

Will Coronavirus Lead to Illegal Collaboration? Antitrust Compliance Even More Critical in Periods of Market Uncertainty

Most companies doing business in the US, Europe and countries around the world with established competition laws operate under antitrust compliance programs that clearly make the point that collusion is illegal.

They understand that anticompetitive practices, like price fixing, market division and bid rigging, hurt the company. Beyond damaging its image, collusion can be incredibly costly to defend in terms of time, inconvenience and financial resources.

Yet, even with compliance programs in place, companies still get caught up in antitrust violations. When a manager believes the survival of his or her company is at stake, legal and ethical considerations are often cast aside in the interests of profitability. As demand declines and overcapacity increases due to unexpected events like the novel coronavirus disease 2019 (COVID-19), cost-cutting becomes the norm. When this happens, and when the company facing overcapacity and declining prices does not have a robust compliance program that is supported strongly and endorsed vigorously by senior management, it is more likely that illegal collusion with other similarly situated companies can occur.

Today, with lessened consumer demand due to the increasing spread of COVID-19, as well as declining oil prices, companies need to be more vigilant than usual in strengthening their antitrust compliance programs. In light of the July 2019 "Evaluation of Corporate Compliance Programs," prepared by the Antitrust Division of the US Department of Justice (DOJ), well-intentioned executives should not be in the dark about how best to implement an effective antitrust compliance program.

Review and Reinforce

Given the uncertainties in the markets today, it would be best not only to review current compliance policies, but to reinforce proper behavior with employees. With the possibility of many industries facing overcapacity and declining prices, now is a good time to review current compliance policies and programs to ensure that the corporate, as well as personal, incentives for following these programs is understood and enforced. This is a process that needs to be supported and implemented from the top down. As the DOJ evaluation clearly states: "An effective compliance program will 'promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.'" The Antitrust Division has recognized that "[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."

The best compliance programs, supported from above by senior management, have both "carrots" to encourage compliance and "sticks" to discourage violations. What are the highlights of such programs? The DOJ evaluation looks at the following factors in assessing compliance programs: "(1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods."

An effective compliance program, then, is one that is integral to the ethical standards of the company, as exemplified by the active support and involvement of senior management. It is a program that is more than just written words in a manual or an annual training session. It is targeted training specific to the industry and personnel involved. Competitor communications are as varied as there are industries and it is important that compliance training not be "cookie-cutter," but that it be relevant to the industry, personnel and circumstances involved. Employees need to be able to identify the myriad circumstances that are potentially illegal and which need to be reported. A visible and well-understood reporting mechanism that is easy to use, and where employees are encouraged to report questionable, anticompetitive activity, is an imperative. It is not just managers who are involved in sales, marketing and pricing matters who need to be educated, it is also any officer or employee who may come into contact with competitors. That is, as the DOJ evaluation states, training "should instruct employees involved in [legitimate joint venture activities] that legitimate collaboration between competitors can become problematic if it develops into an exchange of competitively sensitive business information or future pricing information."

A Supportive Psychology of Compliance

Training manuals and instruction only go so far. It is important that companies also have a well-developed and regular audit program. There needs to be an internal reporting and review mechanism to check for compliance. For example, checking for unusual marketing successes, as well as failures, or significant pricing variations from what is considered normal can be indicative of anticompetitive activity. Some audit programs also check email correspondence of sales and marketing personnel. In order that employees are not frightened into overreaction, it is important that lawyers work closely with employees so that a level of trust and understanding is developed.

Lawyers should not show up only during an audit. They need to develop a team relationship with the employees in the company so that employees feel comfortable talking with the lawyers if there is a problem or even the possibility of a problem. Infrequent compliance lectures and audits are absolutely not the way to build either corporate trust or a robust compliance program.

Counsel should be meeting with more than just top officers of the company – they should also be meeting with sales managers and even salespeople, sometimes on a one-on-one basis, where expense reports and other files can be reviewed. Involving the company and its personnel in the compliance effort on a regular basis and instilling a strong code of ethical behavior throughout the company is instrumental in developing and implementing a strong and successful compliance program.

Although it is hoped that the incentivizing of compliance efforts will lead to success, it is also useful, as part of the compliance program, to provide information about the disincentives for non-compliance, including employee termination. Company personnel need to understand the costs of non-compliance and, given recent efforts by the Antitrust Division, the heightened likelihood of detecting illegal activity. With the growth of leniency and the availability of deferred prosecution agreements, it is unlikely that illegal, anticompetitive activities will stay hidden for very long. Employees need to know not only what will happen to the company, but also to the individual employee, if illegal anticompetitive activities are not immediately reported upon discovery.

Ultimately, each company needs to instill in its employees a sense of ethics and disseminate that ethical code throughout the organization. In developing and implementing a successful compliance program, we cannot undervalue the importance of having a supportive psychology of compliance. With current uncertainties in the markets for the purchase and sale of goods, there is no better time than the present to reinforce corporate compliance efforts.

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