Global Antitrust & Competition Law Risk: The Real Challenges Facing Your Organization and Strategies for Effective Management

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What Are the Risks?

- Cartels & collusion
  - The special nature of cartels
  - Impact of leniency programs
- Monopolization & abuse of dominance
- Distribution issues
- Price discrimination
- Mergers and acquisitions
Who Can Get You in Trouble?

- The folks in the field
- The staff people who write things
- Some folks you might not think of, e.g., HR
- And especially, the executives!

Recent Trends

- New leadership – DOJ & FTC
- Pharma & pay for delay
- MFNs
- E-books – agreeing not to discount, vertical & horizontal
- Agreeing not to hire your competitors’ employees, agreeing on pay
- Financial services – LIBOR, Munis
- Patents & FRAND
- And they are always going after cartels!
The Risk Is Global

- AU Optronics – US reaches conduct affecting US commerce
- Aggressive enforcement around the world
- Increased criminalization
- Even the risk of private actions outside the US
- Cooperation & coordination among enforcers
  - ICN, OECD, ECN

Addressing the Risk – Does the Government Care About your Compliance Program?

- The Antitrust Division & DG Comp – we don’t care about your “failed program”
  - But see Stolt-Nielsen
  - FTC approach
  - Some flexibility in the field?
- DOJ for other violations – programs do count
- Other countries’ approaches to programs
- France, UK, India, Singapore, Chile, etc.
Risk Management for Dominance, Distribution, Price Discrimination & other Complex Areas

- Awareness & sensitivity
- Being there when the questions arise
  - Antitrust expertise
  - Compliance program expertise
- Providing practical business advice

Mergers & Acquisitions

- Risk of government challenge – e.g., airlines
- Gun running
- Compliance & ethics/antitrust expertise “in the room” for planning
- Watch what you say!
- Compliance & ethics as part of due diligence
Risk Management for Cartel Violations

- Price fixing
- Agreements on other terms of sale – e.g., credit
- Dividing up customers, markets or products/services
- Bid rigging
- Group boycotts – agreements to refuse to deal
- Agreements to limit production

Risk Management for Cartel Violations

- Violators are often educated, high level managers
- Usually deliberate violations
- Risk of trade associations
- Impact of leniency programs
Compliance & Risk Management Tools

- Empowered, executive level, independent CECO at the leaders' table
- C&E personnel in the field & in important parts of the business, with reporting to the CECO

CECO Empowerment & Role

- French Competition Authority, Compliance officer
  - Appointed by management bodies
  - Devote self to implementing program
  - Direct access to the board
  - Necessary power to implement program
  - Sufficient human & financial resources
  - Framework-Document of 10 February 2012 on Antitrust Compliance Programmes
Chile’s FNE – CECO Independence

- Calls for CECO with “full autonomy and independence within the company (for example, that person reports directly to the Board of Directors and can be removed only under specifically defined conditions).”

Policies & Procedures

- Code of conduct language
- Compliance manuals
- Handouts, guides & FAQs
- Ongoing messages
- Real world cases
Compliance Auditing

- Real auditing, deep dives & time at the coal face
  - Screening – a key for targeting resources & finding red flags – learning from LIBOR
  - Training internal auditors
  - Red flags lists
  - Not the same as risk assessment

Compliance Auditing

- What to check: any employee, any record, any place

- What can you find?
  - Even conspiracies depend on records
  - People will talk – ask any reporter

- What to do with results of the audit
  - Follow-up
  - Follow-up
  - Follow-up
Training & Communications

- Address the leaders as high risk
- Training –
  - shake up the high rollers
  - reach the witnesses & helpers
  - must have emotional impact
- DOJ Lysine video
- Evaluate training

Reporting Systems

- Let people know that reporting works:
  - acknowledge/thank callers (“giraffe award”)
  - publicize disciplinary cases
  - discipline sharply for any type of retaliation
  - check up on whistleblowers
Trade Associations Are Risky Places

1. Know the antitrust rules ("no training, no travel")
2. Have legal input & review
3. Review agendas
4. Written minutes

Trade Associations Are Risky Places

1. No "off the record" chats
2. If discussions go "off limits," knock over water pitcher
3. Standard setting - legal review required
Compliance & Risk Management Tools

- Discipline – not just the little guys
  - For failure to take reasonable steps to prevent and detect violations
- Incentives
  - In the USSGs & Canadian standards; they work
  - Rewarding sales/profits no matter how you get them?

Compliance & Risk Management Tools

- Assess, test, and reassess your antitrust compliance program
  - Happy employees giving you glowing survey responses about your code and your ethics training will not save you from cartels and monopolization
  - Is the antitrust program well designed, fully implemented & actually working?
  - “Use surveys, focus groups and exit interviews to assess the effectiveness of your compliance program” – Canadian Competition Bureau p. 12
The Lessons of AU Optronics?

- The Antitrust Division may impose a program
- Compliance officer reporting to Audit Committee
- Anonymous helpline/procedures to prevent retaliation
- Training, communications & certifications
- Cover agents/third parties
- Limits on hiring/promotion, including those under indictment (are you listening, EEOC?)
- A monitor with antitrust compliance experience

In the EU

- EU Commission issued guide on competition compliance programs – “Compliance Matters”
- But . . . the EU does not consider compliance programs, or require them, or have anything to do with them, in cartel cases – “Compliance Doesn’t Matter”!
- We are pushing both US Antitrust Division & EU to recognize effective compliance programs
- Some EU members do recognize programs
Resources

- Abrantes-Metz, Bajari & Murphy, “Antitrust Screening: Making Compliance Programs Robust,”
- Murphy & Kolasky, “The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior,” 26 ANTITRUST 61 (Spring 2012).
- Murphy & Boehme, “Fear No Evil: A Compliance and Ethics Professionals' Response To Dr. Stephan,”

Resources

- Banks, Ethics and Compliance Alliance, Risk Forecast Report 2013, Focus Area: Antitrust and Competition (LRN)
Antitrust and Competition Law

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