Antitrust Essentials

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Antitrust law (or competition law, as it is generally known outside of the United States), is one of the most important areas of compliance that must be addressed by virtually every company. Because antitrust compliance has been an accepted fact of life for several decades, with well-publicized jail sentences, fines, and treble damage cases, management may not oppose establishment of an antitrust program. However, more thought needs to be given to the substance of established antitrust compliance programs, which, by their very familiarity, may have faded into the background of ineffectiveness. Furthermore, there is every indication that antitrust enforcement will continue to increase in the United States and in other countries, and more corporate practices will come under scrutiny if there is any hint that they contributed to adverse economic results.¹

Why do antitrust violations occur? One could attribute to greed, but perhaps it is also due to a rather less nefarious human tendency. There is a natural tendency for people to talk about subjects in which they have a common interest, like common business activities. So, when someone meets someone in the same business, they feel a kinship,² and the conversation often quickly moves to their common business challenges. From there, it is just a short step into the prohibited subjects where information exchanges become agreements (conspiracies) and competition in the marketplace is replaced by friendly cooperation. As Adam Smith said, ‘‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.’’³

In some cases, violation will occur out of ignorance, so the education component of compliance programs is very important. But there are also certain people who, no matter what you tell them, will think they are smarter than you are and will ignore instructions to comply with the law. Even if you have a thorough training program, with business controls such as auditing, a compliance program must also contain a punishment component: not only will the individual violator be subject to criminal penalties, but employment will be terminated and the company will not provide counsel.⁴

‘‘Modern’’ antitrust compliance came into prominence with the sentencing of executives in the electrical equipment cases in the 1960s. Interestingly, General Electric, one of the companies

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² The FTC has shown an increased willingness to review transactions that did not need to be reported under the Hart-Scott-Rodino Act, and to challenge transactions after they have closed. New procedural rules at the FTC are designed to speed-up administrative adjudications.

³ Or, to paraphrase the comments secretly recorded by the Justice Department of an ADM executive at a trade association meeting, “The competitor is my friend; the customer is my enemy.”

⁴ Adam Smith, The Wealth of Nations (1776).

⁴ A. Stephan, Heart no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels,” ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, CCP Working Paper 09-09 (July 2009).
involved in the electrical equipment conspiracy, had a policy of antitrust compliance since 1946, and employees were told not to discuss prices with competitors. But the written policy alone was not effective in preventing unlawful conduct, and did not serve as a defense to corporate liability.

Today, with antitrust violators subject to huge fines, jail time and large treble damage awards, the consequences of an antitrust violation should be obvious. But Justice Department combines the stick of large penalties with the carrot of a special amnesty program for antitrust violators who voluntarily confess. If the company is the first to confess, it gets amnesty from criminal prosecution. If it is second, it is out of luck. Interestingly, unless a company is the first to confess to the Department of Justice about participation in a cartel, the fact that it had a compliance program in place apparently is not considered by the DOJ.

Other countries have emphasized the value of compliance programs, and have also adopted leniency programs. In Canada, the Competition Bureau has released guidelines for the determination of an effective compliance program under the Competition Act, and has noted that “A good corporate compliance program helps to identify the boundaries of permissible conduct, as well as identify situations where it would be advisable to seek legal advice. Moreover, in some cases, courts have recognized a credible and effective compliance program as a mitigating factor when assessing remedies in the event of a breach.” Canada also has an immunity program to encourage confessions. In France, the Competition Authority noted that “The Autorité already encourages compliance programs thanks to commitments that can be made, in the course of a settlement package. It wishes to speed up the process by taking a more proactive approach, outside the litigation context. Beneficial to a competitive economy, this preventive compliance may be an element structuring the company’s strategy. The cost of a program should be viewed against the investment in terms of legal security, image, and ultimately, trust on the part of clients and consumers.”

In Israel, the Antitrust Authority provided a Model Internal Compliance Program, that noted the advantages involved in implementing an internal compliance program which included (1) development of a channel of communications with the Antitrust Authority; (2) marking the law’s

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5 There may have been no meaningful attempts to require employees to adhere to the policy. J. Herling, The Great Price Conspiracy: The Story of the Antitrust Violations in the Electrical Industry, at 36 (1962).

6 Contrast this to the practice of the Federal Sentencing Guidelines in general, and the most recent revision to the U.S. Attorneys’ Manual that acknowledges that no compliance program can ever prevent all criminal activity.

7 Five elements are essential: (1) involvement and support of senior management; (2) development of relevant policies and procedures; (3) on-going education of management and employees; (4) monitoring, auditing, and reporting mechanisms; and (5) disciplinary procedures. See Corporate Compliance Programs, Competition Bureau, Canada (Sept. 10, 2008), at http://strategis.ic.gc.ca/SSG/ct01079e.html.

8 http://competitionbureau.gc.ca/etic/site/cb-bc.nsf/eng/02816.html

9 The Authority noted that the main tenets of compliance include: (1) a clear priority of the management; (2) prevention and detection procedures; (3) employee training measures; (4) monitoring and control mechanisms; (5) penalties in case of non-compliance with the program, and especially (6) tailor-fit to the company’s situation. Competition Authority, 2008 Annual Report, “Compliance Works Its Way Into Business Strategies.” Sentencing credit was given for a compliance program in Arcelor/Mittal Decision 08-D-32 (Dec. 16, 2008). See also “Compliance, éloge de la conformité”, 2007 Annual Report of the Competition Council
boundaries; (3) protection from conviction, on a personal basis, of corporate officers; and (4) protection from claims based on a violation of fiduciary duty or the duty of care by a corporate officer. The United Kingdom studied what programs would stop antitrust violations, and determined that large fines are a key part of the antitrust enforcement regime. In May 2010 it released its report on compliance, which acknowledged that compliance programs should be adapted to the risks presented by each organization, and utilize a principles-based approach. The key drivers of a compliance program were (1) fear of reputational damage; (2) financial penalties; (3) individual sanctions; (4) tone at the top; (5) ethical business positioning, and (6) individual employee incentives. Companies would not receive automatic credit for a compliance program if they were prosecuted. The OFT would start with a neutral position, but a compliance program could be the basis for a fine reduction of up to ten percent. A compliance program would not be treated as an aggravating factor.

In the United States, cases are often resolved with some sort of settlement agreement (which could be a consent decree or deferred prosecution agreement) that includes a compliance program requirement. But these mandated programs are generally very mechanical, and are aimed at ease of monitoring rather than educational effectiveness. Your goal, should you be confronted with an imposed compliance program, is to ensure that you satisfy the provisions of the government mandate, and you reach as many employees as possible rather than just “box ticking” (as mentioned in the U.K. compliance guides) to get the job done.

More needs to be done than simply distributing an antitrust compliance pamphlet each year if a company wants to produce an effective compliance program under the Federal Sentencing Guidelines. Instead, a program should combine training focused on the nature of an employee’s job responsibilities and on creation of internal control systems that make it difficult to actually violate the law. Antitrust compliance should include both the civil and criminal aspects of the law, since the reality is that severe business disruption may originate from ignorance of laws that are the subject of noncriminal enforcement.

Antitrust compliance training should start with a theoretical underpinning. Not too much—the audience should not be made to work too hard. But it should be approached like any other subject: principles should be explained in concepts familiar to the audience, not in abstractions. So, one way to explain antitrust law is to compare it to traffic laws. Speed limits exist to make sure all different kinds of vehicles can share the roads. This allows large trucks to co-exist with motorcycles. The antitrust laws provide rules so that different kinds of companies can co-exist in

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10 Components of a compliance program would include: (1) participation and support from management; (2) development of internal compliance procedure and its distribution within the corporation; (3) training and explanation among the corporation’s management and personnel; (4) establishment of control systems: auditing, supervision and reporting; (5) disciplinary steps to be taken by the corporation against those violating the provisions of the Restrictive Trade Practices Law; (6) document management, and (7) notices to the IAA. Israel Antitrust Authority, Model Internal Compliance Program (November 1998).


13 The Sentencing Guidelines contain a limited discussion of compliance programs as a condition of probation at § 8D1.4, but these provisions should not be considered the maximum of what should be done, only as the bare minimum that one might expect to be required by a consent decree or other government agreement resolving a dispute.
the U.S. economy. Rather than having detailed sets of rules about what products can be sold, what prices to charge, etc., companies are given a basic set of rules to adhere to. This system allows for competition to exist and deliver the maximum benefits (in most situations) to our economy. When a company violates the rules and behaves in an anticompetitive manner, the government or a private party will step in with the antitrust laws to attempt to restore competition. The theory should be illustrated with practical examples from their own industry. The goal is to enable employees to understand that their company likes these rules (since it protects them as well as limits their behavior), and that there are legal ways to accomplish their business goals. Thus, they would not only understand the antitrust laws, but they would approach the antitrust compliance with a more receptive attitude.

[A] Pricing

Antitrust regulation is designed to preserve the American definition of free competition, which is essentially a market economy that functions with a set of antitrust rules that substitute for direct government control. When those rules are broken, the government or private parties can bring a legal action. The most sensitive area of competition—and therefore of antitrust enforcement—is pricing. So there should be a strong antitrust compliance program to prevent any activity regarding the prices a company sells its products for, or purchases its products, that might be viewed as anticompetitive.

The most common concern in antitrust is that competitors will engage in coordinated activities instead of competing for business. This could take the form of agreeing on prices to charge when buying or selling a commodity, taking a bribe to rig a bid, or agreeing not to purchase from or sell to a specific customer. Employees must be trained to avoid contacts with competitors, and if contacts are unavoidable, not to discuss any competitive subjects unless counsel has approved the conversation.

The basics of the per se antitrust violations should be hammered home to employees, but it should be done in a way that they understand. They should understand that they should not talk to competitors. The distinction between per se and rule of reason violations is the kind of thing that makes nonlawyers lose interest in legal matters, unless it is handled right. The message to employees should be simple: for things that might be per se violations, never do them; for things that might be other kinds of antitrust violations, call your lawyer for guidance.


15 "Every contract, combination, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal...." Sherman Act § 1, 15 U.S.C. § 1. The FTC has published a plain-language guide to the antitrust laws, which may provide some ideas on how you can communicate your antitrust compliance program to your employees.
The Department of Justice has suggested, that an organization’s antitrust compliance program should contain “affirmative steps to detect price fixing or bid rigging, steps premised on the possibility, or even the assumption, that education and admonition will not deter personnel determined, for whatever reason, to act in bad faith.” It was suggested that there should be active monitoring of pricing or bidding, along with regular and unannounced audits of both pricing and the knowledge of personnel with regard to antitrust law and compliance.

The presentation of antitrust compliance should focus on the types of risks that the company faces, and examples derived from familiar products or industries should be employed to illustrate how the laws are applied. As with all compliance training, specific subjects should be targeted to those employees who are most likely to encounter that risk area. For example, a sales representative who is likely to run into a competitor should understand the risks of price fixing. But if that sales representative has no ability to alter prices or promotional programs, then a lengthy discourse on price discrimination is probably not appropriate. A human resources employee may think nothing of talking to people at other companies about salaries and benefits for certain jobs. But that person needs to be educated as to the limits of such conversations lest it develop into allegations of conspiracy to suppress wages.

[B] Trade Associations

One of the most common sources of antitrust violations is trade association activity. Any area where competitors get together is risky, since people naturally look for subjects in common to talk about. In a trade association, the subject in common is the shared business activity, and, without training and supervision, conversations naturally drift to subjects that are not appropriate. The Department of Justice has obtained numerous convictions of price fixers by examining the activities of trade associations, and while many trade associations are legitimate, many have been used as a cover for cartel activities.

The FTC may also pursue trade associations for conduct that it deems to be an unfair method of competition. The FTC obtained a consent decree from the National Association of Music

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17 The Justice Department published “An Antitrust Primer for Federal Law Enforcement Personnel” in August 2003 and it provides an outline of the key areas that the Antitrust Division seeks to prosecute (price fixing, bid rigging, market allocation) and interesting hints as to how investigators uncover evidence of violations.

18 For example, in Fleischman v. Albany Medical Center, 06-CV-0765 (N.D.N.Y. July 22, 2010), plaintiffs alleged that employers conspired to suppress wages (a per se violation of Section 1 of the Sherman Act) and that they conspired to exchange wage information which had the result of unreasonably suppressing wages in violation of the Act. Approximately six months later a nearly identical lawsuit was filed by nurses in Detroit.


20 For example, evidence of price fixing using trade association activities was part of the government’s case in the lysine and citric acid prosecutions. The Justice Department has noted that multinational companies should be particularly sensitive to the possibility of international cartels that may use trade association meetings as a cover. Because of the risk here, the DOJ suggests the company counsel consider attending these meetings, and make certain they understand the purpose of the association and all of its activities.
Merchants, based on its charge that the FTC Act was violated by enabling and encouraging the exchange of information about pricing at an association meeting. The decree requires, among other things, that the association adopt an antitrust compliance program, including appointment of an antitrust compliance officer, who must be a qualified antitrust lawyer; annual live training for the association’s board, agents, and employees; prior legal review of certain written materials; issuance of guidelines for speakers at association programs that each must sign; establishment of an internal reporting process for reporting wrongdoing; requiring the presence of counsel at meetings; and requiring the reading of an antitrust warning at the beginning of each board meeting or association event.\textsuperscript{21}

Care must also be taken when a trade organization seeks to establish “standards” for an industry. The standards that are developed should not be a sham to exclude certain competitors,\textsuperscript{22} or as a way to fix prices.\textsuperscript{23} Association members who have patented technology may be required to disclose intellectual property that would be essential to the standard, and may be asked to agree to license the technology on reasonable and non-discriminatory terms. The American National Standards Institute has outlined requirements to ensure that “due process” is followed in establishing standards that seek the ANSI designation.\textsuperscript{24}

[C] Bigness and Badness

Employees usually understand the concept that big companies operate in the U.S. economy with certain constraints. They are usually the target of scrutiny from the government, the press, and various interest groups. So rather than going into detailed explanations of monopolization and attempts to monopolize, the key concept to convey to employees is that the flexibility of a company to engage in aggressive competitive behavior declines as the company (and its market share) gets bigger. It must move carefully to avoid “squishing” (intentionally or not) a smaller competitor.\textsuperscript{25} It must be particularly careful should it find itself in a situation where it has a large market share and is selling products at a loss. Ideally, before these unprofitable sales occur (which may be characterized as “predatory pricing” in the antitrust context), the employee will contact her attorney to determine the limits of acceptable risk.

The “bigness” concept is also important when explaining other aspects of antitrust compliance. Tying and exclusive dealing may be techniques that a sales or marketing employee may want to try. When explained in the context of how a restrictive agreement imposed by a


\textsuperscript{22} Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (exclusion of competitor's product from standard).

\textsuperscript{23} National Soc'y of Professional Eng'rs v. United States, 429 U.S. 477 (1977) (rule against competitive bidding).

\textsuperscript{24} ANSI Essential Requirements: Due Process Requirements for American National Standards (2008).

\textsuperscript{25} It is unlawful to “monopolize, attempt to monopolize, or combine or conspire…” to monopolize. Sherman Act § 2, 15 U.S.C. § 2. There is also a rarely used criminal provision of the Robinson-Patman Act, 15 U.S.C. § 13A, which makes it illegal to use unreasonably low prices “for the purpose of destroying competition or eliminating a competitor.”
A key concept to emphasize to sales and marketing personnel is simple: don’t lie. False information provided by a company with a large market share, particularly when the information is about a competitor, will be used as evidence of a scheme to eliminate competition, which can result in devastating treble damage awards. When dealing with acquisitions and joint ventures, the concept of markets needs to be emphasized so the businesspeople understand how the government analyzes a transaction, and how sloppy language in documents can doom an otherwise unobjectionable deal.

[D] The Freedom to Sell

Employees usually have an instinctive understanding of the fundamental American commitment to freedom. So when discussing vertical restraints, distributor terminations, or resale price maintenance, the message should be couched in terms of a commitment to economic freedom: any time the company is thinking of doing anything that limits the freedom of a customer, there should be a legal review to make sure the planned action is proper. There are some areas where a seller can impose restrictions on how a buyer resells the goods that are purchased, but there must be a business plan prepared in advance that explains why those restraints are designed to improve the product’s competitiveness with products made by other manufacturers.

The freedom concept can also be used to explain the underpinnings of the antitrust prohibition against horizontal (competitor) collusion. Our economy expects that sellers will compete against one another by offering better prices, better service, and better quality. In a free and open economy, every seller will be attempting to do a better job than its competitor, and thus every customer benefits. When sellers subvert this principle, by agreeing among themselves as to the prices they will charge, or the territories or customers they will serve, or the products they will sell, then the ability for competitive freedom to provide maximum benefits to the economy is lost.

The freedom to sell has its counterpart in the freedom to buy. Purchasing department employees must also understand that their activities as a buyer are also subject to the same antitrust laws. Thus, a cartel composed of all of the purchasers of a commodity could be attacked as anticompetitive just as a cartel of sellers would be.

Antitrust presentations should also include an explanation of the basic concept underlying the Robinson-Patman Act: that competing customers should be treated in a nondiscriminatory

26 In Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003), treble damages of more that $1 billion were awarded to a small competitor who filed suit based on the unfair tactics of the market leader, which included providing false information to customers and removing the plaintiff's display racks from stores.

manner. While there is much disagreement about the economic wisdom of this statute, employees can accept the concept, particularly when they are selling packaged goods.

Yet the antitrust laws also reward success when obtained properly, and the laws are designed to promote efficiency, as long as it is not achieved at the price of unreasonably reduced competition. Thus, when there are opportunities to achieve efficiencies that involve some coordination with competitors, the key message to deliver to the client is not to abandon the concept, but to discuss it with the lawyer to see if there is a legal way to accomplish the goal.

[E] Antitrust and Lawsuits

Most antitrust disputes are between private parties. While there may be no criminal exposure for a distributor termination, it is important that employees understand that becoming involved in litigation can have a seriously adverse impact on the performance of the company—and on their careers. Thus, they should understand that litigation is something that should be avoided, and the best way to do this is to understand antitrust-sensitive situations and seek legal counsel before taking action.

Antitrust Compliance Basics to Remember:

• Establish a clear policy regarding compliance with the antitrust laws that tells employees how to behave and where to go for more information.
• Keep the antitrust message simple:
  — Don’t fix prices
  — Don’t try to eliminate competitors or talk as if you are
  — Don’t lie or engage in unfair or deceptive practices
  — When in doubt, pick up the phone
• Make sure the policy has management support, and principles are not compromised when profits are short in a quarter. The person in charge of antitrust compliance should be sufficiently senior in the organization that he or she is involved in the formulation of all marketing and sales policies that may have antitrust implications.28
• Establish a method to deliver the antitrust policy that is focused on the risks of specific occupations. A message should be delivered to new employees so that they are conditioned to compliance from their first day on the job.
• Keep in mind the Justice Department’s “red flags” that may signal an antitrust violation:29
  — Trade Associations. Make certain you have a list of every trade association to which the company belongs, and the names of all employees who attend trade association functions.

28 Under the Sentencing Guidelines, the person responsible for compliance should have “substantial control over the organization” or “a substantial role in the making of policy within the organization.” U.S.S.G., § 8A1.2, comment n(3)(b).
Make certain each employee receives training on proper behavior at trade association functions. Examine whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Make certain that every trade association in which your company participates has an antitrust compliance policy, and an active compliance program. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

— Sales transactions between your company and its competitors, particularly around the end of the year. While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to “true up” a market allocation scheme.

— Data on market shares. Look at your company’s market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long period of time are a strong indicator of collusion.

— Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves. When conducting audits, therefore, talk not only to the executives, but also to their assistants.

— Sudden, unexplained price increases and copies of competitor price announcements in your company’s files. If you find any, look at the fax footprints or the cover e-mail to see where they came from.

30 If the association collects transaction data from members, the data should be collected and shared in such a way that individual companies and their prices cannot be identified. In the health care context, the DOJ and FTC have recommended that pricing data be at least three months old before being shared. See Statement 6, Provider Participation In Exchanges Of Price And Cost Information, Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care (August 1996), http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.pdf, in CD-ROM Appendix (PriceExchg.pdf).