Smart Antitrust Compliance Programs

by Matthew L. Cantor and Jeffrey I. Shinder

Whether it is Microsoft in the U.S., or General Electric in Europe, antitrust issues can have a devastating impact on any corporation. Companies that would never consider themselves "monopolies" still face massive liabilities for obscure anticompetitive behavior at the front lines of their organizations. How strong are your antitrust controls?

Violations of antitrust law—whether it is United States, European Union (EU) or other—carry heavy penalties. Firms that run afoul of the U.S. antitrust laws face treble damages awards, conduct remedies that restrict their business freedom, and in extreme cases, structural penalties, such as divestitures. Fines for violating European Union antitrust law can be as high as 10 percent of a company's worldwide turnover (revenue less certain taxes).

Fines for failing to comply with certain Latin American premerger laws could be as high as $1 million per day that a company is out of compliance. Firms and executives may also face criminal sanctions for violating the antitrust law of a particular jurisdiction.

The potential for firms to unwittingly violate the antitrust laws of any country is greater than many executives think. Many industries have consolidated dramatically over the past twenty years. Less rivalry means more opportunity for improper collusion or the unlawful acquisition or exercise of market power.

Antitrust issues are often complex and subtle. The line between legitimate, aggressive competition and anticompetitive, illegal conduct can be difficult to draw. For example, in affirming that Microsoft had violated antitrust laws in the computer operating systems market, the Court of Appeals for the D.C. Circuit noted business practices that might be lawful when practiced by smaller firms can be anticompetitive when used by firms with market power.

Further, medium to large firms employ hundreds or thousands of employees who do not regularly report to centralized management. If even one employee acts in a "rogue" fashion (for example, by "stabilizing the market" through price fixing or certain exclusive contracts) managers who never blessed a particular risky practice could still face massive penalties.

A well-drafted antitrust compliance program helps employees spot complex antitrust scenarios that can arise in everyday business, and sets clear penalties for employee noncompliance.

To avoid antitrust violations or harsh sanctions, many firms retain counsel to draw up and implement antitrust compliance programs. These educate employees about basic antitrust concepts and identify certain practices, such as price-fixing, that are blatantly illegal and to which a particular business may be susceptible.

A well-drafted antitrust compliance program also will spot complex antitrust scenarios that may arise in the course of business so that employees will know when to seek the assistance of counsel and set clear penalties for employees who choose to ignore the policies.

In this article, we briefly identify what antitrust compliance programs are, which companies could benefit from them, why they are important and the benefits of a separate manual for EU competition law for firms whose operations may impact EU markets.

Matthew L. Cantor *and* **Jeffrey I. Shinder** *are partners in the law firm of Constantine & Partners.*

☐ *What are antitrust compliance programs?* Antitrust compliance programs primarily have two stages. First, the firm's current business conduct, plans and future strategies are evaluated to determine whether they meet antitrust laws. This review would cover pricing practices, competitive strategies including acquisitions, supplier and distribution relationships, and the firm's participation, if any, in standard setting organizations, trade associations, or joint ventures. In the latter groups, information exchanges with competitors may be commonplace.

In addition to determining whether the subject firm's practices pass antitrust muster, this process should uncover whether the firm has been injured by the anticompetitive conduct of its competitors, customers or suppliers.

This audit requires a thorough review of important corporate records, including board minutes; the files of policy-making executives and top managers; the files of important committees; and files about competitors, trade associations, and joint ventures. Key personnel also should be interviewed because certain transactions or contacts, especially with competitors, may not be recorded in writing.

Where appropriate the interviews should include detailed questions about how prices are set and announced; whether the firm has any regular or periodic contacts with competitors; participates in any trade associations, joint ventures or standard setting organizations; grants customers reduced prices or special allowances; requires exclusive arrangements from purchasers or suppliers; holds any patents or trademarks; and is planning any acquisitions or joint ventures. These interviews can also identify and correct attitudes, which if left undisturbed, could cause antitrust problems.

A thorough document review and interview process will put counsel in a position to evaluate the markets in which the firm competes, and assess whether the firm has market or monopoly power or something close to it in any of these markets. Substantial buying or monopsony power in any of these markets could also be an issue.

This review is critical as firms with significant market power raise the most obvious, and often most vexing, antitrust issues. An exclusive contract that might be innocuous for a firm with a small share of the market may improperly foreclose competition if entered into by a firm with market power. Or, dominant firms that control essential facilities, such as local phone or cable lines, may have a duty to allow competitors access on reasonable terms.

For example, this "essential facilities" rationale motivated the consent decree demanded by the Federal Trade Commission as a condition of its approval of the recent merger between America Online and Time Warner. The FTC demanded that AOL/Time Warner grant a minimum of three competing Internet service providers access to its dominant cable lines—lines that are essential for cable consumer broadband access—on fair and reasonable terms.

Producing and distributing a written antitrust manual educates employees, shows that your company views antitrust issues as crucial, and sends a uniform message on compliance to employees.

After this initial evaluation is complete, a written antitrust compliance manual should be prepared and distributed to employees. Distributing a written manual satisfies several key objectives: it underscores the importance the company attaches to antitrust compliance, provides ready evidence of the company's compliance policy, and ensures that a uniform message is conveyed throughout the company.

The guide educates employees about basic antitrust concepts, gives employees a handy reference when they need to determine whether counsel should be brought in, and clearly sets forth penalties for employee violations of the compliance program. Moreover, if a firm violates the antitrust laws, a written *and effective* compliance program can reduce its sentence under the Federal Sentencing Guidelines.

The written compliance manual must include a clear statement of the firm's policy (compliance

with the antitrust laws), and identification of those assigned overall responsibility for the program. Also needed are a description of the internal reporting system that employees can use to report suspect conduct without fear of retribution, a summary of the disciplinary measures for those who violate the policy, and an informal certification from senior management that the policy is effective.

A more detailed manual will explain in plain English the purpose of the antitrust laws, the civil and criminal antitrust penalties imposed on firms and executives who violate the antitrust laws, and certain core antitrust principles. These include the *per se* rules against horizontal price-fixing, resale price maintenance, certain tying arrangements, and market allocations, as well as the substantial antitrust risks of contacts with competitors.

Depending on the firm's business, the manual might also discuss general antitrust policy regarding the many business practices (such as exclusive dealing, customer, or territorial restrictions) whose legality depends on the nature, purpose and effect of the conduct.

This section should be tailored to the firm's business, and highlight issues of particular relevance. For example, executives that participate in the governance of joint ventures with competitors should be informed about the unique antitrust issues that arise in those settings. Also, a complete compliance program would provide seminars, which greatly enhance a program's effectiveness, as a compliment to the written manual.

Employee notes or e-mails on strategy with offhand phrases like "dominate the market" or "kill our competitors" will haunt you in an antitrust investigation.

An antitrust compliance manual, like any other manual concerning employee standard operating procedure, should discuss the creation and retention of documents. Employees should also be taught the importance of avoiding conjecture or exaggerated language (i.e. "dominate the market," "kill our competitor" or "orderly markets") that paints a misleading picture of the firm or its practices.

Employees must understand that e-mail and other electronic documentation may be subject to discovery—and will likely be discovered during an investigation. Many people use inflammatory language in electronic documents that they would delete from other forms of written communication. Indeed, some of the most convincing pieces of evidence used by the government during the Microsoft trial were e-mails—some of them authored by Bill Gates himself.

In addition, the compliance program should establish procedures to create documents justifying practices that might be challenged. For example, the reasons for terminating a customer, refusing to deal with a competitor, implementing new pricing or distribution practices or for a major acquisition should be documented. Without such a record, it may be difficult to later prove that the challenged conduct was motivated by legitimate business concerns as opposed to anticompetitive intent.

Employees should understand that, when they are analyzing a potential acquisition's competitive or strategic implications, their written work will almost certainly be turned over to the government if the transaction is subject to the Hart-Scott-Rodino premerger filing rules. An internal analysis of the acquisition's potential impact on competition can trigger a protracted premerger investigation if it suggests that the combined firm will be able to raise prices or otherwise exercise market power.

Given the importance of such documents, the antitrust compliance program should carefully describe when analyses of potential mergers will be turned over to the government as part of a premerger filing. The fact that certain analyses prepared by investment bankers may also be turned over to the government should also be explained.

Finally, employees should understand that all analyses of the competitive or strategic implications of a deal should be routed to counsel in draft form to ferret out any exaggerated language before the material is finalized. In fact, the compliance program should require that other regularly prepared docu-

ments (long-range plans, market research studies, memoranda regarding potential acquisitions or pricing decisions, etc.) be reviewed by antitrust counsel in draft form, prior to circulation.

☐ *Who needs an antitrust compliance program?* Almost any business could benefit from an antitrust compliance program. They are particularly important for firms that: have a decentralized management structure; distribute through independent dealers; set different prices for customers buying the same products compete in concentrated markets; or have a relatively significant market share. Compliance programs are also critical for firms pursuing an acquisition strategy. Finally, compliance programs can benefit those companies who have been either previously accused or found liable of antitrust violations. These firms may be viewed with suspicion by antitrust authorities.

An effective antitrust program can convince a prosecutor that a violation was unintentional, lessening penalties.

☐ *Why bother with an antitrust compliance program?* By implementing a program, firms can uncover and cure potentially illegal practices, or prevent any illegal practices from occurring. Employees learn to avoid patently illegal conduct like price fixing and to recognize when they should seek the advice of counsel on more complex antitrust problems.

Moreover, a compliance program may have an exculpatory effect, prompting a fact finder to conclude that the firm did not intend the violation. For example, according to well-established Supreme Court precedent, in order to prove that a firm "attempted to monopolize" an antitrust market, a plaintiff must prove that the firm had "specific intent" to do so. Also, an effective compliance program can reduce sentences under the Federal Sentencing Guidelines, and the Department of Justice will consider whether a company has implemented an antitrust compliance program in its prosecution decisions.

☐ *Is a separate compliance program needed for EU competition law?* Last summer, the European Union took the unprecedented step of blocking a merger of two U.S. firms (GE-Honeywell) that had already been cleared by U.S. antitrust authorities. In the wake of this controversial and much maligned (at least on this side of the Atlantic) decision, many U.S. firms with overseas operations are re-focusing on increasingly aggressive EU competition law.

While these concerns are certainly well-founded, they are often overstated. There has been substantial convergence between U.S. and EU antitrust policy over the past few years. This is especially true in the realm of merger enforcement, where the EU's recent notices on market definition and merger remedies bear a strong resemblance to the 1992 DOJ/FTC Merger Guidelines and the FTC's recent divestiture study.

Further, the current Assistant Attorney General of the Antitrust Division, Charles A. James, has assisted in forming the International Competition Network, which will determine how international antitrust enforcement can further converge. James has said that "International antitrust enforcement needs to move into the 21st century . . ."

Does this convergence mean that a separate antitrust compliance program for EU competition law is *unnecessary?* Absolutely not. While efforts to promote greater convergence are ongoing, there is virtually no chance of a full-blown harmonization of the U.S. and EU antitrust systems in the near future. Different historic, cultural and economic traditions (and some say, European protectionism) will continue to cause divergent antitrust approaches.

U.S. corporations discover that the EU has surprisingly broad jurisdiction over mergers and antitrust matters.

The EU competition law regime presents unique challenges to U.S. firms. These challenges include the surprisingly broad jurisdiction of the EU Merger Control Regulation, the fact that the antitrust laws of EU member states may apply to certain transactions,

and the severe penalties (up to 10 percent of a firm's worldwide turnover). A well-crafted EU compliance program can help U.S. firms navigate these challenges.

An EU competition law compliance program for U.S. firms should have two distinct sections. First, it should introduce and explain the EU Competition Law regime by discussing its principal provisions (Articles 85 & 86 of the Treaty of Rome) and the fact that EU Competition law generally takes precedence over the laws of member states. This section should explain, however, that the antitrust laws of member states may apply to transactions that are conducted wholly or partly within a particular EU member state.

For example, while premerger notification may not be necessary under the merger control laws of the EU, such notification may still have to be provided to member state antitrust authorities. This section should also identify who enforces the EU competition laws, as well as the severe penalties that may be imposed on antitrust violations.

Second, your compliance program should provide a more detailed discussion of Articles 85 & 86 and the EU's Merger Regulation. The compliance manual should provide examples of prohibited conduct. Most of these examples (price-fixing, market allocation schemes, price discrimination and tying arrangements) should be familiar to those with an understanding of U.S. antitrust principles.

Important differences between the U.S. and EU's antitrust regimes should be highlighted. For example, the EU has crafted several Block Exemptions to Article 85 that grant antitrust immunity to some agreements (including exclusive distribution agreements, patent licensing agreements, research and development agreements) if they fall within the strict terms of the exemption. The manual should also note differences between Article 86 and U.S. monopolization law, such as the EU's more restrictive standards on predatory pricing.

As with a U.S. compliance program, the EU manual should discuss using appropriate language in documents, advance review of certain strategy and pricing documents by counsel, and documenting the business justification for certain conduct.

Given the complexity of EU competition law, its different approaches to certain types of conduct, and the EU's increasingly aggressive enforcement posture, the importance of an EU antitrust compliance program cannot be overstated. In just the past few years, numerous firms that have their operations based in the U.S have been investigated and or sued by the EU, including General Electric, Honeywell, Microsoft, AOL/Time Warner, Visa, Boeing, McDonnell Douglas, MCI and WorldCom. While no means foolproof, an effective compliance program can reduce a firm's chances of joining this list.

An antitrust compliance program should be viewed like an insurance policy. By paying relatively modest fees to antitrust counsel now, massive sanctions can be avoided later. In deciding whether to retain counsel to draw up an antitrust compliance program, firms should assess whether the risk of intentional or unintentional violations, given their management structure or industry, justify the investment.

Finally, any compliance program should explain that antitrust law is an issue not only in the U.S. and the EU. Many jurisdictions, including Canada, numerous countries in Latin America (including Brazil and Mexico) and Asia actively enforce antitrust statutes. Compliance programs regarding these jurisdictions can also be drafted by counsel. ■