Expensive and Damaging Antitrust Trip-Ups

Multi-National Counsel Boot Camp
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Scope of Competition Laws

- Govern how you conduct yourself in the market
- Govern dealing with competitors
  - Trade Associations
  - Buy/Sell Agreements
  - Joint Ventures
  - Mergers/Acquisitions
- Governs dealing with customers
  - Pricing
  - Competitive Bids
- Criminal and civil enforcement
In-house & Competition Law
Top Level Perspective

- Bad Acts
- Danger Zones
- Plaintiff Attorney Risk
- Enforceability

Characterizing Prohibitions

Sherman Act §1 = Combinations “in restraint of trade”

**Per se**
- “Yes” or “No”
- Possible criminal or personal liability

**Rule of Reason**
- Balance procompetitive benefits against anticompetitive effects
Characterizing Party Interactions

**Horizontal Actions**
- Price fixing
- Output restrictions
- Bid Rigging
- Customer and Market Allocation
- Boycotts of Suppliers/Customer
- Cartels

**Vertical Actions**
- Price setting
- Tying
- Exclusive Dealing

**Unilateral Conduct**
- Monopoly
- Exclusionary or Predatory

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**U.S. Competition Enforcement Authorities**

- US Department of Justice
- Federal Trade Commission
- State Attorneys General
- Private parties:
  - Competitors
  - Customers
  - Potentially, customers of customers
  - Above 3, read: class actions.
Assorted Competition-Related Topics

- Distribution Agreement
- Sales Representation Agreements
- Non disclosure Agreements
- Non competition Agreements
- Price “Discrimination”
- Brokers and representatives
- Joint Ventures, formal and contractual
- Technology licensing Agreements
- ROLR / MFN /Pricing clauses
- Profit Pooling
- Patents and IP protection
- Invitations to collude
- Noisy withdrawals

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1. Competitive Intelligence and Compliance

- Competitive intelligence is “the legal and ethical collection and analysis of information regarding the capabilities, vulnerabilities, and intentions of a business competitor”
  - Competitive intelligence can allow a company to compete more effectively
  - But the collection and use of competitive intelligence is subject to important legal restrictions (e.g., antitrust laws)
  - Breach of these laws can have serious consequences for both the company and individuals

U.S. Antitrust Laws and Competitive Intelligence

- Goal of the antitrust laws is to promote free competition and thereby protect consumers
- Antitrust laws govern agreements among competitors, agreements between suppliers and customers, and single-firm conduct
- Sherman Act § 1 prohibits agreements between two or more persons or companies that unreasonably restrain competition, including price-fixing
  - Agreement to raise, fix, or otherwise maintain prices
  - Agreement to eliminate or reduce discounts
  - Agreement to maintain certain price differentials between types of products
  - Agreement to fix credit terms
Risks of Non-Compliance

- Risks for the company
  - Criminal corporate fines of up to $100 million per violation or double the gross gain/loss
  - Civil damages actions brought by government, private individuals; treble damages imposed in addition to fines
  - Court order to change business terms and/or structure
  - Brand/reputational risk for the business
  - Attorneys’ fees and costs
- Risks for the individual
  - Imprisonment for criminal violation (up to 10 years)
  - Criminal fines of up to $1 million per violation
  - Career and reputational damage
  - Disciplinary action by employer

Key Principles of Compliance

- Determine market conduct independently (e.g., to whom to sell, at what price, on what terms)
- Absent a clearly lawful business purpose, meetings or communications with competitors should be avoided
- Informal agreements or communications with competitors—even inadvertent ones—carry risks
  - Don’t communicate with competitors through third parties
- You may obtain competitive intelligence from customers
  - Important to document source of information
- Don’t induce third parties to breach nondisclosure agreements
2. Information Sharing and Price Fixing

- Sharing of competitively-sensitive information with competitors presents particularly high risks of potential liability for price-fixing
  - Proof that competitors have shared price information has served as evidence of a per se illegal conspiracy to fix prices
  - Risks presented even when prices are communicated through facially legitimate business dealings
- It is lawful to obtain competitive intelligence from public sources, such as trade journals and customer communications
  - Companies are free to adapt their conduct intelligently to the existing and anticipated conduct of their competitors
  - Therefore, it is lawful to obtain competitors’ price information from customers or other public sources, and to base decisions on it

Avoid Breaching Duties of Confidentiality

- Information that may be useful for competitive intelligence may be subject to undertakings of confidentiality
  - Individuals possessing information may be subject to undertakings of nondisclosure
- Confidentiality restrictions must be respected
- Do not ask anyone to breach a nondisclosure restriction
  - Do not use false pretenses to obtain information regarding competitors
  - Do not ask new hires to disclose previous employer’s competitively sensitive information
  - Do not ask someone to provide information that you belief is subject to a nondisclosure agreement
3. Information Sharing in the Merger Context: Avoid “Gun Jumping”

- Parties to a proposed transaction face antitrust risk for exchanges of information before closing.
  - Even after you agree to merge or form a joint venture, you face risk of unlawful collusion
  - Includes exchange of pricing information, customer information, future business strategy, production information, etc.
- Risk is global: U.S., Europe, Canada, Brazil, Japan, China and others forbid gun-jumping
- When in doubt, consult counsel

4. Trade Associations Present Antitrust Risk

- Trade associations usually formed for pro-competitive reasons
- U.S. antitrust laws present antitrust risk because they bring together potential competitors to discuss common objectives.
  - Viewed as “walking” or “continuing” conspiracies
  - Association activities: “Opportunities to conspire”
  - Codes of ethics: A means of exclusion
Trade Associations Face Antitrust Scrutiny

- Trade associations and standard-setting organizations can benefit customers
  - But they also afford potential competitors opportunities to collude
- If a subject should not be discussed directly with competitors, it should not be discussed as part of trade association activities
  - This applies not only in formal meetings, but also at cocktail hours, in the hallway, on the golf course, etcetera
  - Company attendees in trade association meetings should be trained on best practices to avoid antitrust risk.

EU Competition Law: Refresher on General Principles

- EU Competition law rules prohibit:
  - Article 101 TFEU:
    - Agreements and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition in the internal market
  - Article 102 TFEU:
    - Abuse of a dominant position in the internal market
  - EU law applies wherever the conduct occurs, if it affects trade to or within the EU.
  - National competition laws apply when an agreement / concerted practice or abuse of a dominant position does not appreciably affect inter-State trade and competition in the internal market. More than one national competition law may apply to the same conduct.
EU Competition Law: General Principles
Notion of “Agreement” Under Article 101 TFEU

- Agreement: “concurrence of wills” between at least two parties
- Form is not important → agreements can be:
  - written
  - oral
  - formal
  - informal
  - incomplete
  - Implementation is not required

EU Competition Law: General Principles
Notion of “Concerted Practice” Under Article 101 TFEU

- Concerted practice is:
  “... a form of coordination between undertakings which, short of the conclusion of an agreement properly so-called, knowingly substitutes practical cooperation between the undertakings for the risks of competition”

- A concerted practice exists where:
  - two or more undertakings act together
  - market conduct occurs pursuant to those collusive practices
  - “cause and effect” relationship between concentration and market conduct
EU Competition Law: General Principles

Information exchanges

Exchange of commercially sensitive information among competitors can be deemed to be restrictions by object

Information exchanges

• Giving AND receiving information (2-sided communication)
• Giving OR receiving information / getting access to information without objection (1-sided communication)
• Just receiving information can be problematic: recipient should explicitly distance himself

Commercially sensitive

• Prices
• Customers & Markets
• Capacity
• Strategies
• Tenders
• Contractual terms / conditions etc.

Restriction by object – example

Exchange of commercially sensitive information facilitating price fixing

Restriction by effects - example

Exchange of commercially sensitive information producing anti-competitive effects (e.g. facilitation of coordination, anti-competitive foreclosure, etc.)

The following factors are important in the assessment:

• type of information
• individualised vs. aggregated data
• age of data
• frequency of exchange
• public vs. non-public data
• purpose & conditions of access to data
EU Competition Law: Consequences of Infringements

Company risks

- Fines (up to 10% of global turnover in the EU)
- Invalidity of Agreements
- Confiscation of illegal gains
- Damage Claims
- Negative publicity
- Licence revocation (in some countries)

Personal risks

- Fines
- Director disqualification
- Imprisonment (in some countries)

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Vertical Price Restraints

1. Resale Price Maintenance

Agreements, express or implied, between a manufacturer and its distributors to set the minimum price at which distributors can sell that manufacturer’s goods.

- Manufacturer imposes restraints by express promises, threats, or other mechanisms with the goal of controlling price.
- Per se illegal in the United States for almost 100 years---until 2007.
**Leegin Creative Leather Products (2007)**

- Overruled *Dr. Miles*
- Court recognizes that RPM can be procompetitive and should be analyzed under the Rule of Reason.
- Court conforms the law governing vertical price restraints with the law governing vertical non-price restraints.
  - Exclusive distributorships (including the internet), territorial restrictions, customer restrictions, location clauses, service requirements.

**Antitrust Trip Ups**

**Liability at the State Level**

- **California** – Dermaquest (skincare)
  - “Distributor cannot resell product in a price structure that yields a Product price at ultimate retail sale below Dermaquest’s Suggested Retail Price.”
  - Settled within 30 days - $70,000 civil penalties
- **New York** – Herman Miller (furniture)
  - Filed post-*Leegin* challenge against Herman Miller
  - $750,000 settlement within days
- **Maryland**
  - Per se unlawful by statute
RPM Around the World

**Canada**
- 2009 amendments to the Competition Act decriminalizing “price maintenance.”
- Price maintenance is now a “reviewable” practice by the Competition Bureau

**EU**
- RPM still a hardcore restraint (no safe harbor)
- 2010 Guidelines on Vertical Restraints
  - Possible to demonstrate efficiencies under Article 101(3)
  - Approach by enforcers still very hostile

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**RPM Around the World**

**China**
- 2008 PRC Anti-monopoly law – Article 14
  - Bars business operators from “entering into the following monopoly agreements with their trading partners: (1) fixing the price of commodities for resale to third parties and (2) limiting the minimum price for resale to third parties.”
  - Courts have rejected a *per se* approach (Johnson & Johnson)
    - Required plaintiff to prove actual restriction or elimination of competition
    - But enforcement actions have levied fines where restriction or elimination of both inter-brand and intra-brand competition
Alternatives to RPM

- *Colgate* Programs
- Minimum Advertised Price Policies or Internet Minimum Advertised Price Policies
- Agency or Consignment Programs
  - Considerations
    - Allocation of business risks
    - Most-Favored-Nation clauses

2. Single Firm Conduct

- Section 2 of the Sherman Act
- Unilateral conduct
  - Prohibits single-firm conduct that undermines the competitive process and thereby enables a firm to acquire, credibly threaten to acquire, or maintain monopoly power.
  - Single-firm conduct generally comes within the scope of Section 2 only if a firm possesses, or is likely to achieve, monopoly power.
Examples of Single-Firm Conduct

1. Price Predation
   - (1) Prices were below an appropriate measure of defendant's costs in the short term and (2) Defendant had a dangerous probability of recouping its investment in below-cost prices.

2. Tying
   - A firm sells one product (tying product) but only on the condition that the buyer also purchases a different product (tied product).
   - Still per se unlawful (but softening considerably)

Examples of Single-Firm Conduct

3. Bundled Discounts / Loyalty Discounts
   - Offering discounts or rebates contingent upon a buyer’s purchase of two or more different products
   - May be unlawful if monopoly power

4. Refusals to Deal
   - General right to refuse to deal with rivals is not unqualified.
   - Not on enforcement radar
International Perspective

- EU
  - More interventionist
    - US = Plaintiff must demonstrate actual harm to competition
    - EU = Plaintiff must demonstrate potential harm to competition
  - Abuse of dominant position (EU) v. Monopolization (U.S.)
  - Nearly per se rule against loyalty rebates granted by a dominant firm.
  - Follows a foreclosure test that does not require evidence that the discount on the competitive product was below an appropriate measure of the defendant’s cost.

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Q & A