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Antitrust Compliance: The Effects of Perceived Regulatory Failure

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A subject for debate arising out of the financial crises is regulatory failure. This author suggests that competition compliance will be affected by that debate in relation to: who has ownership within a corporation for the compliance programme; ensuring the programme is always up-to-date with both the changes in the businesses of the corporation and the foci of the competition authorities; and recognising the tougher stance that competition authorities are likely to adopt. Yet the key challenge for in-house counsel will likely be obtaining the resources to allow the competition compliance programme to be appropriately responsive to these new pressures.

PricewaterhouseCoopers and the Economist Intelligence Unit undertook a study[1] in the financial services sector, the results of which throw an interesting light on compliance challenges. For example, as part of the study, 160 executives were surveyed. They were asked to identify in relation to a list of factors, which ones most mitigate against reputational risk. While 64 per cent identified 'clear and accessible codes of governance and risk management practices', only 36 per cent identified a 'properly resourced compliance function'. The study suggests that an important part of closing the regulatory gap is not to have compliance within the legal department, but rather within a stand alone compliance (or risk management) department. In relation to competition compliance, this author notes there has already been a change, with some corporations moving competition compliance responsibility to the Ethics and Compliance department.

A point considered in the debate on regulatory failure is that businesses change, often through innovation, and those changes can result in the corporation getting ahead of the compliance standard. An example in relation to competition compliance is a payment from an original medicines producer to a generic medicine producer to delay the launch of a generic medicine beyond the date of expiry of the patent held by the original medicine producer. Such 'reverse payments' developed as generic producers became better at developing functionally the same product and being able to launch this generic product the moment the original product went off-patent. Antitrust authorities in the EU and the US have been considering these practices and are increasingly attacking them as anti-competitive. Should reverse payments become unequivocally unlawful under antitrust rules, corporations will have to change their compliance programme content to reflect this. Another example, in the opposite direction, is the US Supreme Court's ruling in *Leegin*,[2] which decided that resale price maintenance is not per se unlawful, and the EU would appear, at the time this chapter was written, to be softening its absolute prohibition on resale price maintenance.[3]

Another point considered in the debate on regulatory failure is the suspicion that there was international regulatory competition, namely, regulatory authorities, fearful of seeing business go overseas, dared not be too tough. The regulators' response to this is 'to be tough'. In relation to competition compliance, there are two elements that should be borne in mind. First, there are more meaningfully relevant competition authorities in the world, given the additional responsibilities and powers given to the competition authorities in China and India. Second, corporations should obtain foresight into where the competition authorities in the major economic regions (US, EU, China, India) will devote their resources, and so which industries should be particularly vigilant. Consideration of DG Comp's activities in the past six months indicates that corporations in the financial, pharmaceutical and transport sectors would be wise to ensure they refocus on competition compliance. This author suggests that less obvious examples are retail (particularly supermarkets) and agriculture, as well as certain issues that are common to many sectors, such as buyer-power.

An argument that has some support from commentators and policy thinkers, as well as politicians, is that since regulators were unable to prevent the worldwide market failure, then the cause was the failure of the regulators.[4] Regulators have in part objected to this, in part recognised there have been regulatory failures, but also argued 'no amount of regulation can ensure that wrong decisions are never made'.[5] The outcomes of the overall debate on regulatory failure will include, this author suggests, increased support of competition authorities' enforcement actions, bolder initiatives in investigating and seeking solutions to competition law infringements (higher fines, pre-decision settlements), continued pressure by DG Comp to facilitate private enforcement and a stronger investigatory stance. These will have many repercussions, such as the pressures for balancing rights of defence. These tonal changes are important and in-house counsel should use the current focus on regulation to re-energise or re-emphasise the importance of a corporation's competition compliance programme, or both.

The regulatory failure has for most corporations brought serious financial pressures, including on an in-house counsel's budget. It should also be recalled that the PricewaterhouseCoopers study identified that only one-third of senior executives considered a properly resourced compliance function is a factor that would most mitigate against reputational risk. These factors strongly imply that in-house counsel's greatest challenge could be obtaining the necessary resources to create or maintain an appropriate compliance programme. What constitutes an appropriate antitrust compliance programme 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 the amnesty plus programme should, if available, 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 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 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.[11]

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 acted as a catalyst for a fundamental review of the relevant subjects that should be addressed in compliance programmes. The perceived regulatory failure relating to the financial crisis will lead to further pressures to ensure corporations have an appropriate compliance programme. 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 US, it is arguably necessary and certainly efficient 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.

The next section of this chapter is 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.

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 all 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'.[12]

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 person or persons who normally attends 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.'[13] 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 the 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 that 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 which are kept in both hard-copy format and electronically (either a server or an employee's computer) with little or no differentiation between them. The problem is exacerbated for larger or international companies, who may 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 1 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 may 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 which 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 requiring executives to focus on the issue may 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 may 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 which 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 dawn raided. 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, to respond to an information request under the EC Merger Regulation,[14] the company is normally given only 10 days to respond. Second, when responding to such enquiries it is important to avoid making statements that are inconsistent with previous statements or may 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 projects of the company 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, which provide legal advice or request such advice can be guaranteed to attract legal professional privilege within the context of an EC antitrust investigation.[15] 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.[16] 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.[17]

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 may contain confidential or privileged information. However, this may not be enough, particularly as it is a standard message, clearly to identify communications that are legally privileged. 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 which individuals in-house counsel is able to represent and the subsequent implications for those individuals who in-house counsel is unable to represent. In-house counsel will represent the company who employs him or her. If a competition law problem arises and there may 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, may 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 may 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 who 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.

Notes

1 Compliance: a gap at the heart of risk management: www.pwc.com/financialservices.

2 *Leegin Creative Leather Prods, Inc v PSKS, Inc*, S Ct (2007) (slip op).

3 As at July 2009, unofficial drafts of the vertical restraints bloc-exemption regulation that will replace the existing regulation no later than May 2010, suggest efficiencies arguments could be used to justify resale price maintenance in some circumstances, such as the opening-up of a new market.

4 There are of course counter arguments, for example, we have had a worldwide market failure and no matter what we do we will have another one someday. There is even the *in extremis* argument, we have had a worldwide market failure that the regulators did not prevent, therefore, there should be no more regulators!

5 The British Bankers' Association.

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 Consideration of the various drafts of the regulation that will replace the VRBE as from May 2010 indicate that both the supplier and the reseller will need to consider their market shares.

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

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

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

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

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

17 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.

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