

Deferred Prosecution Agreements in Antitrust Enforcement: An Efficient Alternative to Pleas

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I. INTRODUCTION

Since 2019, the U.S. Department of Justice (DOJ) Antitrust Division has ramped up its use of Deferred Prosecution Agreements (DPAs) in criminal antitrust matters.¹ DPAs bypass the traditional plea agreement process. In a DPA, the government defers prosecution for a period of time, provided that a defendant adheres to specific criteria during that period.² These pretrial agreements generally involve an admission of wrongdoing, the payment of fines, and the implementation of compliance measures.³ Charges are dropped if the defendant complies with the requirements of the agreement.⁴ After refusing to enter into DPAs for years, the Division's shift in policy poses novel questions about the future of antitrust enforcement. Since 2019, the DOJ has entered into 11 DPAs in antitrust matters, and fines have varied from \$4 million to upwards of \$225 million. Within this period, the DOJ has resolved antitrust matters with DPAs more often than with plea agreements. The tide seems to be shifting in favor of DPAs. In August 2023, the DOJ announced DPAs with Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA, in response to the companies' involvement in a price fixing conspiracy involving several life-saving drugs.⁵ Notably, these were the first DPAs in the antitrust context that required the divestiture of a company's product.

The Antitrust Division argues that DPAs can be a more efficient means of resolving matters and ensuring general deterrence. Yet, scholars have long argued that DPAs lead to increased abuse of prosecutorial discretion because of the lack of judicial oversight.⁶ This article analyzes Antitrust DPAs within the broader context of DPAs

¹ Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, DUKE L. & UVA L. LEGAL DATA LAB (2023), <https://perma.cc/5XY8-9V3M>.

² Andrea Amulic, Note, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 124 (2017).

³ David Lawlor, *Corporate Deferred Prosecution Agreements: An Unjust Parallel Criminal Justice System*, 46 W. ST. L. REV. 27, 29 (2019).

⁴ Amulic, *supra* note 2, at 124.

⁵ *United States v. Glenmark Pharmaceuticals Inc.*, Deferred Prosecution Agreement 1, Case No. 2:20-cr-200-RBS(s) (E.D. Pa. Aug. 21, 2023), <https://perma.cc/K946-AKCP>.

⁶ Lawlor, *supra* note 3, at 36.

used in corporate prosecutions and compares Antitrust DPAs to standard outcomes in federal criminal antitrust prosecutions.

First, this article provides an overview of the outcomes in federal criminal antitrust cases. Then, it compares antitrust DPAs to traditional antitrust plea agreements to argue that DPAs preserve the U.S. government's general deterrence goals while promoting an efficient allocation of government resources. Finally, it addresses two common criticisms of DPAs applied to corporate crime: 1) whether DPAs were intended by Congress to be used in corporate prosecutions, and 2) whether they suffer from lack of judicial oversight. Because DPAs are used to ensure compliance in a timely manner, the Antitrust Division should continue to use DPAs as a method of deterring criminal behavior and protecting consumers from inflated prices.

II. ANALYSIS

Despite criticisms of the role of DPAs in corporate prosecution, DPAs have many benefits. The large fines included in these agreements, along with broad cooperation obligations, provide similar general deterrence benefits as plea agreements. So far, the antitrust fines imposed in DPAs have not systematically differed from previous antitrust settlements. The agreements help the government obtain an efficient outcome by avoiding litigation costs and preserving the government's time and money. Other terms of these agreements, including the admission of guilt and divestiture of product lines, can also be used as powerful deterrents.

A. DPAs, like plea agreements, allow for general deterrence.

General deterrence is particularly important in antitrust crime because these crimes involve the cooperation of many players across an industry. The Antitrust Division's Primer for Federal Law Enforcement Personnel states that "[c]riminal prosecution, incarceration, and substantial fines are the most effective, but not exclusive, deterrents to antitrust crimes."⁷ Yet, most antitrust crimes never reach trial and individuals, rather than corporations, fear the burden of incarceration.⁸ Because only 6% of federal antitrust criminal cases reach trial,⁹ the terms that dictate a defendant's compliance are generally outlined within plea agreements. Therefore, this

⁷ U.S. DEP'T OF JUSTICE ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 10 (Apr. 2022), <https://perma.cc/MW6Q-BXYD>.

⁸ Individuals, along with the corporation, are sometimes prosecuted for antitrust crimes, and the mean prison sentence is 10 months. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1810 (2015).

⁹ *Id.*

article compares the terms of antitrust plea agreements with DPAs to assess their deterrent value.

Compared to other forms of corporate prosecution, general deterrence occupies a unique space in antitrust enforcement. Thus, it is important for antitrust enforcers to seek out creative solutions to these unique problems. For example, the DOJ enters into confidential leniency deals with companies with the goal of “incentiviz[ing] individuals and companies to turn in the entire group of companies engaged in a price-fixing conspiracy.”¹⁰ Leniency is only granted to organizations who report illegal activity before an antitrust investigation has started (Type A leniency) or before the Antitrust Division has enough information to build a solid case (Type B leniency).¹¹ Individual prosecutions in antitrust also contain unique deterrence challenges. Sometimes, lower-level employees who serve a short prison sentence for antitrust crimes are later financially rewarded in their industry.¹² Because of these unique challenges, the Antitrust Division must engage in creative enforcement methods to deter crime within an industry. DPAs are simply an extension of this trend.

The process of settling an antitrust matter and entering into a DPA are quite similar. Both types of agreements can involve major fines and admission of guilt. Like the penalties of plea agreements, the penalties in DPAs are calculated with guidance from the U.S. Sentencing guidelines.¹³ The total payment of companies subject to DPAs does not differ substantially from the payments in traditional antitrust plea agreements. “Total payment” aggregates fines, forfeitures, donations or other fees required by the agreement. I analyzed the total payment data from every federal antitrust plea agreement since 2010 (n=140), which has been aggregated in Corporate Prosecution Registry, and compared these summary statistics to the total payment in DPAs. To better contextualize these summary statistics, Figures 2 and 3 contain the distribution of antitrust payments in DPAs and plea agreements.

¹⁰ *Id.* at 1827.

¹¹ U.S. DEP’T OF JUSTICE ANTITRUST DIV., ANTITRUST DIVISION LENIENCY POLICY AND PROCEDURES (Apr. 2022), <https://perma.cc/63U2-W26J>.

¹² John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, CARDOZO L. REV. 427, 437–42 (2012).

¹³ *United States v. Argos USA LLC*, Deferred Prosecution Agreement 7, Crim. No. 4:21-CR-0002-RSB-CLR (S.D. Ga. Jan 4, 2021), <https://perma.cc/42SN-9JV2>.

Fig. 1: Total Payment (rounded to the nearest 100,000)

| | Mean | Median | Max |
|-----------------------|-------------|-----------|-----------|
| Antitrust Plea | \$43.4 mil | \$9.4 mil | \$925 mil |
| Antitrust DPA | \$ 74.8 mil | \$20 mil | \$275 mil |

Fig. 2: Total Payment Distribution in Federal Antitrust DPAs (2019-2023)

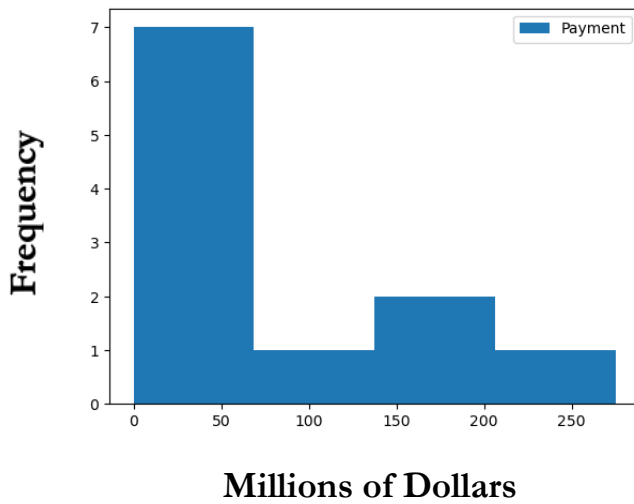
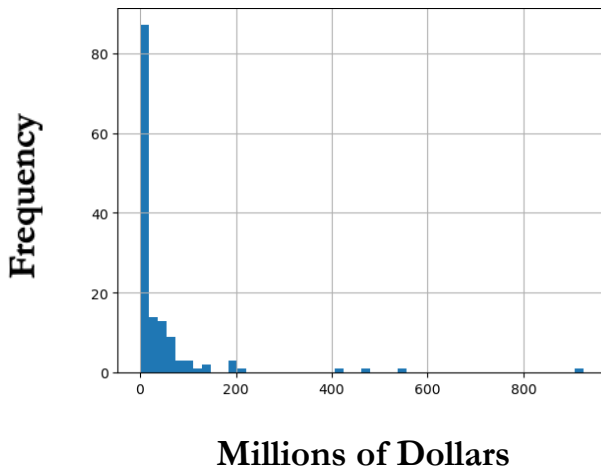


Fig. 3: Total Payment in Federal Antitrust Plea Agreements (2010-2023)



As noted in dual histograms, the distribution of payments in antitrust plea agreements is skewed to the left. There is a wide range of fines in plea agreements, with the \$925 million agreement in *U.S. v. Citicorp* serving as an outlier.¹⁴ Because there are so few DPAs, outliers will have an even greater effect on the mean total payment. But these preliminary data are an encouraging sign that the DOJ is still pursuing hefty financial penalties through DPAs order to deter illegal behavior.

Furthermore, the terms of DPAs can mirror the deterrence benefits of plea agreements by requiring the defendant to admit responsibility. Every DPA issued by the Antitrust Division since 2019 has forced the defendant to accept responsibility for the illegal conduct.¹⁵ Requiring companies to admit responsibility provides more transparency for the public along with an added level of general deterrence. Admitting responsibility is bad for business, so it is possible that companies will think twice before engaging in illegal behavior.

A closer look at the Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA. DPAs demonstrates the severe consequences of these agreements. The indictment against Glenmark alleges that the company conspired with Teva and Apotex Corp. and other pharmaceutical companies “by agreeing to increase and maintain the price of pravastatin and other generic drugs sold in the United States” for at least two years in violation of Section 1 of the Sherman Act.¹⁶ Pravastatin is a drug that is prescribed to tens of millions of individuals in the United States suffering from high cholesterol.¹⁷ Both Teva and Glenmark centered into agreements admitting guilt in a price-fixing conspiracy.¹⁸ Teva agreed to pay \$225 million in criminal penalties and make a \$50 million donation in drugs (that were affected by the price-fixing scheme) to humanitarian organizations. This is the largest ever criminal penalty for a U.S. antitrust cartel.¹⁹ Glenpark will pay \$30 million, and “[b]oth companies will face prosecution if they violate the terms of the agreements.”²⁰ These agreements also include cooperation obligations, requiring the companies to produce non-privileged

¹⁴ See *United States v. Citicorp*, Plea Agreement 9, Crim. No. 3:15CR78 (D. Conn. May 20, 2015), <https://perma.cc/J6XG-6R6X>.

¹⁵ See Garrett & Ashley, *supra* note 1.

¹⁶ *United States v. Glenmark Pharmaceuticals Inc.*, Deferred Prosecution Agreement 1, Case No. 2:20-cr-200-RBS(s) (E.D. Pa. Aug. 21, 2023), <https://perma.cc/K946-AKCP>.

¹⁷ *Number of pravastatin prescriptions in the U.S. from 2004 to 2020*, STATISTA (Oct. 17, 2022), <https://perma.cc/4WFP-A2E6>.

¹⁸ Press Release, U.S. Dep’t of Justice, *Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy* (Aug. 21, 2023), <https://perma.cc/A44B-FK7G>.

¹⁹ *Id.*

²⁰ *Id.*

materials requested by the United States.²¹ Furthermore, the companies are subject to an ongoing duty to report evidence of federal criminal antitrust violations.

Within industries like the pharmaceutical industry, DPAs can allow the government to preserve deterrence while balancing consumer welfare. For example, Heritage Pharmaceuticals Inc. entered into a DPA in 2019 for the disposition of charges alleging it conspired with its competitors to fix prices, rig bids and allocate customers.²² A guilty plea or conviction would have likely excluded the company from all federal health care programs for at least five years, “which would lead to substantial consequences, including to American consumers.”²³ Yet, the DPA allowed prosecutors to balance the needs of consumers in deciding which penalties to pursue.

Overall, both settlement agreements and DPAs provide general deterrence benefits in antitrust prosecutions. The fines and forfeitures in the latest DPAs have not differed substantially from those in antitrust settlements. Furthermore, the specialized terms of DPAs, like the admission of guilt, have the potential to increase general deterrence in antitrust enforcement.

B. DPAs offer effective solutions efficiently.

Antitrust DPAs have the potential to ensure cooperation on a quicker timeline. Because litigation is costly, using DPAs can free up the government’s resources to more effectively tackle matters that require heavy investigatory demands. Proponents of corporate DPAs tend to argue that they allow the government to obtain compliance and information necessary for a conviction without incurring litigation costs.²⁴ DPAs can also avoid “creating unintended collateral damage to the economy and other stakeholders.”²⁵

Since these agreements are tailored to a company’s conduct, the solutions have the potential to be more effective than merely agreeing to a fine or judgment. Terms in typical corporate DPAs—like requiring changes in business practices, changes in compliance programs, independent monitors, and socially beneficial donations—

²¹ *Id.*

²² Press Release, U.S. Dep’t of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), <https://perma.cc/5QZX-J7NT>.

²³ *Id.*

²⁴ Gus De Franco, R. Christopher Small & Aida Sijamic Wahid, *The Effect of Deferred Prosecution Agreements on Firm Performance* 2 (Aug. 19, 2019) (unpublished manuscript), <https://perma.cc/9JB3-NN82>.

²⁵ *Id.* at 2–3.

could be adopted in future antitrust prosecutions.²⁶ Taking a note from the Teva agreement, the DOJ can continue to push for divestiture within DPAs and for donations of a product.

C. Antitrust DPAs are lawful.

Some have argued that DPAs lack judicial oversight and, thus, lead to increases in prosecutorial abuse of discretion, but these concerns are unwarranted.²⁷ Although DPAs must be approved by a judge in a timely manner,²⁸ DPAs can take effect without judicial review “relating to the basic fairness of DPAs or whether they are in the public interest.”²⁹ Yet, the prosecutorial system is structured so that federal prosecutors maintain wide discretion in many aspects of the decision-making process. The DOJ’s confidential leniency agreements are one example of how the criminal justice system entrusts prosecutors to balance the benefits and drawbacks of pursuing an antitrust prosecution. Prosecutors pursuing confidential leniency agreements are not subject to stringent judicial oversight when deciding whether or not to press charges. Why, then, should a decision to defer prosecution be subject to heightened oversight?

Although DPAs are legal under 18 U.S.C. § 3161(h)(2), a section of the Speedy Trial Act, some scholars have argued that DPAs have exceeded their intended Congressional use.³⁰ After approving a DPA where a corporation was a defendant in 2015, Judge Emmett Sullivan reasoned in dicta that “the current use of deferred-prosecution agreements for corporations rather than individual defendants strays from Congress’s intent.”³¹ Proponents of this viewpoint, like scholar Andrea Amulic, have dug into the legislative history behind the Act and point to Senate reports stating that deferrals were intended to promote “social rehabilitation” of “individual offenders.”³²

However, the actual text of section 3161(h)(2) does not specify that DPAs should be limited to individual criminals. Furthermore, DPAs have been used extremely frequently in corporate prosecutions. Congress has had over 50 years since the Speedy Trial Act was enacted to change the language, but it has refused to do so. In fact, Congress passed legislation in 2021 requiring the DOJ to provide reports on corporate DPAs through section 6311 of the National Defense Authorization Act

²⁶ Jake A. Nasar, *In Defense of Deferred Prosecution Agreements*, 11 N.Y.U. J.L. & LIBERTY 838, 870 (2017).

²⁷ See, e.g., Lawlor, *supra* note 3.

²⁸ Nasar, *supra* note 25, at 883.

²⁹ Davis, Frederick, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSNAT’L L. 751, 764 (2022).

³⁰ See, e.g., Amulic, *supra* note 2.

³¹ *United States v. Saena Tech Corp*, 140 F. Supp. 3d 11, 37 (D.D.C. 2015).

³² Amulic, *supra* note 2, at 133 n.73.

(NDAA). This law suggests that Congress understands that DPAs are lawfully used in corporate prosecutions *and* that Congress's preferred remedy to the lack of oversight is Congressional, rather than judicial review.

III. CONCLUSION

The use of DPAs in criminal antitrust prosecutions provides a promising new avenue for the DOJ to preserve government resources while maintaining the general deterrence benefits of traditional prosecution. This article demonstrates that the terms of DPAs—notably, total payout and admission of guilt—do not differ significantly from the terms of traditional plea agreements, and that DPAs are a lawful use of prosecutorial discretion. By resolving matters outside of the costly litigation process, DPAs allow the government to act swiftly in protecting consumers from the harms of anticompetitive conduct. In light of the groundbreaking Teva and Glenmark agreements, the DOJ should continue to pursue aggressive measures—such as product divestiture—through these agreements. The efficiency gains of DPAs could help the Antitrust Division free up resources to investigate more criminal antitrust matters. Ultimately, aggressive action imposing sanctions quickly and effectively would help the agency protect consumers and ensure general deterrence for antitrust crimes.