

DOJ Treatment Of UBS Undermines Leniency Program

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The U.S. Department of Justice, under public pressure to prosecute banks and bankers, has undermined its Antitrust Leniency Program by violating at least the spirit of that program in its treatment of UBS AG regarding the foreign exchange rate investigation conducted jointly by the Antitrust Division and the Criminal Division. UBS received amnesty for its exchange rate conduct, but the DOJ turned around and used that conduct to renege on an agreement between UBS and the Criminal Division executed in December 2012 regarding Libor.

Foreign Currency Exchange Rate Resolutions

Recently, the DOJ held a press conference to announce that four of the world's largest banks (Barclays PLC, Citigroup Inc., J.P. Morgan Chase & Co. and Royal Bank of Scotland) will plead guilty and pay a combined \$2.5 billion for having manipulated currency exchange rates around the globe.[1] The DOJ emphasized that Citigroup's penalty alone of \$925 million is the largest fine ever imposed under federal antitrust laws. The press conference was attended by Antitrust Division leadership, Criminal Division leadership and the attorney general, among others.



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What was not mentioned by any of the DOJ's speakers is that these guilty pleas and record fines would never have occurred without the assistance and extraordinary cooperation of one major bank: UBS. Public accounts strongly suggest that UBS informed the DOJ that it and the four other banks conspired to manipulate currency exchange rates. Without that invaluable information, the DOJ may never have learned of the conduct, and therefore never would have obtained four corporate guilty pleas and \$2.5 billion. In other words, UBS may have single-handedly given the DOJ its largest cartel case ever.

Given the integral role that UBS played in making the DOJ's case, it is perplexing that DOJ officials went out of their way to bash UBS, publicly and caustically, at the currency exchange press conference.[2] More substantively, it is disturbing that the DOJ announced at that press conference that it was taking the virtually unprecedented step of "tearing up" UBS's prior nonprosecution agreement from 2012 regarding a different cartel matter — manipulation of Libor — because of UBS' conduct in the currency exchange rate conspiracy.

UBS sought amnesty for its currency exchange rate conduct under the DOJ's Antitrust Division's Leniency Program, a well-established amnesty program for corporations that are "first-in-the-door" to report their involvement in antitrust misconduct.[3] Presumably, UBS "confessed" to the currency exchange rate conduct and agreed to cooperate with the DOJ throughout the investigation of the cartel to inoculate itself from criminal charges and fines. By the DOJ's own admission, the investigation of the currency exchange rate issue was a joint investigation of the Antitrust Division and the Criminal Division.[4] Thus, UBS's amnesty involved both divisions of the DOJ.

But the DOJ appears to have missed the point of its own amnesty program when it used the information UBS gave DOJ about UBS' own currency exchange misconduct to justify renegeing on the Libor agreement the DOJ made with UBS. UBS was effectively forced to pay \$203 million for its role in the currency exchange rate conspiracy and plead guilty to its Libor misconduct. Bottom line: It appears UBS did not get the amnesty to which it was entitled under the DOJ's own amnesty program. Sadly, the DOJ's conduct has created the appearance that the DOJ succumbed to political pressure and public criticism instead of honoring the program it has heralded as "the Division's most effective generator of international cartel cases." [5] This unfortunate episode, however, may thwart the DOJ's effort to prosecute antitrust violations by discouraging large corporations from coming forward.

2012: DOJ Showers UBS With Praise About the Libor Investigation

Given the tone of the DOJ's recent statements about UBS, it is difficult to imagine that, less than three years ago, the DOJ showered UBS with praise, portraying UBS as an excellent corporate citizen that went to great lengths to do the right thing. In December 2012, UBS Japan pleaded guilty and admitted to manipulating the data it provided to the British Bankers' Association for calculation of Libor rates. UBS Japan's parent, UBS AG, was required to pay the DOJ \$500 million and enter into a nonprosecution agreement.[6]

At a Dec. 19, 2012, press conference, the attorney general lauded UBS for its conduct and the assistance it gave the DOJ: "The non-prosecution agreement illustrates the significant steps that UBS has taken to help investigators uncover LIBOR misconduct, and to implement remedial measures strengthening the company's internal controls." [7]

The DOJ went to great lengths to praise UBS AG. The DOJ states in the agreement that UBS "cooperated fully" with DOJ, and that cooperation was "exceptional in many important respects," including UBS' "substantial efforts to assist the government." [8] The agreement notes that UBS provided "highly valuable information that significantly expanded and advanced [the DOJ's] investigation," and that "compelling information" demonstrated that UBS had made "important and positive changes" regarding compliance.[9] The DOJ describes UBS' "recent record as commendable." [10] Such profuse praise of a company is rarely contained in a deferred prosecution agreement or NPA.

2013: The "Too Big To Jail" Kerfuffle

Just a few months later, in March 2013, the attorney general testified at a Senate Judiciary hearing, lamenting that some banks are so large that prosecuting them could create havoc in the national and world economy. These statements sharpened the debate about whether any bank should be "too big to jail." The attorney general sought to quell the uproar a few days later, stating that "[b]anks are not too big to jail. If we find a bank or a financial institution that has done something wrong, if we can prove it beyond a reasonable doubt, those cases will be brought." [11] But congressional outcry continued, and pressure mounted on the DOJ to demonstrate it was tough on banks.

In February 2015, the attorney general announced that he had imposed a 90-day deadline for prosecutors to decide whether to bring criminal or civil cases against those involved in the financial crisis.[12] A month later, the assistant attorney general continued the DOJ's rebuttal to the allegations that the DOJ was too soft on banks, foreshadowing the DOJ's decision to renege on UBS' agreement: "And let me be clear: the Criminal Division will not hesitate to tear up a DPA or NPA and file criminal charges, where such action is appropriate and proportional to the breach." [13]

Tearing Up an NPA

The idea that the DOJ would "tear up" an agreement that included a payment of a half-billion dollars is not only counterintuitive, it is unprecedented. The DOJ typically addresses corporate misconduct after the execution of an NPA or DPA by extending the time period of the agreement and requiring the company to take further remedial measures. That is what the DOJ recently did with Barclays Bank PLC and Standard Chartered.

Not surprisingly, the instances in which the DOJ has revoked the immunity it has bestowed on a company via a DPA or NPA are few and far between. In 2003, for example, the Antitrust Division revoked its promise of immunity to Stolt-Nielsen SA after the company allegedly breached the agreement.[14] This marked the first time that the Antitrust Division revoked a leniency agreement in the Leniency Program's current form — 10 years after its reform in 1993.[15]

UBS' NPA agreement regarding Libor provided that UBS could be prosecuted for its Libor conduct if "UBS has committed any United States crime subsequent to the date of this Agreement." [16] The agreement defines UBS to include UBS AG and its subsidiaries and affiliates. This broad language is not uncommon, and it creates future risk that increases the larger the corporation signing such an agreement is. The larger the company, the more of a risk that it — or some subsidiary, no matter how small — will be involved in some subsequent misconduct or regulatory violation that the DOJ deems "in its sole discretion" to be a crime.[17]

Will DOJ's Treatment of UBS Chill Future Amnesty Applicants?

The DOJ's likely response to the concern that, in effect, the DOJ did not give UBS the complete immunity it was promised, is to point to the language included in most DPAs and NPAs with DOJ Antitrust, stating that the agreement binds the Antitrust Division of the DOJ only, and no other entities within DOJ. In other words, the DOJ did not and does not give complete immunity in this context.

Such an argument relies upon an artificial distinction between offices within the DOJ, a distinction that is itself suspect and breeds distrust for those negotiating with the DOJ. An agreement that only prevents Antitrust prosecutors from further prosecuting a company that resolves a criminal case, but that permits those same prosecutors to walk down the halls of the DOJ and enlist another prosecutor in a different branch of the DOJ to go after that company for the very same conduct, is a recipe for selective subsequent prosecution. The "spirit" of such limiting language is to prevent Antitrust from, perhaps unwittingly, hamstringing other federal prosecutors from prosecuting the company for different misconduct that may have occurred at the same time as the antitrust misconduct. That is not what happened here.

Despite the DOJ's unyielding insistence on language that makes such agreements binding on just one of the several divisions within DOJ, it rarely, if ever, permits any other part of the DOJ from going after a

company that settles with the Antitrust Division for the same conduct. The reason is obvious: If DOJ Antitrust extracts a large fine from a company, a subsequent prosecution for the same conduct by other DOJ prosecutors sets a bad precedent for the DOJ. If a company knows it will face charges by other DOJ entities if it settles with Antitrust, the company is not truly resolving the matter and the value of the Antitrust resolution to the company drops considerably.

That is exactly what has happened to UBS. The "amnesty" it received from the Antitrust Division for the currency exchange rate conduct is illusory — UBS' admission to that conduct became the basis for a \$200 million fine and a criminal guilty plea. What makes this result particularly troubling and unfair is that both the Libor and foreign exchange rate investigations were joint investigations by both the Antitrust Division and the Criminal Division. UBS received amnesty regarding a joint investigation conducted by both divisions; it is patently unfair for one of those divisions to use the information obtained during the amnesty process to find a violation in another investigation — Libor — which was also a joint effort by the Antitrust Division and the Criminal Division.

The DOJ was so anxious to flex its muscles and demonstrate that it can be tough on the banking industry that it created a precedent it may live to regret. Large, global corporations often have multiple ongoing government investigations. In such situations, the benefits of seeking incomplete amnesty limited to the Antitrust Division are likely outweighed by the risk that others at the DOJ will use the same conduct to create liability — liability that the Leniency Program was designed to resolve. Even if the DOJ had a legal right to terminate UBS' NPA, it was a mistake to do so in light of UBS' amnesty and because doing so is at odds with the DOJ's own precedent. The artificial distinctions between DOJ divisions should not be used as a loophole by the DOJ, particularly where the two divisions in question operated in concert.

Assistant Attorney General Bill Baer recently stated that the DOJ "never has and never would use other criminal statutes to do an end-run around antitrust leniency ."[18] Here, the DOJ appears to have engaged in an end-run around the leniency program by using information UBS provided to it under the leniency program to force UBS to enter into a guilty plea and to pay a \$203 million fine.

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[1] Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

[2] Leslie R. Caldwell, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at Attorney General Press Conference (May 20, 2015) (on file with author) (stating that "UBS has a rap sheet that cannot be ignored. The Department has resolved that [sic] three criminal investigation of UBS. Each time resulting in a nonprosecuton or deferred prosecution agreement. UBS has entered into civil and regulatory settlements in connection with that [sic] sales practices on multiple occasions. Enough is enough.").

[3] Leniency Program, U.S. Dep't of Justice, <http://www.justice.gov/atr/public/criminal/leniency.html> (last visited May 29, 2015).

[4] Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

[5] James Griffin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div., Presentation at American Bar Association Section of Antitrust Law Annual Meeting (Aug. 12, 2003), available at <http://www.justice.gov/atr/public/speeches/201477.htm>.

[6] In general, non-prosecution or deferred prosecution agreements grant immunity to a corporation (or individual) provided that the corporation cooperates with the prosecuting authority. As in this case, cooperation may entail providing information critical to a criminal investigation.

[7] Eric Holder, Att'y Gen., U.S. Dep't of Justice, Remarks at UBS Press Conference (Dec. 19, 2012), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-ubs-press-conference>.

[8] Letter from Denis J. McInerney, Chief, Fraud Section, Criminal Division, U.S. Dep't of Justice, to Gary R. Spratling and David P. Burns, Gibson, Dunn & Crutcher LLP (Dec. 18, 2012), available at <http://www.sec.gov/Archives/edgar/data/1114446/000119312513106100/d497201dex43.htm>.

[9] Id.

[10] Id.

[11] Jason M. Breslow, Eric Holder Backtracks on Remarks on "Too Big to Jail," Frontline, May 16, 2013, <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/eric-holder-backtracks-remarks-on-too-big-to-jail/>.

[12] Andrew Grossman, Holder Sets Deadline for Financial Crisis Cases Against Individuals, Wall St. J., Feb. 17, 2015, <http://www.wsj.com/articles/holder-sets-deadline-for-financial-crisis-cases-against-individuals-1424215598>.

[13] Leslie R. Caldwell, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at New York University Center of the Administration of Criminal Law's Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center>.

[14] James Rowley, Stolt-Nielsen Misled U.S. on Timing of Price Fixing, Bloomberg News, Apr. 2, 2004, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acF20WAQJjis>.

[15] Jim Walden & Kristopher Dawes, The Curious Case of Stolt-Nielsen S.A. v. United States, The Antitrust Source (March 2005), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fpublishing%2Fantitrust_source%2F02_mar05_walddawe323.pdf&ei=spVoVYacD8yPyATUqYGYBw&usg=AFQjCNH8f03QKICzbrMX8QqemPMkV6H5Hg.

[16] Letter from Denis J. McInerney, Chief, Fraud Section, Criminal Division, U.S. Dep't of Justice, to Gary R. Spratling and David P. Burns, Gibson, Dunn & Crutcher LLP (Dec. 18, 2012), available at <http://www.sec.gov/Archives/edgar/data/1114446/000119312513106100/d497201dex43.htm>.

[17] *Id.*

[18] Bill Baer, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div., Remarks at Georgetown University Law Center's Global Antitrust Enforcement Symposium (Sept. 10, 2014), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.justice.gov%2Fatr%2Fpublic%2Fspeeches%2F308499.pdf&ei=vph1VbbSDtffsATWl4HIBw&usg=AFQjCNGjp1LVCFLUzEzZT_rz38nxlp0Gfw&sig2=MG_5goLgsdBrMmtej8A-Xg&bvm=bv.95039771,d.cWc.