Global Antitrust Compliance Enforcement

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Who am I?

- Lawyer, economist, Master of Laws (Harvard Law School), PhD
- Co-head of the Antitrust Group at TozziniFreire in Brazil
- Former Commissioner of the Brazilian Antitrust authority CADE
- Official delegation to OECD and WTO antitrust
- Speaker at the SCCB Compliance Academy
- Speaker at many international events (ABA, IBA, WB, OECD)
- Faculty at US DOJ-ABA-IBA Cartel Workshops
- Non-governmental advisor to several conferences of the International Competition Network
- Organized and presented antitrust compliance training programs at dozens of companies from around the world

Summary

- Introduction
  - What are Antitrust Laws for?
  - Where do they fit regarding compliance?
  - Globalization of Antitrust
  - Why worry about antitrust compliance?
    - Risks and Penalties - country examples
  - International Developments and Trends
  - Challenges for companies
    - Antitrust Compliance in an International Setting
    - Designing a program
    - Examples
  - Conclusion
Introduction

- Main goal of Antitrust (current mainstream thinking)
  - Ensure Rivalry and Competition among Companies
  - Greater Efficiency and Better Allocation of Resources
  - Incentive for Innovation
  - Better Products to Consumers at Lower Prices
- BUT: Other objectives in many countries
  - European Union: development of the common market
  - Employment, economic development, protecting a diverse economic environment, race relations etc.
- Convergence is increasing, but significant differences remain
- Affect what the rules are and how different authorities enforce them

Introduction

- Where does it fit in the corporate structure
  - Traditionally under legal
  - Sometimes with compliance
  - Prevention x litigation
- If not linked to compliance, must coordinate
  - Trainings
  - Investigations
  - Violations
  - Contacts with government (leniency/settlement)
- Extension of antitrust compliance programs to other countries
- New trend: dedicated position of (Global) Head of Antitrust
  - Reflects growing importance of topic worldwide

Globalization of Antitrust

- US Sherman Act: 1890
- Slow evolution until 1970s and then 1980s/1990s
  - Big boom of antitrust laws
  - Market oriented reforms, liberalization
  - Shock with many established business (and government) practices
  - Difficult cultural change (cartel: theft or speeding?)
  - Concrete results have varied tremendously
- Brand new players in 2000s: China and India
- Growing cooperation: Multiple Bilateral Agreements and the International Competition Network
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Countries with Antitrust Laws

Developed Countries
Developing Countries
Eastern Europe

Countries with antitrust laws
Countries developing antitrust laws

Globalization of Antitrust: Over 100 countries with competition laws

Globalization of Antitrust

- Extra-territoriality / "Effects doctrine"
  - Adopted by most antitrust laws internationally
  - Conduct anywhere in the world can affect many countries
    - Definition of "effects": export sales typically suffice
    - M&A deals need clearance in several jurisdictions at the same time
    - Practices can be investigated and punished in several jurisdictions at the same time
  - Parental liability / economic group
Why worry about antitrust compliance

- Crucial new developments since 2000:
  - More countries with antitrust laws, more countries enforcing them
  - Increased communication and coordination among authorities
    - Simultaneous searches / "dawn raids"
    - Share or coordinate new investigations
  - Escalating fines
  - Spreading of leniency/immunity programs
  - Criminalization

= Much greater risks for companies

Globalization of Antitrust

- Examples of Multijurisdictional Investigations
  - Collusion/Cartel/Exchange of information
    - Lysine, vitamins, GIS, air cargo, LCD, CRT, marine hoses, high voltage cables, D-RAM, compressors, ODD, freight forwarders, auto-parts
  - Air Cargo (up to 2011):
    - US (22 companies and 21 individuals indicted, US$ 1.8 billion in fines, 6 executives in jail, civil damages US$ 480 million, AF-KLM 350 million),
    - EU (11 airlines convicted, total US$ 1.1 billion)
    - Canada (CAD 174 million)
    - Korea (US$ 118 million)
    - Australia (US$ 52 million)
    - New Zealand (NZD 14.1 million)
    - Japan, Brazil, South Africa, Singapore

Globalization of Antitrust

- Examples of Multijurisdictional Investigations (cont.)
  - Collusion/Cartel/Exchange of information
    - LCD: US (US$ 1.4 billion, 10 executives in jail, LG 400, AU 500), EU (US$922 million), Korea (US$ 175 million), Japan, Canada, Brazil etc
  - Marine Hoses: Bridgestone US$ 28 million for violation of Sherman Act and FCPA (first joint case DOJ AD+CD), executives successively jailed in 2 countries, several other investigations
  - Monopolization/Abuse of dominance
    - Microsoft, Intel, Google, credit cards, pharmaceutical patent settlements
Country Examples

- United States:
  - US DOJ Antitrust Division 2011:
    - 90 new criminal cases
    - Individuals sent to prison: 21
    - Average prison term: 17 months (28 months 2012)
    - Total prison days: 10,544 (13,201 in 2012)
    - 96% of the criminal fines imposed last 5 years related to international cartels

- European Union:
  - Total fines
  - Average fines for company
    - 2010: US$ 57.3 million, 2011: US$ 54.9 million
  - Canada, Japan, South Korea, Australia, South Africa, Israel, New Zealand, Chile, Mexico, EU Member States, Turkey etc
    - All with multi-million dollar fines, greater enforcement and increased coordination
  - China and India

Country Examples

- United States:
  - Total criminal fines and other monetary assessments from DOJ AD Investigations:
    - US$ millions

Country Examples

- European Union:
  - Total fines
  - Average fines for company
    - 2010: US$ 57.3 million, 2011: US$ 54.9 million
Country Examples - Brazil

- Enormous increase in enforcement since 2000
- Progressive escalation of fines: companies and individuals
- 40+ dawn raids per year since 2007
- More than 150 on-going cartel investigations
- Over 200 executives facing criminal prosecution, more than 40 convictions (including prison terms of 5 years)
- New law May 2012

Country Examples - Brazil

- 1st cartel fines - 1999
- Fines imposed for cartelization in steel:
  - CSN - US$ 22 million
  - USIMINAS - US$ 16 million
  - COSIPA - US$13 million
- Publication of the CADE decision in a large newspaper for two consecutive days and three weeks

Country Examples - Brazil

- Increasing the fine: percentage of total turnover
  - 1%: steel cartel, 1999
  - 22.5%: the sand cartel, 2008
  - 25%: the gas cartel, 2010
    - Air Products: US$ 112 million
    - Linde gases: US$118 million
    - Air Liquide: US$ 123 million
    - White Martins: US$ 1 billion (2nd largest ever in the world)
    - Individual Executives: fines of up to US$ 2 million
- New law: lower base, lower range
Country Examples - Brazil

- Other cartel decisions:
  - Steel rods (more than US$ 150 million), vitamins, air shuttle SP-Rio, SP, pharmaceutical companies - Generics, newspapers, gas stations, driving schools, funeral homes, peroxide etc

- Some ongoing investigations:
  - International cases:
    - Air cargo, compressors, LCD, CRT, freight forwarders, marine hose, D-RAM, high voltage cables, ODD
  - Domestic cases:
    - Orange juice processors, blood products, cement, dozens of gas stations, milk, chloride, freight trucks, school supplies, cleaning and security services etc

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Country Examples - Brazil

- Gas Stations Cartel (João Pessoa)
  - Effects of a cartel: prices before and after the search warrants

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Country Examples - Brazil

- Unilateral conduct
  - AmBev (AB InBev): largest fine in Brazil
    - US$ 200 million
    - Point of sale loyalty program
  - Other vertical investigations:
    - Resale price maintenance, exclusivity, distribution restrictions, refusal to sell, price discrimination, sham litigation, predatory pricing etc
Consequences of Antitrust Violations around the World

- **Company**
  - Fines (administrative or criminal)
  - Civil damages
  - Prohibition from public bids
  - Publication of conviction in newspapers
  - Compulsory licensing of IP, loss of government subsidies or benefits

- **Individuals**
  - Individual fines (administrative or criminal)
  - Debarment from managerial positions
  - Custodial or other criminal penalties

Other Consequences

- **Annulment of contractual clauses**

- **Investigation Costs**
  - Proceedings are long, expensive and demand considerable employee time
  - Extensive document review (privacy/labor issues)

- **Great damages to the company’s reputation**

- **Great personal damages**

- **Loss of trust with antitrust authorities**

Developments and Trends

- More investigations, more multijurisdictional investigations
- Higher and higher fines
- Growing criminal enforcement: more prison sentences
- Civil actions for damages
- Greater international cooperation (joint dawn raids)
- Increase in leniency and settlement cases
- Convergence x Divergence?
Developments and Trends

Criminalization
- US DoJ Antitrust Division
  - Fines are not enough
  - Individual has to be held accountable
  - "Evangelizing" around the world
- Growing trend
  - Brazil (2 to 5 years in jail or AND fines)
  - United Kingdom (Marine hoses)
  - Canada, Japan, Ireland, Australia, New Zealand etc
- Pandora's Box
  - New authorities joining the game
  - Considerable uncertainty: situation of documents, individuals, obligations etc

Leniency Programs
- Game-changer
  - alters the logic of trust
  - Confession and cooperation in exchange for immunity
  - "most effective way to fight cartels"
- Spreading fast around the world
- Surpassing cultural differences?

Interplay compliance and antitrust
- Marine Hoses Case
  - First joint US DOJ CD and AD investigation for joint violation of FCPA and Sherman Act
  - Expectation of the DOJ of more to come
- Bid-rigging and corruption
  - Often linked in many countries
  - "Ensures effectiveness", "client asked for it"
  - More will come to light with more training and investigations, especially e-search
  - Many surprises still to come
### Challenges for companies

- Higher stakes, more concern
  - more money and support?
  - costly, lengthy and disruptive internal investigations
- How to structure antitrust:
  - within legal department
  - With/within in compliance
  - independent structure (national/global)

### Challenges for companies

- Spread of antitrust compliance training worldwide throughout the organization
- Need to coordinate compliance and antitrust:
  - Programs / Training
  - Audits / Investigations
  - Violations
  - Response (e.g., approach to government agencies)

### Challenges for companies

- Worldwide standard x customized approach
  - Cartel rules more similar
    - But: information exchanges, hub-and-spoke
  - Unilateral conduct – more variation
    - Less risky and complex: adopt safest common denominator
    - OR arbitraging different laws and enforcement practices / capabilities (more complex, potentially more profitable)
    - Ex: distribution systems, resale price maintenance, rebate programs, etc.
Antitrust Compliance - What is it?

- Antitrust Compliance is a permanent program of education, prevention and detection which aims at guiding the behavior of a company and all its employees in their relations with competitors, suppliers, distributors, clients etc, in order to ensure full respect to applicable competition rules and legislation.

- It aims at making every employee capable of identifying what are sensitive competition issues and when to seek assistance.

Antitrust Compliance - General

- In many countries requires profound change in culture and behavior:
  - "we have always done it like this"; "everyone does it", "this is how the market works, we can't work any other way"
  - Often opposition from business
  - Affects daily work routine (writing e-mails, obtaining market intelligence) but also informal contacts and life outside the office, relations with friends etc.

Antitrust Compliance - General

- Program must be tailored to each market and company:
  - market structure and conditions; structure of distribution; trade associations; sales promotions, loyalty rebates; consortia etc

- Requires unequivocal commitment from headquarters AND from local top management:
  - Local executives often skeptical
Designing a program

- **Diagnostics**
  - Identifying sensitive areas, relations and positions
  - Interviews, review of contracts, minutes of meetings, sample of electronic documents etc
  - Determine the position of the company in all its markets

- **Designing the program**
  - Defining the target audience
  - Presentations/ training
  - Red, Green and Yellow Lights (Do's and Don'ts)
  - Support and reference material; certification

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Designing a program

- **Clear definition of channels of communication**
  - Compliance officer/legal department
  - Domestic / regional / global (language and culture issues)
  - Hot line? (same)

- **Evaluating the program**
  - New trend: mock dawn raids

- **Constant updating**

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To whom does it apply?

- Because individuals represent their employers, even outside the office
- Because some actions or inactions may bring serious consequences not only for the company but also for the individual, in particular in contacts with competitor, customers and suppliers

**THAT IS WHY IT IS IMPORTANT FOR EVERYONE TO:**
- Know how to identify subjects and situations that may represent a risk
- Know how to proceed in certain circumstances
- Know where to look for guidance
Example 1: Search and Seizure

Phase of the investigation for gathering of information and evidence against investigated companies.

- Presence of authorities at the company’s headquarters
- More and more frequent
- Often simultaneous several countries
- Surprise element
- Affects all employees
- Computers, files, personal documents
- Very traumatic!

During the Search

- What to do when the authorities arrive?
  - How to receive them, what to do, whom to contact

- During the search
  - Can you make copies of material being taken?
  - Can authorities ask questions to employees? Do they need to answer?
  - Do you need to provide passwords for access?
  - What to do with confidential/privileged documents?
  - What not to do during a search?

- Important: answers may differ from country to country

Example 2 – Trade Associations

- Representatives of certain industry(ies) meet to discuss common interests
- Many legitimate topics (influence new legislation, for instance)
- BUT very dangerous setting
  - Risk of collusion, coordination or exchanges of sensitive information
  - Adam Smith, 1776: “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”
Meetings among Competitors

• What topics are allowed / dangerous/ forbidden?
• How to deal with agendas / minutes?
• How do you react when an improper topic is raised? What if they insist on dealing with it?
• How do you get out of a meeting in a way to ensure protection for yourself and you company?

Example 3 - Writing can be Dangerous

• Requires change of habits
• Always remember that notes or e-mails (even personal) may be reached by authorities
• Think that any communication may be (mis)understood
• Be clear, avoid ambiguities and exaggerations
• Many companies have their own policy of documents retention/destruction. Follow it

Be careful how you say it

Instead of "this strategy will destroy/eliminate the competition in the market"

Use "this strategy will allow the company to become more competitive in the market".

Instead of "the information obtained suggests that...."

Use "the information publicly available in the market shows that" or "the information obtained from customers shows that" (whenever possible, identify the origin of the document)
Other topics

- Structure and functioning of a distribution network (exclusivity, territorial allocation)
- Sales promotions (tie-ins, bundling, price discrimination/differentiation among customers)
- Loyalty and rebate programs
- Resale price maintenance / suggested price
- Many other possibilities, depending on the market and the company

Doubts?

Always check with the compliance officer / legal department in respect of any potentially anti-competitive issue

Conclusion

- World is becoming a riskier more complicated place
- Consequences of antitrust violations will continue to increase worldwide
- Globalization of antitrust poses many challenges
- But Antitrust as a preventive concern is here to stay
- Companies have to incorporate and adapt to new reality
- Need to coordinate with compliance
Sources and Resources

• Gibson Dunn & Crutcher Criminal Antitrust Update 2011 (source slide 13*)
  • www.gibsondunn.com

• Shearman and Sterling Cartel Diges
  • www.carteldigest.com

• Websites of following authorities:
  • United States - Department Of Justice Antitrust Division
  • European Commission - Directorate General for Competition
  • United Kingdom - Office of Fair Trading
  • Brazil - CADE (Conselho Administrativo de Defesa Econômica)
  • International Competition Network

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