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Antitrust Compliance: Beware the Ethical Investor

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One of directors' main concerns is to keep investors happy and there is an argument that ensuring the highest appropriate form of antitrust compliance is one element needed in order to achieve this.

It is increasingly the case that corporations must be sensitive to the investor community's interest in corporate governance and the softer ethical code of the corporation. LRN, a leading provider of legal, compliance, ethics and governance solutions, highlights the impact that corporate ethical reputations have in the marketplace on purchasing and investment decisions.[1] Indeed, socially responsible investing (SRI) is now a material and growing part of the investment community. The European SRI market grew from €1 trillion in 2005 to €1.6 trillion in 2007.[2] SRI is not a new concept but the scope of what falls under this heading has expanded during recent years and continues to do so as the marketplace becomes more concerned with consumers' and investors' demands that corporations represent good values.

Reviewing several multinationals' codes of ethics gives a clear picture that the current trend is to include competition compliance provisions under the ethics heading.[3] The corporate ethics community is including antitrust compliance in its portfolio of interests to further highlight its values.

It is arguable that this development places an additional set of pressures on antitrust compliance. This additional set is to make absolutely sure that your corporation does not fall foul of antitrust violations since to do so might seriously impact on your ethical reputation, which is increasingly important to investors.

During the 2008 annual meeting of the European Competition Authorities,[4] the Norwegian competition authority presented an approach to strengthen its fight against cartel activity by approaching the major ethical funds and indexes.[5] The idea is not only to blacklist companies that have been convicted for hard-core cartel activities from an index or an ethical investment fund but also to include as a criterion for inclusion by the ethical fund or index in the first place the existence of an effective compliance programme for the company in question. This proposal is a good example of the increasing trend towards the need for a good compliance programme in order to preserve a company's reputation.

Breaching antitrust rules is likely to be a violation of the company's own code of ethics, which may lead to disclosure requirements. Revealed antitrust violations can lead to the investor community not only having a negative view of the company but also potentially withdrawing investments from it. Such serious consequences should be of direct concern to company directors. Consequently, as a complement to the increasing importance of corporate governance that in part is the responsibility of non-executive directors, it is perhaps time for these directors to be given the additional role of ensuring antitrust compliance. With the continued development of ethical considerations, ensuring the highest appropriate form of compliance is part of protecting the interests of stakeholders and keeping investors happy. What constitutes appropriate antitrust compliance is dealt with in the remainder of this chapter.

The breadth of coverage of a compliance programme

A non-exhaustive list of elements common to compliance programmes, including antitrust compliance programmes, is as follows:

- senior management statement of commitment;
- detailed policy statements concerning specific subjects;
- document retention policy, including electronic records;
- oversight;
- training (what is the proper method) and communication;
- monitoring, auditing and reporting;
- HR issues, such as discipline for transgression; and
- leniency and immunity, conflict of interest, and amnesty plus.

A compliance programme that does not, to varying degrees depending upon the company, address these elements is unlikely to have broad enough scope to be effective. For example, if senior management is not seen by others to be committed to antitrust compliance, it is more difficult to ensure that the sales and marketing people take time out of their busy workload of growing the business to attend training sessions.

It may not be that the compliance programme is rolled out to every country where a company has operations. Traditionally, this seemed a sensible restraint on resources (for example, limited travelling time for in-house lawyers to train people in every country). However, today many distance training tools are available, some of which cover antitrust compliance.

It is still the case, however, that the number of people that are trained can be limited to those that are, or who are likely to be, engaged in activities that might raise antitrust concerns. For example, it is most unlikely that employees in production facilities could engage in prohibited antitrust behaviour. In contrast, all employees in a sales department could be and so should be included in an antitrust compliance training programme.

An element of any compliance programme will be the need to determine if and when to consider leniency when it comes to light, perhaps as a result of an annual compliance audit. This also, and in particular, raises the potential conflict issue for in-house counsel, previously described, and the need for in-house counsel to understand how to determine whether or not other cartels exist and if so, whether or not any available amnesty plus programme should be used.

The depth of coverage

As a natural follow-on to the breadth of coverage, it is clear that certain business functions are naturally more prone to antitrust violations. The activities of a sales department are more likely to be of concern to an antitrust compliance programme than the activities of an R&D department. Companies active in certain sectors or selling certain products appear to be prone to antitrust violations, including: the chemicals sector, producers of commodities or basic processed products, and the construction sector. If a company is engaged in these activities, it would be justified in spending more resources, time and energy on its antitrust compliance programme.

Where depth is required, this is best achieved by ensuring as many small-group (no more than 20 people) training sessions are organised as the budget allows. This personal delivery of the educative elements but, probably more importantly, the message that antitrust violations will likely lead individuals to face serious consequences, is the most effective tool.

How to reduce the risk

A compliance programme will be more effective and so reduce the risk if it is dynamic. This is achieved by implementing an active risk management programme. Risk is also reduced by ensuring that the direction, energy and resources of the company's antitrust compliance are harmonised with its compliance efforts generally, for example, under Sarbanes-Oxley.

Active risk management

A key consequence of the 'modernisation' of EC competition law as from 1 May 2004 is the need for a company's compliance programme to include active risk management. This need has always existed but modernisation has underlined this need. Indeed, this author suggests that a compliance programme that does not include active risk management would not be an effective compliance programme. Such non-active programmes deny companies many of the benefits of having a compliance programme at all, as there is no possibility of:

- a reduction in the likelihood of criminal prosecution being brought;
- a reduction in sentences or fines imposed;[6]
- a minimisation of the chance of burdensome consent decrees or remedy orders;
- an increased ability to argue that the alleged anti-competitive conduct was aberrant;[7] and
- an increased ability to defend against the imposition of (punitive) damages.[8]

Indeed, only a compliance programme that incorporates active risk management will be able to satisfy one of the three key factors that US federal prosecutors must assess to determine whether a compliance programme is merely a paper programme or whether it is truly effective. That factor is whether there is sufficient staff dedicated to auditing, documenting, analysing and utilising the results of the compliance programme.[9]

As importantly, only active risk management within a compliance programme will ensure that the commercial value of a company's external agreements are secure by ensuring competition concerns are raised and addressed. For example, an exclusive distribution agreement, if later successfully challenged, could deprive the distributor of its exclusive sales territory, thus potentially resulting in a reduction of sales by the distributor.

The need for active risk management arises because an agreement or conduct might, on an initial analysis, be considered compatible with competition law, but over time that conclusion may be weakened and even become incorrect. For example, an exclusive distribution agreement might be compatible with the vertical restraints block exemption (VRBE),[10] noting that at the time the agreement was entered into the supplier had a market share relevant to the agreement of below 30 per cent. Yet after four years the supplier's market share might have risen to 40 per cent, resulting in the agreement no longer benefiting from the exemption under the VRBE.

Active risk management for a compliance programme will ensure the following. First, a record is kept of all agreements that are assessed for compatibility with competition law by the company. Second, a particular person or a person in a particular position (for example, marketing department Northern Europe) involved in a certain agreement is allocated responsibility for active risk management of that agreement. Agreements with higher commercial value to the company should be allocated to particular persons or positions with responsibility in the corporate hierarchy. Third, a diary date should be scheduled for the relevant person to review a previous competitive assessment in relation to an agreement. There should always be a back-up reminder. For some companies, the review may be undertaken by a business person, with the back-up being with the in-house legal department. For others, the review process might be the other way round or even both the review and back-up within the in-house legal department. Each company will need to take a decision based on its culture and resources. In this author's experience, placing responsibility for review with a commercial person is very helpful. If that person understands that failure to review could, ultimately, mean the commercial value to the company of that agreement is at risk, it is in that person's direct interest to ensure the review occurs. Fourth, the marketing department should be required to liaise with the in-house legal department, or whoever is responsible within the company for compliance and similar matters. The marketing department should inform that person of the company's market position in its areas of activities. Every time a triggering market share threshold is met by the company, the marketing department should communicate this to the relevant person. Under EC competition law, the triggering market share thresholds are 10, 15, 25, 30 and 40 per cent. The marketing department should also have access to the record of agreements and should actively communicate when triggering market share thresholds are met by the other parties to the agreements with the company. Fifth, all agreements on the record should be reviewed at least every three years, preferably every year. This review could be undertaken in conjunction with a wider compliance review. As identified below, for many of the larger international corporations, such reviews may have to be conducted every year.

Many companies will not have the resources to create and maintain active risk management. An external law firm can be asked to provide this service on an outsourced basis. This role would be facilitated if the law firm in question were also the entity that undertook, with the company's internal advisers, the initial competition compliance roll-out. Naturally, this has a cost, but it cannot be overemphasised that fines imposed can be significant.

Compliance harmonisation

For many companies the Sarbanes-Oxley Act has acted as a catalyst for a fundamental review of the relevant subjects that should be addressed in compliance programmes. Most companies identify approximately 10 to 12 major subjects. Those would include antitrust or competition, conflicts of interest, corporate governance, document retention and management, human resources, employee privacy, bribery, environmental regulation, export and import control, intellectual property, government investigations, political contributions and gifts, product liability, and securities regulation.

For many larger companies, and certainly for all international companies involved in business in the USA, it is arguably necessary and certainly efficient to ensure the antitrust compliance programme is keyed into the company's other compliance programmes, not least the corporate governance programme under the Sarbanes-Oxley legislation.

Under Sarbanes-Oxley, foreign private issuers must disclose whether they have a code of ethics for senior financial officers and

if not, they must explain why not. CEOs and CFOs must provide certifications for annual and quarterly reports stating that they are responsible for maintaining internal controls designed to ensure that material information is properly disclosed, that the effectiveness of the internal controls was evaluated within 90 days from the day of the report, and that all significant deficiencies in the internal controls were disclosed to outside auditors and the audit committee.

Other relevant requirements of the Sarbanes-Oxley Act are that audit committees must establish procedures for processing complaints regarding accounting and internal controls, and whistleblowers may not be discharged, demoted or otherwise discriminated against. Foreign private issuers that fail to comply with the audit committee requirements of the Sarbanes-Oxley Act may not be listed on US exchanges.

It is necessary to ensure harmonisation of a corporation's various compliance programmes to ensure that its antitrust compliance programme is fully effective. For example, there is little merit in having a document retention policy within the compliance programme that indicates documents are deleted after five years unless specifically saved, if this conflicts with national tax legislation that requires documents to be retained for at least seven years. For efficiency purposes, the evaluation that is identified and necessary under Sarbanes-Oxley could be used to undertake an annual review of the record of documents that have been assessed in relation to competition law.

Now follows an analysis of each of the key elements that make up an antitrust compliance programme, highlighting relevant legal issues and giving some practical advice and examples. A checklist of key points is provided at the end of the chapter.

Antitrust programmes in general

Purpose

An antitrust programme will be successful if it prevents antitrust infringement, both at the EU level and in other jurisdictions where the company does business, and if it facilitates the early detection of violations that do occur, allowing for a possible reduction of a fine and minimising claims for damages in private lawsuits. This can only be achieved by educating the company's representatives, at all levels. The purpose is not to create an army of antitrust lawyers. Rather, it is to make everyone aware of the areas affected by antitrust issues and to ensure all are able to deal with those issues properly (seeking advice from counsel where appropriate). The importance of antitrust issues during the educative exercise will need to be underlined by communicating the seriousness with which the company views antitrust compliance. To ensure this objective is met, an antitrust compliance programme must be practical, relevant to the business, readily understood, and must form an integral part of the company's training and induction programmes.

Creation

Antitrust compliance programmes have become increasingly sophisticated over time, with mock dawn raids, video and PC-based training and full compliance manuals replacing the traditional compliance programme. Traditional compliance programmes often consisted solely of a document which gave an introduction to antitrust law, focused on dawn raids, and listed some contacts. Programmes these days are often, as is advisable, specifically tailored to the company, rather than 'off-the-shelf', although such programmes are available. Tailored programmes take into account factors such as the particular issues likely to be faced, the various jurisdictions in which the company operates, its market positions in its industry sector, the antitrust risk levels associated with their industry sector, and the internal structure of a group or company. However, a programme, whatever the level of tailoring, is nothing without implementation.

Implementation

The most important element of any antitrust compliance programme is its implementation. The programme should:

- be actively implemented. This means that there is no reason to create a compliance programme or to buy an off-the-shelf scheme if it merely sits in a drawer. It means there is no merit in-house counsel attending conferences on this topic if the knowledge is not then incorporated into an active compliance programme;
- have management support. This is achieved by ensuring senior management is seen to be engaged in the training process. Presentations by senior management representatives of a company's policy on the subject is helpful and lends weight to the seriousness of the issue. It also begins to deal with one of the common characteristics of cartels, namely that often it is senior management that is actively involved in cartel activity;
- include simple procedures that will be followed. This will ensure that people know what to do and that there are appropriate reporting systems and methods to deal with issues that arise.
- include ongoing training This is achieved through workshops, seminars, mock dawn raids, DVD or videos, online educational sessions by using a company's intranet and by antitrust compliance forming an integral part of the company's training and employee induction programme; and
- be evaluated and have audits undertaken. Without testing a programme it will not be possible to determine whether it is achieving its objectives. The auditing procedure should also form part of the compliance programme to ensure that the programme is seen by representatives of the company who may be involved in activities affected by antitrust law. As identified above, active risk management is also an essential element for a compliance programme.

Practical issues

In creating an antitrust programme it should be recognised that there may be personnel who act in bad faith, for which no amount of education and admonition will act as a deterrent. Sales targets and bonuses can be too much of an incentive to break the law. Indeed, some may even go to great lengths to hide their activities from in-house counsel. In relation to the Vitamins cartel, the US Department of Justice (DOJ) noted that F Hoffmann-La Roche 'continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy'.[11] Consequently, a formal auditing exercise seeking to uncover price fixing, bid rigging and market allocation is an essential component of any antitrust compliance programme.

Recognising that trade association meetings are commonly used as a cover for antitrust infringement activity, a compliance programme will need to ensure that counsel examines the antitrust policy of trade associations within which a company is active. Indeed, as a first step, in-house counsel should hold a list of all the trade associations of which the company is a member and the name of the persons who normally attend on behalf of the company. It is appropriate that in-house counsel insist, from time to time, that they attend trade association meetings. Budgets should be drawn up to allow for this, in particular allowing for attendance at the meetings of trade associations which occur outside the country in which in-house counsel is based.

Companies should be aware of contract employees in senior

positions. A real case highlights the problems. Smith & Nephew plc received news on 30 June 2006 that its US business had received the day before a subpoena from the DOJ, as had a number of its competitors. On 31 July 2006 the company announced that its internal investigation revealed that an independent sales representative under contract with the company had sent an e-mail to competitors proposing the recipients join in a coordinated response to a customer's request. That e-mail was in breach of the company's policies.

The company's policy regarding antitrust law compliance

The European Commission in one decision stated: 'The Commission considers that management has the responsibility to establish effective internal rules for compliance with EEC competition law.'[12] In the light of this, an effective programme must obtain the visible cooperation of the senior executives of the company, and this can in part be demonstrated by the company adopting a policy on antitrust compliance. Such a policy could state, for example: 'The Board emphasises that strict compliance with antitrust laws is a requirement. No person has authority to give an instruction or direction which would result in a conflict with this policy. It is management's duty to bring matters affected by antitrust law to the attention of the company's legal department.'

Instruction and training in antitrust law compliance

The objective of the instruction and training programme is to disseminate compliance throughout the organisation and ensure that it becomes a part of the company's culture. Information management is one element of the programme that should become part of employees' working practices. Teaching the law is not useful to this end and, in any event, antitrust is generally recognised as being a difficult subject to communicate to non-lawyers. Consequently, it is best to teach by examples and to make those examples relevant to the company and recognisable to the participants in situations that they encounter. In crafting these examples, or case studies, it is a good tip to ask relevant participants in the programme what antitrust questions they would like answered. The responses are often surprising and can be used to direct the content of the programme.

Practical application of an antitrust programme can take different forms. Many companies use a 'dos and don'ts' methodology, often expressed in a simple pamphlet which is readily available. These days, in-house counsel can have use of intranet sites and may use these to publicise such guides. They may even create discussion groups to work through problems. A mixture of educative styles is useful, particularly when retraining, to ensure the message remains fresh and interesting. Videos, quizzes, e-mail 'Q & A' lessons, role-playing interactive simulations, mock trials, mini dawn raids, audits, workshops, pamphlets, online manuals, seminars and varying the speakers (in-house and external counsel, as well as executives and managers, can be effective communicators). Company representatives, and not just in-house counsel, can attend presentations by external organisations on latest developments in antitrust law. Some law firms offer, or can be encouraged to offer such presentations free or at little cost as part of the continuing client relationship programme.

Information management

As the cost of electronic document creation and storage has fallen and technology has speeded up communications immensely, companies now are often faced with a jumble of documents that are kept in both hard copy format and electronically (either a server or an employee's PC) with little or no differentiation between them. The problem is exacerbated for larger or international companies, who might have many servers throughout the world, keeping an enormous number of documents (often in duplicate). When competition regulators begin investigations, they request large amounts of information relating to specific topics or transactions over long periods of time. The time limits for such requests are often very short. Failure to respond within the time limits can lead to the company being fined, and will certainly prejudice the view of the regulator in the investigation. Failure to deal with document organisation across the corporation can also seriously prejudice antitrust litigation or raise costs significantly, or both. This author has experience of a case in which documents had to be found and scanned, resulting in well over one million images that then needed to be read and considered as to their relevance to the issues in hand.

There are a number of reasons for having a well implemented information management system, many unrelated to antitrust concerns. Certain jurisdictions in Europe, such as Denmark, have limitation periods that require contractual documentation to be kept for 20 years from the date the contract is made. In this context, companies should integrate antitrust compliance into their overall document management systems. Furthermore, a company should have clearly defined retention policies, which deal with the question of limitation periods in all the jurisdictions in which the company does business, and even the type of document retained. One company known to this author systematically deletes all e-mails on its system that are older than two weeks. Employees cannot make exceptions to this rule, and must keep important information in another medium.

As the cost of electronic storage has fallen dramatically over the past few years, the temptation to have a central information dump working to the longest limitation period is high. However, active and clear retention policies, with well defined categories of documents and comprehensive recovery systems are vital for responding properly to litigation, antitrust concerns or other disputes. Software is readily available that 'profiles' documents, allowing for the speedy and safe recovery of all electronic documents (including e-mails). Companies should, as a fundamental part of an antitrust compliance programme, work with in-house or external IT specialists to implement a document profiling system on an integrated basis across the company.

The more efficiently the system operates, the more likely antitrust regulators are to take the view that an active compliance programme is in place. Furthermore, such a policy will help to protect a company from the allegation in an antitrust investigation or in a private lawsuit that it deliberately destroyed or lost documentation that could have been prejudicial to its interests.

Linked to this is the practical issue of employees who no longer work for the company. Years after an employee has moved on, there may be an investigation into the activities of that employee, but there might be no records available (written or otherwise), or even personal recollections, and thus no evidence to protect the company from allegations of antitrust infringement. With a well implemented information management system, such problems are minimised.

Within the overall system, categories should be set aside for privileged documents and those that are likely to raise significant competition law concerns. It is vital to ensure a paper trail is kept in relation to such issues. Some companies implement a 'contact report system', which requires a frank disclosure of meetings or conversations with competitors. These reports are useful to demonstrate innocence during an investigation, or even to prove a competitor's culpability in an action regarding unfair practices.

Real cases have dramatically shown that electronic document

creation and storage brings its own risks. Information technology experts would have little problem, once granted access to an IT system, in extracting deleted files and even drafts of e-mail messages. Such experts form part of the EU Commission's investigation team, which has the right to search a company's database for evidence, this power coming from article 20 of Council Regulation (EC) No. 1/2003. Deep in the recesses of the hard drive there are untold numbers of documents and records of digital actions that many computer owners believe have long since vanished into the ether, such as forgotten drafts of notes never sent. Virtually everything is kept somewhere on the hard drive. Not until all space on a hard drive is used up, do deleted files get overwritten, and many hard drives never reach that point.

As such, care must be taken when drafting communications. Bad drafting can create the wrong impression. Internally, it must be ensured that memoranda and e-mails (including draft versions) do not give the false impression that the company is engaged in anti-competitive behaviour. As to external communication, sensitive information should be vetted prior to issuing or, better, the public relations department should be included in antitrust sessions to become familiar with inappropriate and misleading language.

Employees and antitrust compliance

Ensuring executives and senior managers focus on antitrust issues is often a problem faced by in-house counsel. Some have suggested the best approach is to require such representatives to sign, once a year, a statement of compliance with the firm's antitrust policy. Clearly, if not pitched correctly, this exercise will not get off the ground, but a general and simple statement that requires executives to focus on the issue might reassure in-house counsel that they are continuing to heed the company's antitrust policy. However, executives should understand that by complying with an exercise such as this, they are showing their company's commitment to an effective compliance programme, and the statements themselves may prove to be useful evidence if or when seeking a reduction in a fine. Provided that potential concerns of the human resources department are allayed, you could require, for example, executive or senior managers (including sales managers) to sign the following statement: 'During the past year I have not directly and knowingly been involved in breach of the company's antitrust policy. I recognise that breach of this policy is a serious offence likely to prejudice my position with the company.'

Alternatively, a tighter, cartel-focused statement could be required, such as: 'During the past year I have not directly and knowingly been involved with competitors in fixing prices, making rigged bids, establishing output restrictions or quotas, or sharing or dividing markets by allocating customers, suppliers, territories or lines of commerce. I recognise that this would breach the company's antitrust policy and is a serious offence likely to prejudice my position within the company.'

Requiring executives and senior managers to sign such a document will improve the visibility of their cooperation. It will also help to ensure that the managers themselves, to an extent, act as antitrust guardians for the company.

In auditing employees' compliance, it has been suggested that in-house counsel should spot-check the travel arrangements of executives and compare this information with the in-house counsel of the company's competitors. In practice, even this activity might raise a suspicion, so in-house counsel who are undertaking this form of audit would be better advised to transmit the relevant information to external counsel, who could then advise of any possible issues in the light of all the information available from participating companies.

If a regulator is to endorse the compliance programme with a sufficient level of credibility (and thus consider that the programme entitles the company eligible for a reduction in a fine should there have been an infringement), the programme should include forms of redress for those within the organisation found in breach of the policy. Immediate dismissal is the ultimate sanction. Where there have been breaches in internal procedures (for example, attendance at a trade association meeting when no agenda was circulated in advance, without the consent of in-house counsel), then employees might be denied or have reduced bonuses, or be required to attend antitrust retraining sessions, or both. The degree of reprimand needs to be finely judged. It is better to ensure accidental errors are disclosed by employees, allowing in-house counsel to judge whether or not the matter needs to be dealt with further, rather than employees deliberately covering up their unwitting errors, creating evidential gaps that can prove more problematic later.

Investigations and dawn raids

It is more likely that a company will receive a formal information request or letter of enquiry from an antitrust authority, such as the European Commission, than be subject to a dawn raid. Information requests either from the Commission or the domestic antitrust authority must be taken seriously, as normally there is a legal requirement to respond to the enquiry, and failure to do so potentially results in a fine.

Experience indicates two practical elements to bear in mind. First, such letters of enquiry are often received by the senior officers of the company, such as the company secretary, or are received at the official registered office of the company. It is important that procedures are put in place to ensure that letters of enquiry received by the secretary or at the registered office are sent to in-house counsel immediately, since there is often little time given within which to respond. For example, the company is normally given only 10 days to respond to an information request under the EC Merger Regulation.[13] Second, when responding to such enquiries it is important to avoid making statements that are inconsistent with previous statements or might later prove problematic. For example, one should avoid suggesting a market definition that suits the current matter, if it may later prove problematic in relation to future company projects for which consent from the same antitrust authority is required.

Professional privilege remains a problem for in-house counsel under EU antitrust law. As a clear rule, only those communications with external counsel, who are themselves qualified in an EU member state, that provide legal advice or request such advice can be guaranteed to attract legal professional privilege within the context of an EC antitrust investigation.[14] An internal document that repeats the contents of a clearly privileged communication will also attract privilege, so long as the document is confined to the report.[15] All other communications are in danger of not attracting such protection and so can, without challenge, be requested of a company by the European Commission. This position has been challenged, but does not appear likely to change in the near future.[16]

In-house counsel mostly use e-mails as a form of communication with outside counsel. Commonly, e-mails will have a footnote tagged to them automatically, that notifies the reader that the message might contain confidential or privileged information. However, this might not be enough to clearly identify communications that are legally privileged, particularly as it is a standard message. Consequently, it is advisable for legally privileged e-mails to be headed as such by the author.

The in-house counsel's role

The criminalisation of competition law raises serious issues concerning whom in-house counsel is able to represent, and the subsequent implications for those individuals whom in-house counsel is unable to represent. In-house counsel will represent the company that employs him or her. If a competition law problem arises and there might be criminal sanctions, then pursuant to the leniency and immunity programmes of a number of countries where there is criminalisation of competition law, one of the early considerations will be whether or not the company seeks immunity (or amnesty) from prosecution. External counsel, if advising, can be asked specifically to consider the consequences for the company and its employees. If the decision is to seek immunity, then both the company and the employees are very likely to have similar interests, and in-house counsel should be able to represent both. However, if the decision is taken not to seek immunity, this potentially has serious consequences for the employees. From that point in time, employees, who may be in the dark about the decision or even that the antitrust problem has come to the attention of in-house counsel, might be denied the ability to seek protection from prosecution. Consequently, in-house counsel immediately faces a dilemma, possibly both of a legal and ethical nature. Should in-house counsel advise the relevant individuals:

- of the nature of the potential conflict that exists between the best interests of the company and the best interests of the individuals;
- of the need to seek separate advice on the conflict and on future representation; and
- of the alternatives available to the individuals, including seeking amnesty personally, irrespective of what the company does?

Finally, who are the relevant individuals that the in-house counsel should address? It may be far from clear whether the current information available to in-house counsel has properly identified all those who have participated in the alleged offence. This is particularly a problem with international companies and international cartels. In addition, in the US at least, there is an amnesty plus programme, by which companies that seek leniency in relation to a cartel can also obtain leniency if they come forward in relation to other cartels of which they are aware. In-house counsel might not know of the existence of a second cartel and arguably only if in-house counsel is able to address all issues regarding the first cartel (including whether leniency is being sought) openly within the company can in-house counsel properly seek to solicit information about the second cartel. If the DOJ considers a company was knowledgeable about a second offence when seeking leniency for the first event, and the company fails to report it, the DOJ will consider that failure an aggravating sentencing factor in relation to the second cartel.

The above relates to in-house counsel's role in relation to cartel offences, but it can be just as relevant with other antitrust offences, given that many companies indicate to employees that they can be sanctioned for breach of antitrust laws. If a breach is discovered, the offending employee may consider that any sanction is a breach of the country's labour laws. In such circumstances, the employee will not necessarily have a commonality of interest with the company, and again the in-house counsel will need to be clear as to whether there is a conflict and thus whom he or she is representing.

The above conflict is likely to be particularly difficult to deal with if the offending employee is a senior manager or director of the company. In-house counsel may need to communicate formally to the board through a channel other than that usually used by the in-house counsel, to properly protect the company's interest.

* * *

An antitrust compliance programme is an essential requirement. It must include active risk management to ensure regular reviews of agreements affected by competition law taking into account the company's market positions in its markets. It should be keyed in to other compliance programmes, for example, the compliance programme under the Sarbanes-Oxley Act. As a result of these and other elements that an antitrust compliance programme must contain, companies should recognise that antitrust compliance programmes are sophisticated products, and resources will need to be devoted to creating and maintaining them. While resources are finite for any company, the amount needed for such programmes is small in comparison with the fines that are commonly issued by authorities and the amount of damages awarded by the courts. The increasing criminalisation of antitrust law means a compliance programme should deal with leniency and immunity issues. Dealing with those issues may potentially result in in-house counsel having to deal with a conflict and unable to properly represent the employees of his or her company. A compliance programme should help in-house counsel address and deal with this problem. Despite the already clear benefits for a corporation in having a compliance programme, the downside to not having a compliance programme, or one that proves effective could now become important to the investor community. As such, directors should be made aware of the potential impact on their relationship with the investor community, and it may be that non-executive directors should ensure the existence and enforcement of the highest appropriate form of compliance is an important element of their corporate governance role.

Notes

1 www.lrn.com/insights/lrn-ethics-study-ethics-impact-on-purchase-and-investment-decisions.html

2 www.celent.com/PressReleases/20070313/SRI.asp

3 For example, Shell Canada Limited states in its code of ethics (available at www.shell.com/home/Framework?siteId=ca-en&FC2=/ca-en/html/iwgen/zzz_lhn.html&FC3=/ca-en/html/iwgen/about_shell/how_we_work/ethics_shared/code_ethics.html) that 'Shell Canada seeks to compete fairly and ethically within the framework of applicable competition laws. Shell will not prevent others from competing freely with it.'

4 The ECA (European Competition Authorities) was founded in Amsterdam in April 2001 as a forum for discussion of the competition authorities in the European Economic Area (EEA) (the member states of the European Community, the European Commission, the EFTA States Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority). http://ec.europa.eu/comm/competition/publications/eca/

5 www.konkurransetilsynet.no/iKnowBase/Content/429933/080425_ethical_investment.pdf

6 'The provision of the undertakings and the adoption of the compliance programme were taken into account by the Commission in its Napier Brown Decision of 1998 as mitigating factors when setting the fine', Case IV/F-3/33.708 – *British Sugar plc*, 1999/210/EC: Commission Decision of 14 October 1998 (OJ L076, p1, 1999-03-22). See also the UK's Office of Fair Trading's guideline 407 'Enforcement', paragraph 4.35.

7 For example, corporate directors in the US can defend against claims that they breached a duty to shareholders by showing 'that a corporate information and reporting system, which the board concludes is adequate, exists' (*In re Caremark Int'l Inc Deriv Litig*, 698 A2d 959, 970) (Del Ch 1996).

8 'British Sugar acted in a manner contrary to the clear wording contained in its compliance programme […] In conclusion, the aggravating factors mentioned justify an increase of 75 per cent […] in the basic amount [of the fine].' Case IV/F-3/33.708 – *British Sugar plc* (supra), paragraphs 208-210.

9 The other two key factors are: whether there is adequate information disseminated to employees about the compliance programme, and the strength of the company's commitment to its own compliance programme.

10 Commission Regulation of 22 December 1999 on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

11 'Antitrust Compliance Programs: The Government Perspective', Corporate Compliance 2002 Conference, Practicing Law Institute (PLI), San Francisco, CA; 12 July 2002.

12 Case IV/32.879 – *Viho/Toshiba*; Commission Decision of 5 June 1991 (OJ L287, p39, 1991/10/17).

13 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

14 Case 155/1979, AM&S *Europe Limited v Commission* [1982] ECR 1575.

15 *Hilti AG v EC Commission*, (Bauco (UK) Ltd and Profix Distribution Ltd Intervening) [1990] 4 CMLR 602 CFI (2nd chamber).

16 There have long been calls for reform of the position relating to legal privilege. Suggestions for reform include allowing an independent third party (for example, a lawyer in private practice) to examine any documents where privilege is claimed, to verify if the content is actually privileged or not, instead of the Commission deciding, as it does at present. This procedure of independent examination has been followed in the past by the Commission, and in-house lawyers should certainly consider suggesting it where possible.

About the Authors

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Kiran S Desai is a partner in the antitrust practice of Mayer Brown's Brussels office, which the 2008 edition of *Legal 500* identifies as a top 20 recommended competition practice in Brussels, stating: "Mayer Brown is elevated on the strength of client feedback. It 'could handle competition matters, regardless of the jurisdiction, any litigation risks, or the commercial issue involved'. The group is praised for 'always going the extra mile to make sure it has an in-depth understanding of the clients' business requirements and offers advice with this broad perspective in mind'. The team has also seen an increase in merger filings, having acted for Aeroflot, RWE AG, Andrew Corporation and Onex and continues to handle a steady diet of behavioural matters.

Six antitrust lawyers lead the work, with Kiran Desai as the practice frontrunner. One peer says: 'Desai is a class act and seriously undervalued.' ■