Global Antitrust Compliance – Assessing Antitrust Risks and Creating an Effective Antitrust Compliance Program

Timothy Bridgeford, Executive Director Global Antitrust Compliance, JP Morgan

Pedro de la Torre, Global Compliance Officer & Corporate Counsel, The Chemours Company

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What We Will Cover

- Overview of global legislation, antitrust enforcement activity and trends in the evolving antitrust compliance environment
- Learn how to conduct a comprehensive, global risk assessment to uncover antitrust risk in your organization
- Learn how to effectively promote antitrust compliance in your organization and create an effective antitrust compliance program to mitigate global risk
U.S. Cartel Fines Hit All-Time High in 2015

Total Criminal Fines & Penalties*

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>$338 Million</td>
</tr>
<tr>
<td>2006</td>
<td>$473 Million</td>
</tr>
<tr>
<td>2007</td>
<td>$630 Million</td>
</tr>
<tr>
<td>2008</td>
<td>$701 Million</td>
</tr>
<tr>
<td>2009</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2010</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2011</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2012</td>
<td>$1.1 Billion</td>
</tr>
<tr>
<td>2013</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2014</td>
<td>$1.3 Billion</td>
</tr>
<tr>
<td>2015</td>
<td>$3.6 Billion</td>
</tr>
</tbody>
</table>

* Source: Antitrust Division Criminal Enforcement Trends

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European Commission fines (in millions) (2008 - 2015)*

<table>
<thead>
<tr>
<th>Year</th>
<th>Fine (in millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>2,263 €</td>
</tr>
<tr>
<td>2009</td>
<td>1,074 €</td>
</tr>
<tr>
<td>2010</td>
<td>2,866 €</td>
</tr>
<tr>
<td>2011</td>
<td>614 €</td>
</tr>
<tr>
<td>2012</td>
<td>1,876 €</td>
</tr>
<tr>
<td>2013</td>
<td>2,124 €</td>
</tr>
<tr>
<td>2014</td>
<td>1,670 €</td>
</tr>
<tr>
<td>2015</td>
<td>365 €</td>
</tr>
</tbody>
</table>

* Source: Gibson Dunn 2015 update
U.S. and EU Regulatory Perspective on Antitrust Compliance

- Effective antitrust compliance programs = no violations or first to detect
- Will not reward preexisting antitrust compliance programs where have a violation and not first to report
- Expect compliance perfection - Why? According to regulators, antitrust is different because
  - Amnesty is available
  - Usually involves senior employees and is a corporate act, no rogue employees

Necessity of Antitrust Compliance Program

- Compliance with the law
- Build company reputation for compliance and stakeholder confidence
- Prevent disastrous violation from occurring
  - Potential enormous criminal/civil fines in multiple jurisdictions
  - Employee jail time
  - Customer class action lawsuits
  - Shareholder class action lawsuits
  - Potential debarment from government contracts
  - Enormous brand/company reputational damage
- Increase chance of detection and qualifying for leniency
- Cost of failure heavily outweighs the cost of compliance
- Emerging credit for effective antitrust compliance programs (e.g. Canada, Brazil, Hong Kong, Singapore, even U.S. for “forward looking” antitrust compliance programs)
Complexities of Forming an Antitrust Compliance Program - Anticorruption Comparison

<table>
<thead>
<tr>
<th>Anticorruption Compliance</th>
<th>Antitrust Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Significant Specific Guidance from Regulators</td>
<td>Sparse guidance, rather high level and vague</td>
</tr>
<tr>
<td>Best practices aplenty – compliance ideas more transferrable between companies</td>
<td>Nascent – need more tailored approach</td>
</tr>
<tr>
<td>Easier to explain and train – (“don’t bribe”)</td>
<td>Antitrust is complex and not easily explained or trained</td>
</tr>
<tr>
<td>Crime usually leaves a trail (ie. a payment leaves the company or is in the financials)</td>
<td>“Secret” crime which is hard to detect and may not leave a paper trail</td>
</tr>
<tr>
<td>Critical mass of adoption through third party due diligence</td>
<td>More nascent stages</td>
</tr>
</tbody>
</table>

Key Components of Effective Antitrust Compliance Programs

- Be sure to win “tone from the top” and senior management commitment/oversight specifically on competition matters
- Be certain competition compliance is specifically addressed in the code of conduct
- Drafting a policy
- Risk assessment
- Tailored trainings
- Detective controls
- Mergers and acquisitions
- Internal reporting (e.g. hotline) and investigations
- Appropriate discipline/incentives

Effective compliance programs must be tailored to the company’s specific business and risks and be dynamic to evolve with the business and its risks.
Business and Industry Risk Assessment

- There is no “off the shelf” or “one size fits all” compliance program.
- Every company, even companies in the same industry, can have different antitrust risk factors.
- Need to conduct a proper regulatory risk assessment - know your company, industry, and jurisdiction(s) and the risks that are present.
- Are you starting from scratch, or do you have a developed compliance program?
- What has been your company’s historical record in compliance, specifically in antitrust matters?

Cartel Risk

- Which countries do you operate and potential penalties?
- Commodity product?
- Number of players in your industry? Barriers to entry?
- Competitor Interaction and Opportunity? (e.g. - Conferences, Trade Associations, Joint Ventures)
  - Very Important to get a handle on your trade associations and other competitor contact!
  - Due Diligence
  - Risk Analysis
  - Safeguards
- Bids/Tenders?
  - Government bidding?
- Information Exchanges?
- Employee Rotation Amongst Industry?
Information Sharing or Exchange Risk

- Which countries do you operate and potential penalties?
  - Hub and Spoke Risk?
  - One Way Risk?
- How often? What is business justification?
- Forum for Exchange?
  - Trade Associations
  - Joint Ventures
  - Distributors, Customers
- Risk Analysis
- Safeguards

Monopolization and Vertical Restraint Risks

**Monopolization**

- Market power
- Barriers to entry
- Abuse of a dominant position?
  - Tying products
  - Predatory tactics
  - Refusing to deal
- Very much a jurisdictional risk

**Vertical Restraints**

- Are you using an indirect sales model?
- Are you employing any forms of RPM?
- Are you using exclusive territories?
- Do you need third party antitrust protection (e.g. due diligence, contracts, training)
Tailored Trainings

On-line
- Create an on-line module that is engaging, sleek and will resonate with your employees
- Preferably for new hires and annually for at least high risk employees
- Tailor your trainings to your company’s specific antitrust risks

Live
- If done well, best bang for your compliance buck
- How do you make antitrust training understandable and entertaining?
  - Definitely stay clear of legalese (e.g. “per se” and “rule of reason”)
  - Use real life examples – tailored for audience, business, and region you are training
- Consider bespoke trainings – investigators, sourcing, etc.

Auditing and Detective Controls

- Auditing of your Antitrust compliance program’s controls and procedures
- Cartel detection - is it really feasible to uncover a clandestine cartel?
- Detective controls are part of an effective antitrust compliance program!

Considerations
- Very difficult to implement and expensive
- Must be risk based – businesses/jurisdictions
- Data privacy
Auditing and Detective Controls – Possible Options

- Ongoing proactive or reactive email/communication surveillance
- Proactive field audit
  - Work with audit team to develop an audit program - look at bids, stable market shares, etc.
- Targeted transaction reviews
- Segregation of duty pricing controls
- Trade association audits
- Pricing or data screens
- T&E audits
- Mock dawn raids
- Questionnaires

Mergers and Acquisitions

- Is your business properly trained for “initial discussions?”
- Antitrust due diligence on target company
- Does your M&A team and business have appropriate safeguards to firewall information during due diligence?
- Is the M&A team and business properly informed of dangers of “gun jumping?”
- Integration of acquired company into your antitrust compliance program
Internal Reporting and Investigations

- Must have a reporting system (hotline) for any effective compliance program
  - Can be anonymous
  - Must have adequate resources to investigate
  - Investigations must be given high priority to garner employee faith in the system
  - Strict discipline for employees found to commit violations.
- You have a cartel or other serious antitrust allegation, what do you do?
  - Have your “break the glass” plan ready

Questions?