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Senior management alert – why every business must have an antitrust compliance policy

BY JAMES J. CALDER

Senior managers carry bulging portfolios and heavy responsibilities. While their primary roles involve managing the daily operations of the business enterprise and planning for its future, their most difficult and dangerous challenges are often unanticipated and can appear without warning. Like the perfectly healthy adult who is suddenly struck with a life threatening illness, the healthy business enterprise can be struck with massive, external legal problems that can threaten its profitability, business prospects, and even its continued viability. Antitrust investigations and lawsuits frequently present such threats. They can destroy careers, result in criminal penalties for the corporation, prison terms for individuals, huge private damages lawsuits, and hundreds of millions – sometimes billions – of dollars in expense.

Unlike the patient, however, who is frequently powerless to prevent the attack of a frightening disease, the risk of a major antitrust event can generally be avoided if proper protective measures are in place. It is for this reason that every senior manager must be sensitive to antitrust and competition issues and ensure that antitrust compliance is deeply embedded in the firm's corporate culture – especially among those non-executive employees whose unsupervised activities can create antitrust exposure. Respect for antitrust compliance is crucial at the operating level because, quite often, major antitrust problems arise from the conduct of people in the field, not those in the executive suite.

The utility of an antitrust compliance program is not merely protective or defensive in nature, however. US antitrust and foreign competition laws also protect businesses from the anti-competitive activities of others. A firm's knowledge of and sensitivity to antitrust and competition laws may enable it to protect its competitive interests when threatened by the anti-competitive activity of others.

The antitrust risk

US antitrust laws are enforced both criminally and civilly. On the criminal side, hardcore antitrust violations are prosecuted as felonies and the penalties are heavy. The largest US criminal fine to date is $500m. In the ongoing criminal investigation into price fixing in the international air cargo industry, guilty pleas to date have resulted in US fines of $1.2 bn. And in the last three years, 72 individuals have been sentenced to terms in US prisons for antitrust violations. These terms average just under two years, but the statute provides for prison terms up to 10 years.

Significantly, foreign citizenship or ownership offers no defence or immunity to US antitrust law. The US Department of Justice boasts that it has imprisoned executives from a raft of foreign countries for antitrust violations. These countries include: Canada, France, Germany, Japan, Korea, Norway, the Netherlands, Sweden, Switzerland and the UK. Foreign corporations are also frequently the subject of heavy US criminal fines.

On the civil side, the sophisticated and well organised American antitrust plaintiffs' bar attacks the subjects of virtually every antitrust investigation announced by US or foreign competition law enforcement agencies. Settlements of civil cases that exceed $1bn are not unheard of, and even weak cases are often settled for extravagant amounts because the risk of trying the case to a jury is simply too great to take.

Foreign competition law enforcement adds to the risk equation. There are over 100 countries that now have competition laws on their books and most have government agencies that enforce them. In international investigations of hardcore anti-competitive conduct, the enforcement agencies of the US, the EU, and dozens of other countries coordinate their investigations. For businesses with international operations, antitrust investigations are now frequently multinational affairs and fines from foreign enforcement bodies, especially the EU, can rival those of the US.

The antitrust opportunity

All of this is sobering stuff for the senior executive whose job it is to minimise risk and maximise sales, profits, and enterprise value. However, antitrust and competition law also provide protection and opportunity for the sophisticated executive. Just as antitrust law prohibits anti-competitive conduct, it provides protection from that conduct. Thus, businesses that face serious threats from the merger of key suppliers, customers or even competitors, may be able to use antitrust and competition laws to protect themselves. Victims of raw anti-competitive practices such as price fixing or market allocation may do the same. A strong antitrust compliance program arms both executives and operations managers with the knowledge necessary to identify instances where the business itself may be the victim of anti-competitive conduct. That knowledge may permit the firm to seek antitrust protection where necessary and appropriate.

What must be reviewed

In developing an antitrust compliance policy certain key areas must be covered. The topics will vary with the audience. Essentially, however, the following should be covered. First, hardcore antitrust rules. Rules against price fixing, bid rigging, market and customer allocation must be fully appreciated by decision makers and field personnel alike.

Second, rules for dealing with competitors. In some industries it is necessary for competitors to deal with each other on a periodic or regular basis. Personnel who are responsible for communicating with firm rivals should receive special training in what communications are and are not appropriate.

Third, rules for dominant competitors. For firms with exceptionally large market shares, rules concerning monopolisation or 'abuse of dominant position' may apply. For such firms, ▸▸

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sensitivity to the special antitrust issues that may apply to them is important. For smaller firms that compete against exceptionally large rivals, understanding these antitrust sensitivities may be equally important.

Fourth, distribution and pricing issues. Antitrust and foreign competition laws apply directly to the distribution and pricing of the firm's products. Significantly, the rules in this area may differ materially from one country to another and the fact that the firm's business or distribution model works as a legal matter in the US is no guarantee that it is risk free in another country. As a precaution, firms with foreign operations need to vet their business and pricing models in every jurisdiction in which they operate.

Fifth, intellectual property issues. The acquisition and licensing of patents, copyrights and other IP rights may also be treated differently under the competition laws of different jurisdictions. For firms that rely on IP (either as licensors or licensees), an appreciation of the antitrust treatment of IP relationships may be crucial, especially since the enforceability of one's IP rights may be lost if the IP is used in connection with an antitrust violation.

Finally, M&A and joint ventures. These are special sub-areas of antitrust and competition law. Personnel involved in such activities need to appreciate the unique competition law issues raised by such transactions long before any transaction is undertaken.

Who must be trained

It goes without saying that all members of senior management must have a thorough understanding of antitrust and competition law issues. The general counsel, chief compliance officer or one of their designees should have more in-depth training in the area. If necessary, an outside adviser with knowledge of the enterprise and its business should be consulted regularly on competition matters as they arise.

Beyond the executive level, it is critical that training be provided to personnel who have any involvement with competitors, any responsibility for pricing or terms of sale or purchase, or any responsibility for negotiating with customers or suppliers. Special training should be provided for those involved in IP licensing, mergers and acquisitions and joint ventures.

Conclusion

For the busy senior executive, antitrust and competition law compliance is not an optional course. Nor is it a responsibility that can be delegated. All senior managers and those in antitrust-sensitive positions need antitrust and competition law training. Serious, periodic compliance education for such members of the enterprise is the best way to avoid the potentially catastrophic antitrust event. It is also the best way to ensure that the enterprise is able to protect itself from the anti-competitive activities of others. ■

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