Updates
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Three Reasons Companies Need Customized Antitrust Compliance Programs Now

Antitrust compliance programs that are tailored to a company's culture, line of business, and competitive conditions have long been worth their weight in gold. But as 2022 draws to a close, a looming economic slowdown and an aggressive enforcement agenda are driving their value even higher—into a territory typically reserved for platinum and plutonium. This Update analyzes three trends that make customized compliance programs more crucial than ever and provides guidance on how companies can begin to craft catered policies to fit their business needs.

Economic Downturns Drive Collusion

With an economic slowdown in many financial forecasts for 2023, sales teams will face increased pressure to show profits. As a result, businesses may be motivated to become more aggressive with their sales strategies and communications, particularly when engaging with competitors. Now is the time for counsel to get out in front of their business partners and remind them of appropriate antitrust guardrails. History has not been kind to companies that resort to collusion as economies contract.

For example, take the following air cargo case: Air cargo carriers "transport a variety of cargo, such as heavy equipment, perishable commodities, and consumer goods, on scheduled flights internationally." Collusion in the industry began at the start of the 2001 recession and picked up steam as air travel declined following the September 11 attacks. As economic growth ground to a halt, several air cargo carriers entered into a price-fixing conspiracy to coordinate various "surcharges" for fuel and other line items such as war risk, security, and customs. The companies and executives participating in this conspiracy faced severe repercussions. Prosecution by The U.S. Department of Justice (DOJ) brought criminal charges against 22 airlines and 21 individuals. The vast majority of these airlines pled guilty and paid more than $1.8 billion in criminal fines, and eight executives were sentenced to prison time for their role in the conspiracy. Fines across Europe approached (€)1 billion. Class-action lawsuits resulted in another $1.2 million in civil settlements.

Around the same time, manufacturers of liquid crystal display (LCD) panels in Japan, Taiwan, and South Korea were grappling with downward pricing pressure driven by sluggish U.S. economic growth, a rapidly deflating dot-com tech bubble, and uncertainty following the September 11 attacks. LCD panels are a ubiquitous part of our everyday lives, present in the televisions, desktop computers, laptops, tablets, and smartphone screens that dominate our waking hours. Instead of competing on price, quality, and innovation, LCD panel makers conspired to fix prices. The conspiracy kicked off on September 14, 2001, when the first of more than 60 in-person "crystal meetings" was held among executives from the largest Taiwanese and Japanese LCD manufacturers.

Though this may have seemed like an easy way to maintain profits at the time, the years of prosecutions that followed exacted a heavy toll. Multiyear investigations and prosecutions saw enforcers in the United States, Europe, Japan, Taiwan, and South Korea rack up a litany of guilty pleas, criminal fines, trial victories, and prison sentences. DOJ indicted more than 20 executives, with high-level executives receiving prison sentences of up to three years. Criminal fines totaled more than $1.4 billion, and civil liability surpassed $1 billion in the United

States alone. Penalties levied by European and Asian competition authorities were also significant. With effective antitrust compliance programs, these firms could have steered clear of this unlawful conduct and the penalties that followed.

The Great Recession of 2008 also incentivized competitors to cut corners. As DOJ explained, the "recession triggered by the financial and subprime mortgage crises led to a surge in homeowners defaulting on their home loans." Swooping in to profit at the expense of "financial institutions, debtholders, and in some cases, homeowners," bidders at foreclosure auctions agreed to "refrain from bidding against each other at the auctions (often in exchange for payments from the 'winning' bidder) in order to enable the 'winning' bidder to obtain title to a foreclosed property at below-market prices." At times, co-conspirators held "secondary side auctions to determine which conspirator would be awarded a specific property." The bid rigging was not limited to a few isolated communities but occurred across a dozen diverse markets from San Francisco, California, to Mobile, Alabama. After the dust settled, more than 140 individuals were charged criminally, with 125 pleading guilty and a dozen more convicted at trial.

DOJ Prosecutions Show Size Doesn't Matter

Those who think their company is too tiny (or too niche) to worry about complying with antitrust laws should think again. As recent prosecutions demonstrate, even small and specialized firms face antitrust risk and criminal exposure under the Sherman Antitrust Act. Just last month, DOJ announced its first criminal prosecution for attempted monopolization in recent memory. The target wasn't a large technology platform, as many had predicted, but a small provider of highway crack sealing services.

According to the charging document, defendant Nathan Nephi Zito attempted to monopolize the market for highway crack sealing projects that prevent water, sand, and dirt from damaging road surfaces. In a proposed agreement with a competitor to allocate regional markets, Mr. Zito suggested a "strategic partnership" in which he would stop pursuing projects in South Dakota and Nebraska, and the other company would cease competing in Montana and Wyoming in exchange for $100,000.

Assistant Attorney General Jonathan Kanter stated in a press release that "Congress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition" and promised that DOJ will "continue to prosecute blatant and illegitimate monopoly behavior." The $27,000 fine, while not insignificant, suggests that Mr. Zito was not attempting to monopolize a massive market. Mr. Zito also faces potential probation and prison time. This enforcement action sends a clear signal that no company or market is too small to escape DOJ scrutiny. All companies and industries face criminal liability for antitrust violations.

That same month, DOJ secured the guilty plea of a healthcare staffing company, VDA OC, LLC, for engaging in a criminal worker allocation and wage-fixing conspiracy targeting school nurses in Clark County, Nevada. According to the plea agreement, the "volume of commerce corresponding to the wages paid to the affected nurses was $218,016," and the defendant employed around 50 individuals. Like the highway services case, this prosecution shows that DOJ is poised to prosecute companies that engage in collusive conduct regardless of their size, the duration of the conspiracy, or the volume of commerce. Although the fine here was not enormous, this healthcare staffing company will suffer significant reputational harm that could hinder its recruitment and marketing efforts for years to come. A compliance program tailored to human resources professionals could have helped them avoid this fate.

Aggressive Enforcement Agenda

Companies ought to consider additional antitrust guardrails given the aggressive enforcement agenda being pursued by DOJ, the Federal Trade Commission (FTC), and state attorneys general. The FTC is dusting off several seldom-used enforcement tools. This includes Section 3 of the Clayton Act, which bans certain tying and exclusive dealing arrangements that businesses should have on their radars.

The FTC has additionally indicated that it will pursue cases under Section 5 of the Federal Trade Commission Act, which covers "unfair or deceptive acts or practices." In a September 22, 2022, speech titled "Returning to Fairness," Commissioner Alvaro M. Bedoya argued that the FTC's "Section 5 authority goes beyond Sherman" and advocated for a return to "enforcement under our unfairness authority." This suggests that companies should err on the side of caution given the lack of clear lines demarcating "fair" and "unfair."

In the same vein, several FTC commissioners favor enhanced enforcement of the Robinson-Patman Act, which Commissioner Bedoya describes as banning "unfair practices" such as "secret discounts" and "secret rebates" that are "available only to the large and powerful." As Commissioner Bedoya explained, "[c]ertain laws that were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman...We should enforce them." Commissioner Bedoya further noted that "[f]or decades, Robinson-Patman was a mainstay of FTC enforcement." In light of these calls to revive Robinson-Patman enforcement, companies should consult closely with antitrust counsel regarding rebates, discount programs, and charging different prices to purchasers.

For its part, DOJ is taking a close look at information exchange and signaling conduct. In a proposed consent decree filed this summer, the Antitrust Division alleged that poultry processors conspired to suppress worker pay "[t]hrough a brazen scheme to exchange wage and benefit information." In addition, the Antitrust Division's appeal of its loss in the U.S. Sugar Corporation/United Sugars Corp. merger challenge to the U.S. Court of Appeals for the Third Circuit featured arguments that one of the defendants had "exchange[d] information about current and future prices, pricing strategies, and 'sold position'" through a third-party intermediary that "orchestrated" these exchanges. Firms that provide data and competitive information to industry analysts and pundits should confer with antitrust counsel to evaluate the risks associated with these practices.

Three Simple Steps To Jumpstart Antitrust Programs

1. **Communication with antitrust counsel.** The most effective antitrust programs are tailored to a company's culture and line of business. Compliance programs geared toward startups will be different than those for mature companies; firms in the pharmaceutical space will have different needs than companies selling commodity products. Further, employees in different roles will need different types of training. For example, salespeople require different guardrails than hiring professionals. Educating counsel about the company's unique business needs and how employees interact with the market on a day-to-day basis will pay strong dividends for employers down the road. Continuing those conversations as their business evolves is even better.
2. **Time is of the essence.** According to an ancient Chinese proverb, the best time to plant a tree was 20 years ago; the second-best time is now. The same holds true for antitrust policies. Compliance programs are preventative measures that work to stop violations before they occur or, at a minimum, detect them in their incipiency. Employers should not delay—these programs are far less effective after the fact.
3. **Swords and shields.** Any effective policy will train employees on how to avoid antitrust violations, but the best programs will also teach them how to identify when competitors are violating the law to harm their business. Antitrust plaintiffs can recover mandatory treble damages, costs, and attorneys' fees. Leveraging the law as a sword is an important element of an effective antitrust strategy.

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