Antitrust & Competition Law: Don’t Underestimate the Real Risk Facing Your Organization – Use Tools that Work

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An opening scenario: What would you do?

The GC says forget about antitrust risks – our people are too competitive to worry about that, And having a program won’t do us any good anyway.

We are expanding overseas, including Chile, France, Singapore and India – those are our big worries, not antitrust
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
- And especially, the executives!
Recent trends

• Pharma & pay for delay
• Google & “favoring yourself first?”
• MFNs
• E-books – agreeing not to discount, vertical & horizontal
• Agreeing not to hire your competitors’ employees, agreeing on pay
• And they are always going after cartels!

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
- Providing practical business advice

Risk management for cartel violations

- Price fixing, bid rigging, market allocation
- Violators are often educated, high level managers
- Usually deliberate violations
- 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).”

Compliance & risk management tools

• Real auditing, deep dives & time at the coal face

• Screening – a key for targeting resources & finding red flags – learning from LIBOR
Compliance & risk management tools

• Address the leaders as high risk
• Training – shake up the high rollers, reach the witnesses & helpers – must have emotional impact
• Let people know that reporting works: publicize disciplinary cases, discipline sharply for any type of retaliation & check up on whistleblowers

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?

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
Less notable development

• EU Commission issues 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

Resources

• 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,” http://ssrn.com/abstract=1965733
Questions?