reauthorization and suggested areas of potential reform (enclosed).

Conclusion

The Antitrust Division’s ACPERA Roundtable provided a useful forum to hear the views of interested stakeholders with views on the operation and efficacy of ACPERA after 15 years. As part of its continuous efforts to ensure that the Division’s criminal program has the proper tools to protect American consumers from anticompetitive conspiracies, the Division is studying the range of views and proposals that participants and commenters shared at this event.

⁵ Panelists were John Terzaken (Simpson Thatcher); Roxann Henry (Morrison & Forrester); Joe Saveri (Saveri Law Firm); Scott Hammond (Gibson Dunn); and John Taladay (Baker Botts).