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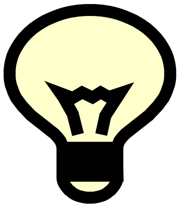

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Antitrust Pitfalls in Hiring and Employment Practices

A. Michael Warnecke and Diana L. Gillis

The Antitrust Division of the Department of Justice (the "DOJ") recently filed suit against eBay, alleging the company entered a *per se* illegal agreement not to solicit employees of Intuit.[1] The suit is the latest in a series brought by the DOJ involving non-solicitation agreements among technology companies. The actions highlight the potential antitrust risks related to employment and hiring practices. Significantly, the agreements at issue are *not* traditional non-compete agreements between employers and their own employees, but rather are agreements between different employers about not poaching each other's employees. As the DOJ stated: "There is no basis for distinguishing allocation agreements based on whether they involve input or output markets."[2] This article explains these cases and offers some practical tips for companies going forward.

Background

The DOJ brought suit against Adobe, Apple, Google, Intel, Intuit, and Pixar in 2010, alleging that agreements among the various companies regarding non-solicitation employment practices were per se illegal under Section 1 of the *Sherman Act*, which prohibits agreements that unreasonably restrain trade.[3] The same investigation led to suits against Lucasfilm[4] and then eBay.[5] A series of bi-lateral agreements were alleged as follows:

Apple – Adobe	Google – Intel
Apple – Google	Google – Intuit

[1] *United States* v. *eBay*, Case No. 12-5869 (N.D. Cal. Nov. 16, 2012).
[2] Competitive Impact Statement, *United States* v. *Adobe Systems*, *Inc.*, Case No. 1:10-cv-01629 (D.D.C. Sep. 24, 2010).
[3] *United States* v. *Adobe Systems*, *Inc*., Case No. 1:10-cv-01629 (D.D.C. Sep. 24, 2010).
[4] *United States* v. *Lucasfilm Ltd.*, Case No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010).
[5] *eBay, supra* note 1.

Apple – Pixar	Lucasfilm – Pixar
eBay – Intuit	

The DOJ alleged the core of each agreement was that the companies would not cold call or recruit each other's employees. The Lucasfilm – Pixar agreement was alleged to go further, providing that one company would notify the other if making an offer to an employee and that the firm making the offer would not counter above its initial offer. The agreements were not all in writing and included "handshake" agreements between executives. The agreements were enforced though oral instructions to recruiters, written policies in hiring manuals, "do not call" lists, and direct communications between executives.

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The DOJ asserted that the agreements essentially amounted to a *per se* illegal allocation of employees among competing employers, and "eliminated a significant form of competition to attract…employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities."[6] While several of the companies were involved with legitimate procompetitive business ventures, the non-solicitation agreements were not ancillary to these agreements and were broader than reasonably necessary in that they applied to all employees – unlimited by geography, job function, product group, or time period.[7] Notably, the affected employees were not aware of and did not consent to these agreements.

Adobe, Apple, Google, Intel, Intuit, Pixar, and Lucasfilm all settled with the DOJ, and are prohibited from entering, or attempting to enter, non-solicitation agreements for a period of five years. The consent decree, by itself, is not costly, but does impose auditing requirements. For example, the companies must file an annual statement with the DOJ regarding compliance, including copies of certain agreements entered into by the company, and must allow the government access to company documents and employees upon request. Though not an issue in these cases, an additional risk going forward in litigation against the government is that judges are increasingly refusing to rubber stamp the parties' proposed settlements and, instead, may impose additional restrictions or requirements on the defendant companies. Also, as is typical with federal antitrust enforcement actions, a follow-on private class action has been filed.[8] The suit seeks compensation for the employees affected by the unlawful agreements, as well as treble damages.

eBay has not settled with the DOJ, and in its motion to dismiss the DOJ's complaint, has argued, in part, that there was no actionable "conspiracy" under Section 1 of the *Sherman Act* because the alleged agreement was among individuals who served as officers and directors of eBay – though one director was also the founder and CEO of Intuit.[9]

Practical Implications

The DOJ consent decrees explicitly identify types of conduct that are *not* likely to violate the antitrust laws:

1. Traditional Employment and Severance Contracts:

While not likely to raise market allocation concerns, employers must still consider the legality of non-compete and non-solicitation agreements with its own employees, and ensure such

[6] *Adobe Systems, Inc.*, *supra* note 3.

[7] An agreement among competitors that is not strictly per se illegal will be analyzed under the rule of reason, as long as the agreement is "reasonably related to, and reasonably necessary to achieve procompetitive benefits." Federal Trade Comm'n and Dept. of Justice, Antitrust Guidelines for Collaboarations Among Competitors § 1.2, April 2000.

[8] In re High-Tech Employee Antitrust Litigation, Case No. 11-cv-02509-LHK (N.D. Cal.).

[9] Motion to Dismiss, *United States* v. *eBay*, Case No. 12-58690 (N.D. Cal. Jan. 22, 2013).

agreements are reasonably narrow as to purpose, time, and geography. California, for example, heavily disfavors non-compete clauses in employment agreements.[10]

2. Unilateral Action Regarding Non-solicitation Policies:

Employers should be aware that the DOJ can investigate, and even bring action, where a company believes it has acted unilaterally but the government has reason to believe it acted in concert with others. In several of the challenged agreements, there were shared board directors among the allegedly conspiring entities, which may lead to an inference of improper agreements. The eBay suit will be instructive in this regard when the court rules on eBay's argument that shared board members are not legally capable of conspiring under *Copperweld*.[11] To mitigate antitrust risk, any company that decides, even unilaterally, not to solicit another's employees should document the legitimate business justifications for doing so and the independent decision-making process used.

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3. Agreements Ancillary to Legitimate Ventures:

Non-solicitation agreements with other companies may be valid provided they are ancillary and reasonably necessary for:

(a) "mergers or acquisitions (consummated or unconsummated), investments or divestitures, including due diligence related thereto;

(b) contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers or temporary employees or contract workers;

(c) settlement or compromise of legal disputes; and

(d) contracts with resellers or OEMs; contracts with certain providers or recipients of services; or the function of a legitimate collaboration agreement, such as joint [ventures].[12]

Here again, companies should identify and document why a non-solicitation agreement is necessary to achieve and implement the procompetitive venture. Protecting trade secrets, for example, is a legitimate concern in the employment context. In addition, the DOJ advises that for any written contracts, companies should specifically identify the agreement to which the provision is ancillary, tailor it narrowly, specify the employees subject to the provision, include a termination time, and sign the agreement.

4. Industry Information Exchanges and Surveys:

While not part of the DOJ's recent suits against the technology companies, employers should also be aware that antitrust actions have been brought over the exchange of salary or benefits information among competing employers.[13] Recently, registered nurses brought a class action against eight Detroit-area hospitals alleging that compensation information was exchanged among the hospitals through direct communications, industry meetings, and third-party surveys. Motions for summary judgment were granted in part and denied in part.[14] Several hospitals have settled while others remain in the suit. The Federal Trade Commission and the DOJ have issued guidance for exchanging price or cost data among competitors, including employee compensation

[10] *See, e.g.,* Edwards v. Arthur Andersen, LLP, 44 Cal. 4th 937, 941 (Cal. 2008) (holding that California Business and Professions Code § 16600 "prohibits noncompetition agreements unless the agreement falls within a statutory exception," regardless of how narrow the non-compete provision may be).

[11] *Copperweld Corp*. v. *Independence Tube Corp*., 467 U.S. 752 (1984).

[12] Competitive Impact Statement, *United States* v. *Adobe*, Case No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

[13] *See, e.g., Todd* v. *Exxon Corp*., 275 F.3d 191 (2d Cir. 2001) (denying a motion to dismiss in a suit involving allegations that fourteen petroleum companies exchanged past, current,

[14] Opinion and Order Regarding Defendants' Motions for Summary Judgment, *Cason-Merenda* v. *Detroit Med. Ctr.*, Case No. 06-15601 (E.D. Mich. Mar. 22, 2012).

information: (1) a third-party must collect and manage the survey or information exchange, (2) the information provided must be more than three months old, and (3) the information must be sufficiently aggregated from numerous companies (as further specified in the guidance).[15]

Conclusion

These DOJ lawsuits over non-solicitation agreement put employers on particular notice that antitrust risks lurk even in human resources departments, far away from the traditional antitrust risks posed by the sales teams. Companies should consider adding a provision in their policy and training documents about compensation setting and hiring practices to underscore general antitrust principles: the need for independent action and to ensure that any restrictions placed on employees are reasonably related to a procompetitive purpose (e.g. protecting trade secrets, ensuring the success of acquisitions, joint ventures, etc.). Managers, human resources personnel, third party recruiters, etc., may not currently be considering antitrust issues alongside the separate employment law issues they must also navigate, so simply raising antitrust concerns within the human resources department may go a long way to prevent similar problems.

Above all, these recent lawsuits underscore the age old adage that very little good can come from unsupervised discussions with competitors almost regardless of the topic. As Adam Smith observed over 200 years ago in The Wealth of Nations (1776): "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

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[15] Fed. Trade Comm'n and Dep't of Justice, Statements of Antitrust Enforcement Policy in Health Care, §6(A) (1996). Exchanges that do not meet these precise requirements may still be valid, but they will not qualify for the "antitrust safety zone" created by following these requirements.

AB In-Bev and Exelon: Lessons for the Merger Review Process and Consent Decree Compliance

James Hunsberger and Patrick Bock

Introduction

Early in his Second Inaugural Address, President Obama declared: "Together, we discovered that a free market only thrives when there are rules to ensure competition and fair play."[1] With this statement, President Obama became just the sixth president to make reference to the antitrust laws in an inaugural address, and the first to do so in more than 80 years.[2] Although inaugural addresses do not necessarily constitute comprehensive policy statements, they carry huge symbolic force. In this sense, it is significant that President Obama chose to use the inaugural platform to highlight the importance of the antitrust laws. President Obama's symbolic statement reflects his Administration's active approach to enforcing the antitrust laws, particularly in the merger review area.

During the President's first term, the Obama Administration successfully challenged three significant merger transactions: AT&T – T-Mobile, H&R Block – TaxAct, and NASDAQ – NYSE Euronext. These merger challenges, among other enforcement actions, signaled that President Obama was intent on following through on his campaign promise to strengthen antitrust enforcement.[3] The Obama Administration has continued this trend, with its recent challenge to the proposed "beer merger" between Anheuser-Busch InBev and Grupo Modelo. The Obama Administration's vigilant enforcement approach is also reflected in the recent civil contempt action brought against Exelon Corporation for alleged consent decree violations. Both of these cases offer valuable insight for companies seeking to navigate the antitrust laws under the Obama Administration.

AB InBev – Modelo

On June 29, 2012, Anheuser-Busch InBev ("AB InBev"), the largest brewer in the United States and the world, announced that it had reached an agreement with Grupo Modelo ("Modelo"), the third-largest brewer of beer sold in the United States, under which AB InBev would acquire the remaining stake[4] in Modelo for $20.1 billion via tender offer.[5] The deal is the culmination of a multiyear effort by AB InBev—whose leading brands include Budweiser and Stella Artois—to obtain full control of Modelo, the maker of Corona. After extensive negotiations between AB InBev and the Antitrust

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1 *Obama's Second Inaugural Speech*, N.Y. TIMES, Jan. 21, 2013, http://www.nytimes.com/2013/01/21/us/politics/obamas-second-inaugural-speech.html.

2 American Antitrust Institute, *Obama Inauguration Speech Mentions Antitrust: References to the Antitrust Laws in Presidential Inaugural Addresses - Now and Then*, *available at* http://www.antitrustinstitute.org/content/obama-inauguration-speech-mentions-antitrust-references-antitrust-laws-presidential-inaugura.

3 As the outgoing head of Antitrust Division, Christine Varney, has stated, "I came in with President Obama committed to fulfilling his promise to reinvigorate antitrust law, and I think we've done that." Dan Strumpf, *Brewers Enlist DoJ Veterans*, WALL ST. J., Jan. 31, 2013, http://blogs.wsj.com/law/2013/01/31/brewers-enlist-doj-veterans/.

4 At the time of the announcement, AB InBev already held a 35.3% stake in Modelo. Under the proposed transaction, AB InBev would purchase all outstanding Modelo shares it does not already own, thus giving AB InBev complete control of Modelo.

5 Press Release, AB InBev, Anheuser-Busch and Grupo Modelo to Combine, Next Step in Long and Successful Partnership (June 29, 2012), *available at* http://www.ab-inbev.com/press_releases/hugin_pdf/518847.pdf.

Division of the Department of Justice ("Antitrust Division" or "DOJ") regarding how to resolve the DOJ's antitrust concerns, the negotiating process broke down, with the head of the Antitrust Division saying the two sides were "just too far apart."[6] As a result, in late January 2013, the DOJ filed a lawsuit in federal district court to block the proposed transaction.[7] The DOJ argued that the merger would substantially lessen competition in the market for beer in the United States as a whole and in 26 specific metropolitan areas across the country. This decrease in competition, the DOJ said, would result in higher prices and less innovation for consumers. In response, AB InBev vowed to "vigorously contest" the DOJ's action, claiming that the agency's action was "inconsistent with the law, the facts and the reality of the market place."[8]

In its Complaint, the DOJ extensively detailed the alleged anticompetitive consequences of the proposed merger.[9] As a starting point, the DOJ emphasized that the U.S. beer industry is already highly concentrated, with the two biggest companies—AB InBev and MillerCoors—controlling approximately 65% of all sales nationwide. The market for beer, the DOJ said, would become significantly more concentrated as a result of the proposed merger, which would combine the first- and third-largest beer producers in the country, with market shares of 39% and 7%, respectively. After Modelo, the only other major player in the beer market is Heineken with 6% market share; the rest of the market is filled out with "fringe competitors," such as craft breweries. As in the proposed 2011 AT&T – T-Mobile merger, here the DOJ is objecting to a 4-to-3 merger with a remaining fringe—although in this case, unlike the AT&T – T-Mobile case, the largest player post-merger (AB InBev) would be *significantly* larger than the second-largest player in the industry. Post-merger, AB InBev would have 46% market share; MillerCoors would have 26% market share; Heineken would have 6% market share; and several small fragmented players would have 22% market share combined. Citing a commonly accepted measure of market concentration, known as the Herfindahl-Hirschman Index (HHI), the DOJ argued that the AB InBev-Modelo merger is presumptively anticompetitive because the post-merger HHI of the U.S. beer market would be greater than 2,800, with an increase of 566 points.[10] Interestingly, these HHI figures cited by the DOJ are quite similar to the HHI figures presented in the AT&T – T-Mobile Complaint, where the post-merger HHI was greater than 3,100, with an increase of nearly 700 points.[11]

Although Modelo accounts for only 7% of beer sales in the U.S., the DOJ argued that Modelo plays a vital role in disciplining the interdependent pricing practices of the two market leaders.

The market shares, however, were not the DOJ's primary focus. Although Modelo accounts for only 7% of beer sales in the U.S., the DOJ argued that Modelo plays a vital role in disciplining the interdependent pricing practices of the two market leaders. The DOJ alleged that AB InBev initiates annual price increases and then MillerCoors generally follows suit—what the DOJ refers to as a "leader-follower" pricing relationship. According to the DOJ, AB InBev publicly announces its price increases, thereby "purposely making its price increases transparent to the market so its competitors will get in line."[12] The DOJ cited an internal document from AB InBev, known as the "Conduct Plan," which outlined the company's pricing strategy. This strategic pricing plan, the DOJ said, "reads like a how-to manual for successful price coordination."[13] AB InBev's Conduct Plan, according to the Complaint, emphasizes the importance of being "Transparent – so competitors can clearly see the plan"; "Simple – so competitors can understand the plan"; "Consistent – so

[6] Brent Kendall & Valerie Bauerlein, *U.S. Sues to Block Big Beer Merger*, WALL ST. J., Jan. 31, 2013, http://online.wsj.com/article/SB10001424127887323701904578275821720321186.html.
[7] *United States* v. *Anheuser-Busch InBev & Grupo Modelo*, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013), *available at* http://www.justice.gov/atr/cases/abimodelo.html.
[8] Press Release, AB InBev, Anheuser-Busch InBev Statement Regarding DOJ Action (Jan. 31, 2013), *available at* http://www.ab-inbev.com/press_releases/hugin_pdf/545416.pdf.
[9] Complaint, *United States* v. *Anheuser-Busch InBev & Grupo Modelo*, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013), *available at* http://www.justice.gov/atr/cases/f292100/292100.pdf.
[10] Under the DOJ and FTC's joint Horizontal Merger Guidelines, a proposed merger is presumed to enhance market power if the post-merger HHI is greater than 2500 and the increase in HHI from the merger is more than 200. U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. This presumption is rebuttable by "persuasive evidence showing that the merger is unlikely to enhance market power." *Id*.
[11] Second Amended Complaint, *United States* v. *AT&T, Inc., T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-01560 (ESH) (D.D.C. Sep. 30, 2011), *available at* http://www.justice.gov/atr/cases/f275700/275756.pdf.
[12] Complaint ¶ 44.
[13] Complaint ¶ 45.

competitors can predict the plan"; and "Targeted – consider competition's structure." In the DOJ's view, this Conduct Plan has been generally successful with respect to MillerCoors, which has followed AB InBev's price increases "to a significant degree."[14] In other words, the beer market already exhibited "coordinated effects": "conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."[15] In this case, according to the DOJ, coordinated effects arose when AB InBev raised its prices with the expectation that MillerCoors would follow suit, rather than engage in competitive pricing to win over one another's customers.

The increased likelihood of coordinated effects as a result of the merger loomed large for the DOJ in its decision to challenge the merger. The DOJ feared that the merger—by eliminating Modelo—would eliminate the only effective bulwark against full-fledged coordinated pricing by AB InBev and MillerCoors. When AB InBev and MillerCoors increased prices, the DOJ said, Modelo resisted, instead choosing to adopt its "Momentum Plan."[16] Under this plan, Modelo would maintain steady pricing, while AB InBev and Modelo's prices rose, in hopes of narrowing the price gap between Modelo's import brands and AB InBev and MillerCoors's domestic brands.[17] Internal AB InBev documents showed that, as Modelo started to cut into AB InBev's market share, AB InBev repeatedly complained about the increased price competition created by Modelo's price gap strategy. The DOJ argued that Modelo, by not following AB InBev's price increases, "has constrained [AB InBev's] ability to raise prices and forced [AB InBev] to become more competitive."[18] The DOJ also worried that the loss of head-to-head competition between AB InBev and Modelo would result in less product innovation and product variety, as evidenced by past examples where Modelo's product innovations motivated AB InBev to develop new, more competitive products. Thus, the DOJ maintains, AB InBev's acquisition of Modelo would facilitate future pricing coordination between AB InBev and MillerCoors, thereby resulting in higher prices and less innovation for consumers.

According to the DOJ, internal AB InBev documents showed that AB InBev was increasingly worried about the threat of Modelo limiting its ability to increase prices.

In addition to coordinated effects, the DOJ also expressed serious concerns about "unilateral effects."[19] Unilateral effects occur when the merged firm's increased market power gives it a greater ability to unilaterally raise prices and, in the process, ignore its competition, thereby harming consumers. According to the DOJ, internal AB InBev documents showed that AB InBev was increasingly worried about the threat of Modelo limiting its ability to increase prices. Without this competitive threat from an independent Modelo, the DOJ said, AB InBev "would have strong incentives to raise the prices of its beers."[20] If it owned Modelo, AB InBev could raise the price of Modelo beers and, because of its large market share, rest assured that AB InBev-owned brands would recapture a significant portion of customers switching away from Modelo because of the price increase. Effectively, then, the DOJ argued that the proposed merger would lead to upward pricing pressure on both AB InBev and Modelo brands.

It is noteworthy that the AB InBev – Modelo transaction included a "fix-it-first" remedy—a remedy which the DOJ did not deem sufficient to resolve its competitive concerns. The goal of a fix-it-first remedy is to preemptively address the DOJ or FTC's antitrust concerns, thereby (hopefully) eliminating the need for governmental intervention. Here, the initially proposed fix-it-first remedy did not achieve this goal. At the same time as the merger announcement, AB InBev also

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14 Complaint ¶ 44.

15 U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 7 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. Coordinated effects are also known as "conscious parallelism." Coordinated effects, or conscious parallelism, are common in highly concentrated markets with only a few major players, known in economics as "oligopolistic markets."

16 Complaint ¶¶ 48-51.

17 Because Modelo's brands are generally regarded as of higher quality than AB InBev and MillerCoors's brands, the smaller price gap resulted in consumers "trading up" to Modelo's brands, which translated into market share growth for Modelo.

18 Complaint ¶ 53. In support of its argument, the DOJ described pricing battles between AB InBev and Modelo in three local markets that, the DOJ said, resulted from Modelo's aggressive pricing strategies.

19 U.S. Department of Justice & FTC, Horizontal Merger Guidelines §§ 6-6.4 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

20 Complaint ¶ 63.

announced that it would sell Modelo's 50% interest in the Crown Imports joint venture ("Crown")—which currently imports Modelo beer into the U.S.—to Crown's other owner, Constellation Brands ("Constellation"). As part of the agreement, Constellation would also have the exclusive right to import Modelo beer into the U.S. for ten years. Unfortunately for AB InBev, the DOJ responded to this proposed fix-it-first remedy with considerable skepticism. The DOJ portrayed the divestiture as a transparent but inadequate attempt to secure antitrust approval, saying that it created only a "façade of competition" between AB InBev and Constellation.[21] Because Constellation would acquire no Modelo brands or brewing facilities under the arrangement, the divestiture, the DOJ said, would make Constellation wholly dependent on AB InBev for its supply of Modelo beer. According to the DOJ, Constellation has been less willing than Modelo to push back against AB InBev's price leadership model in the past and is "unlikely to reverse course" once Constellation is "fully dependent" on AB InBev for Modelo beer.[22] Thus, in the DOJ's view, the proposed divestiture is inadequate to remedy the transaction's anticompetitive effects and, in fact, would actually further facilitate coordinated pricing in the market for beer.

At the time of writing, the district judge had granted the DOJ and AB InBev's joint motion to temporarily stay the proceedings in light of ongoing settlement discussions.[23] This stay was apparently spurred by AB InBev's offer to revise its proposed fix-it-first remedy. Under the proposed revision, in addition to obtaining full ownership of Crown, Constellation would also take control of Modelo's largest brewery in Mexico and secure perpetual licenses to Modelo's brands.[24] According to AB InBev, the sale of the brewery and the perpetual licenses are designed to "ensure independence of supply for Crown and provide[] Constellation with complete control of the production of the Modelo brands for marketing and distribution in the U.S."[25] Although AB InBev and Constellation expressed confidence that this revision would address all of the DOJ's antitrust concerns, it remains to be seen whether the DOJ will be fully satisfied with the new terms of the proposed divestiture.

Internal documents are often dispositive of whether a proposed transaction will be subject to a Second Request and a potential court challenge.

Practical Implications: Merger Review Process

Although the ending has yet to be written, the first few chapters of the AB InBev – Modelo merger review story highlight several practical considerations for companies contemplating a merger or acquisition in the future. Three of the most important practical implications are that (1) documents matter; (2) competitive effects and economics matter; and (3) experienced antitrust counsel and antitrust economists matter.

Documents matter. In the world of antitrust merger review, there is no denying the importance of internal documents. Internal documents are often dispositive of whether a proposed transaction will be subject to a Second Request and a potential court challenge. The AB InBev – Modelo case is merely the latest installment in a long line of enforcement actions in which the agencies have relied extensively on unhelpful internal documents. It appears that the DOJ's decision to challenge the merger in this case hinged largely on AB InBev's "Conduct Plan"—allegedly outlining the company's strategic plan for coordinated pricing—and other similar internal documents. As reflected in the AB InBev Complaint, the enforcement agencies often focus on strategic analyses prepared by company employees and internal communications, particularly those dealing with competition issues (such as assessments of the proposed transaction, market studies, and competitor profiles). Of course, the enforcement agencies would look unfavorably upon internal documents stating or implying that the purpose of the transaction is to eliminate a competitor or raise prices. But such explicit documents are not the only ones that cause problems. In the merger review process, as elsewhere in life, statements are often taken out of context. Thus, it is important for company executives and consultants tasked with assessing the competitive significance of a

21 Complaint ¶ 9.
22 Complaint ¶ 10.
23 Joint Motion to Stay Proceedings, *United States* v. *Anheuser-Busch InBev & Grupo Modelo*, No. 1:13-cv-00127 (D.D.C. Feb. 20, 2013), *available at* http://www.justice.gov/atr/cases/f293700/293763.pdf.
24 Press Release, AB InBev, *Anheuser-Busch InBev and Constellation Brands Announce Revised Agreement for Complete Divestiture of U.S. Business of Grupo Modelo* (Feb. 14, 2013), *available at* http://www.ab-inbev.com/press_releases/hugin_pdf/547822.pdf.
25 *Id.*

transaction to avoid using misleading language that may later come back to haunt them during the merger review process. As company documents prepared without the involvement of antitrust counsel tend to be the most compelling in the eyes of the enforcement agencies, it is crucial that company executives and employees have a workable understanding of the antitrust laws when engaged in their everyday business operations (i.e., well before dedicated antitrust counsel arrives on the scene). On this point, like many others, early education on the merger review process and antitrust laws is vital. As a result, it is often advisable for any company with an appetite for mergers and acquisitions to adopt a comprehensive antitrust training program and interact regularly with competent antitrust counsel.

Competitive effects and economics matter. The AB InBev – Modelo case demonstrates the fundamental importance of economic analysis to antitrust law, particularly in the area of merger review. With the adoption of the new Horizontal Merger Guidelines in 2010 and the Obama Administration's record of active merger enforcement, the competitive effects analysis and underlying economics of the proposed merger have become increasingly important. For example, the facts of this case indicate that market shares, by themselves, are not dispositive in determining the competitive effects of a proposed merger. Rather, it is the market structure, taken as a whole, which drives the competitive effects analysis. On first glance, a company with 7% market share, like Modelo, may appear fairly inconsequential in determining the pricing practices of a market in which the remaining 93% of sales are controlled by other companies. Yet, this case demonstrates how detail-oriented the agencies are in their review of proposed mergers. Through its market analysis, the DOJ determined that Modelo plays an extraordinarily important role in the pricing dynamics for the beer market. The DOJ argued that Modelo, via its outsized influence, imposes price discipline on the two market leaders, who would otherwise engage in coordinated price increases that would harm consumers. This sophisticated economic argument, it appears, dictated the DOJ's decision to challenge the merger.

> The AB InBev – Modelo case demonstrates the fundamental importance of economic analysis to antitrust law, particularly in the area of merger review.

Experienced antitrust counsel and antitrust economists matter. The first two lessons from the AB InBev – Modelo case naturally lead into the third. Because of the legal and economic complexity of the merger review process, merging companies should ensure that they receive antitrust counseling as early as possible in the process. Both of the companies involved in this merger appreciated the importance of experience and familiarity with the merger review process and therefore obtained high-quality antitrust counsel early on in this long process. If the merger is successfully shepherded through the antitrust review process later this year, the success will be owed, in large part, to the diligent work of the merging companies' skilled and well-respected antitrust counsel. In many transactions, companies find it beneficial to obtain antitrust counsel's opinion on the antitrust risk of the transaction before even negotiating the merger agreement. This will provide the company and its in-house counsel with a realistic assessment of the likelihood that the company will face the costly, lengthy, and intrusive Second Request process (and potentially litigation). This allows the company to systematically weigh the antitrust risk and associated costs (including the costs of delay) in the cost-benefit analysis of the transaction. If the parties then decide to proceed with the transaction, antitrust counsel can assist the company with each step along the way: before the HSR filing; during the initial waiting period; while compiling the response to the Second Request; after responding to the Second Request; and, of course, during litigation (if necessary). Antitrust counsel can also assist the company in determining whether the merger is subject to multijurisdictional antitrust review, which is increasingly likely in this era of globalization. When faced with an in-depth investigation, the parties should work with antitrust counsel as early as possible to develop a comprehensive strategy, identify the key issues, identify the custodians of requested documents, and begin preparing and reviewing potentially sensitive documents. In the same vein, it is advisable for parties to hire antirust economists early on in the process to assist counsel in preparing a competitive assessment. Strong and skilled advocacy by antitrust counsel in early interactions with the DOJ or FTC—especially when armed with compelling economic analysis—can go a long way in persuading the reviewing agency that it should not act to block the merger. This is particularly true with respect to articulating a legitimate procompetitive rationale for the merger. Thus, it is crucial that the parties work with antitrust counsel and antitrust economists to demonstrate how the merger will achieve some procompetitive efficiencies—such as substantial long-term cost savings—that will ultimately benefit consumers in the form of lower prices or greater innovation.[26]

The Exelon Civil Contempt Case

On November 14, 2012, the Antitrust Division and Exelon Corporation ("Exelon") entered into a settlement agreement, under which Exelon agreed to pay $400,000 to resolve a civil contempt claim for alleged violations of a DOJ consent decree.[27] Exelon entered into the consent decree with the DOJ in connection with its $7.9 billion acquisition of Constellation Energy in December 2011. A consent decree is a binding agreement between the DOJ and a defendant that is filed in federal district court. Upon entry by the court, the consent decree becomes a binding court order. In the merger context, consent decrees are the most common method of resolving the reviewing agency's competitive concerns. Under a consent decree, the DOJ (or FTC) requires the parties to take certain steps—such as the divestiture of certain overlapping assets—in exchange for allowing the transaction to go forward unchallenged. In the Exelon case, the DOJ required that the company divest three of its electricity plants in markets with significant overlap. In connection with the consent decree, the DOJ also required Exelon to agree to a "Hold Separate Stipulation and Order" ("Hold Separate Order").[28] Hold Separate Orders are generally designed to preserve the to-be-divested assets and maintain adequate competition during the pendency of the divestiture. Under the Exelon Hold Separate Order, Exelon was required to offer electric power from certain electricity plants into the wholesale energy market at or below cost during the period in which the divestitures were pending. Thus, the Hold Separate Order was intended to protect competition by ensuring that Exelon would not be able to raise the market price for electricity in the pre-divestiture period.

According to the DOJ, Exelon inadvertently made above-cost offers during the pre-divestiture period, in violation of Exelon's obligations under the Hold Separate Order. Upon recognizing the inadvertent above-cost offers, Exelon took appropriate remedial steps, including notifying the DOJ and market regulators,[29] implementing measures to ensure no further above cost-offers would occur, and agreeing with market regulators to return any incremental revenues Exelon earned and to redress any market harm. Despite Exelon's self-reporting and agreement with market regulators to disgorge any ill-gotten revenues, the DOJ still sought and obtained $400,000 in additional civil penalties (above and beyond the disgorgement agreement with market regulators). According to the DOJ, the $400,000 payment represented "disgorgement of profits gained through Exelon's alleged violations and reimbursement to the department for the cost of its investigation."[30]

Despite Exelon's self-reporting and agreement with market regulators to disgorge any ill-gotten revenues, the DOJ still sought and obtained $400,000 in additional civil penalties (above and beyond the disgorgement agreement with market regulators).

Practical Implications: Consent Decrees

The Exelon case offers a few lessons for companies dealing with the DOJ (or FTC) at any point during the merger review and enforcement process. The most important practical implication is that strict compliance with consent decrees matters.

Strict compliance with consent decrees matters. The policies and practices of the DOJ and FTC highlight the importance of strict adherence to the terms of consent decrees. To ensure strict compliance, both the DOJ and FTC use the various enforcement mechanisms at their disposal to punish those who violate consent decrees. The DOJ emphasizes that strict enforcement of merger

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26 *See generally* U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 10 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

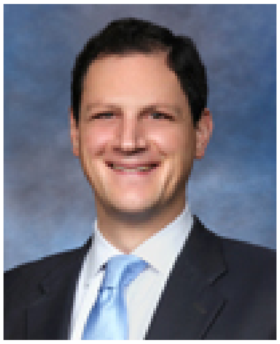
27 Press Release, U.S. Department of Justice, Justice Department Settles Civil Contempt Claim Against Exelon Corporation (Nov. 15, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/288801.htm.

28 Hold Separate Stipulation and Order, *United States* v. *Exelon Corp. & Constellation Energy Group, Inc.*, No. 1:11-cv-02276 (D.D.C. Dec. 21, 2011), *available at* http://www.justice.gov/atr/cases/f278400/278480.pdf.

29 The market regulators in this case were the Federal Energy Regulatory Commission (FERC) and the Maryland Public Service Commission.

30 Press Release, U.S. Department of Justice, Justice Department Settles Civil Contempt Claim Against Exelon Corporation (Nov. 15, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/288801.htm.

remedies, including consent decrees, is essential to the Antitrust Division's mission because "[e]ven the most appropriately tailored remedy is of little value if it is not enforced."[31] Historically, the enforcement agencies have been less aggressive where the parties acted in good faith and the violations were inadvertent or minor. As the Exelon case demonstrates, however, this is not invariably true. The DOJ decided to bring the civil contempt action even though Exelon had self-reported the violation, Exelon had already agreed with the market regulators to disgorge its ill-gotten profits, and both the DOJ and Exelon agreed that the violation was inadvertent. This action may be explained by the fact that Exelon's violation allowed it to achieve a substantial anticompetitive gain, which directly contravened the purpose of the Hold Separate Order. In this sense, Exelon may be somewhat of an outlier. Yet, the practical lesson remains the same: violating a consent decree, even if inadvertently, can lead to significant negative consequences. For this reason, it is crucial for companies operating under a consent decree to work with experienced antitrust counsel to establish a comprehensive compliance program. The company's in-house counsel and outside antitrust counsel must work together to ensure that the company's executives and officers understand their obligations under the consent decree and appreciate the serious ramifications for violations.



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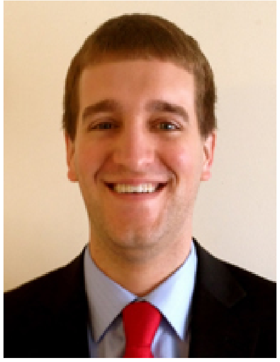

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[31] U.S. Department of Justice Antitrust Division, Antitrust Division Policy Guide to Merger Remedies, at 33 (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf.

Supreme Court Urged to Offer Guidance on Monopolization Standards in *Eaton* Case

Steve Cernak and Kimberly Kefalas

In September 2012, a divided panel of the 3rd Circuit Court of Appeals upheld a jury verdict against Eaton Corporation and in favor of ZF Meritor LLC (ZFM) and Meritor Transmission Corp. (Meritor). (696 F.3d 254) ZFM and Meritor had accused Eaton of illegal monopolization and exclusive dealing through use of a loyalty discount program and other sales tactics when selling their transmissions for heavy duty trucks. On February 25, 2013, Eaton filed with the US Supreme Court its petition for a writ of certiorari. ZFM and Meritor, and likely amici, will be weighing in shortly. If the Court grants the petition, it may clarify when allegedly exclusionary practices should be analyzed as predatory pricing. Even if the petition is denied, however, the 3rd Circuit's opinion (both majority and dissent) is itself an important new step in the evolving law regarding the kinds of "exclusionary" contract terms that can be utilized by market participants with high market shares.

Facts of the Case

Eaton and Meritor made transmissions for heavy duty trucks. The vast majority of heavy duty trucks in the US are linehaul trucks and nearly all of them use only manual or automated mechanical transmissions. Eaton was the only significant manual manufacturer for decades. Meritor entered the market in 1989 and had approximately 17% of the sales ten years later. Also in 1999, Meritor and ZF Friedrichshafen of Germany formed ZFM to convert ZF's automated mechanical transmissions to US standards. Eaton responded to ZFM's entry by introducing its own automated mechanical transmission and entering long term agreements with the only four U.S. original equipment manufacturers of heavy duty trucks (OEMs).

According to Meritor and ZFM, all of those agreements, while different for each OEM, included four features that allegedly damaged competition. First, Eaton offered various forms of price discounts if the OEM purchased Eaton transmissions for a large percentage – anywhere from 65% to 95% -- of its needs. Significantly, none of the discounts resulted in any sales at a loss. Second, Eaton required the OEMs to make the Eaton transmissions either the standard (default) or preferred (best-price) choice in their respective databooks. Truck buyers usually, but need not, use databooks to help select truck options. Third, Eaton required some of the OEMs to "preferential price" its transmissions to truck buyers against any competitor's equivalent transmission. Fourth, each of these agreements was for at least five years, longer than the three year agreements Eaton and Meritor had with at least Freightliner. Another feature of each of the agreements, emphasized by Eaton, was the "competitiveness clause" that allowed the OEM to exclude an Eaton product from the share target if another manufacturer offered transmissions of better quality or lower price.

Both ZFM and Eaton experienced quality problems with their automated mechanical transmissions but only ZFM's sales share dropped. In late 2003, ZFM was dissolved and Meritor returned to the market itself. In 2006, Meritor exited the heavy duty truck transmission business entirely. It and ZFM sued Eaton that same year, claiming damages from monopolization under Section 2 of the *Sherman Act* and *de facto* exclusive dealing contracts under Section 3 of the *Clayton Act*. The jury returned a verdict of liability against Eaton and the judge later denied Eaton's motion for judgment as a matter of law. Eaton did not appeal the jury's finding that it had monopoly power but did appeal the finding that its actions were anti-competitive. By a 2 – 1 vote, the Third Circuit panel upheld the decision.

Third Circuit Opinion

The majority first had to deal with Eaton's argument that the Supreme Court's *Brooke Group* price-cost test, which was developed to assess whether "predatory" pricing practices are anticompetitive, should have been applied. (*Brooke Group Ltd*. v. *Brown & Williamson Tobacco Corp*., (509 U.S. 209 1993)) Under *Brooke Group*, low pricing will not be deemed anticompetitive so long as it is above an appropriate measure of cost. While acknowledging that *Brooke Group* is the applicable standard when price is clearly the predominant mechanism of exclusion, the majority held that there was evidence that several of the non-price elements in Eaton's agreements also contributed to the anti-competitive effects, and that evidence was sufficient to support the jury's verdict.

Rather than applying *Brooke Group*, therefore, the majority conducted a more general rule of reason balancing applicable to any monopolization or exclusive dealing claim. First, it found support in past cases for successful exclusive dealing claims that were only *de facto* or partial, such as the approximate 85% of the sales foreclosed here. The import of that foreclosure increased because of the extraordinary length of the agreements. The majority also found evidence sufficient for a jury to find the databook and preferential pricing requirements anti-competitive. Finally and perhaps most significantly, the majority found coercion based on evidence that Eaton might cancel the agreements, rather than simply increase prices, if the OEMs did not meet their market share targets, despite the agreement's competitiveness clause. Because Eaton was by far the larger of the only two suppliers of a necessary truck component, the OEMs could not take the risk of supply disruption.

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The dissent agreed with the majority that: (a) *Brooke Group* is not dispositive in every case that challenges pricing practices and (b) a competitor could act anti-competitively without engaging in below cost prices. To the dissent, however, the Supreme Court's repeated references to the Brooke Group analysis in previous cases has rendered it a "cornerstone of antitrust jurisprudence," and that it must, therefore, be a high barrier to success to plaintiffs making these types of claims. Specifically, the dissent suggested that courts review all elements of such pricing programs, apply Brooke Group, and presume lawful any program with above-cost discounts. The dissent would have found insufficient evidence to support a jury finding that the presumption should be overturned. For instance, the dissent found no support in any prior *Clayton Act* Section 3 cases for exclusive dealing claims when the exclusive dealing was both de facto AND partial. Also, the dissent noted that the 85% foreclosure figure relied on by the majority was just an estimate of Eaton's actual share of sales both before and during the challenged time period, and did not necessarily represent the share of the market foreclosed to ZFM. The dissent did not agree that there was sufficient evidence that Eaton coerced the OEMs with a threat of cancellation. Only two of the four agreements explicitly allowed Eaton to cancel the agreement if the share targets were not met, and "cancellation" only meant that Eaton would try to recoup its discount, not stop shipping more transmissions. Also, while Eaton was one of only two suppliers to the OEMs, each of those OEMs was one of only four customers, and so stopping all shipments would be economically irrational. Finally, the dissent saw the databook requirements as subjects of negotiation normal to the industry and focused on evidence that ZFM and Meritor had successfully negotiated regarding those terms in the past.

Eaton Petition for Supreme Court Review

Eaton petitioned for Supreme Court review of the 3rd Circuit Court of Appeals opinion on the basis that it creates several conflicts with other appellate cases that have applied the price-cost test of Brooke Group in similar fact patterns and because the opinion conflicts with the Court's general antitrust guidance.

Eaton sees the opinion creating conflicts with prior opinions in the First, Second, Sixth, Eighth and Ninth Circuits. It believes the conflict is sharpest with the clear acceptance of the Brooke Group standard in *Barry Wright Corp*. v. *ITT Grinnell Corp*. (724 F. 2d 227 (1st Cir. 1983)), written by then-Judge Breyer, and *Concord Boat Corp*. v. *Brunswick Corp*. (207 F. 3d 1039 (8th Cir. 2000)). Eaton also argues that some of the factors relied on by the Third Circuit forego use of the test present in some of those conflicting opinions from other Circuits. For instance, the Third Circuit was concerned with the high penetration targets and multi-year terms of the Eaton program. The loyalty discount program of the dominant engine supplier offered to the many boat builders in Concord Boat, however, called for discounts for hitting penetration targets ranging from 60% to 80%, similar to the targets in the Eaton case. Similarly, in *NicSand, Inc*. v. *3M Co*., (507 F. 3d 442 (6th Cir. 2007)(en banc)), the agreements entered at the buyers' insistence with five of the six largest buyers, representing approximately 80% of the market, were for 100% of the buyer's needs and sometimes for multi-year terms.

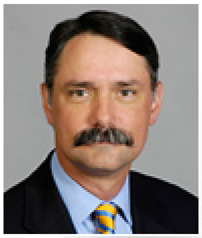
Eaton also likens its databook provisions to the terms present in *Southeast Missouri Hospital* v. *C.R. Bard, Inc*., (642 F. 3d 608 (8th Cir. 2011)). There, the Eighth Circuit applied the price-cost test of Brooke Group despite the fact that the discounting contracts made the defendant the only supplier listed on a group purchasing organization's price lists presented to hospitals. As was true for truck buyers in the Eaton case, the hospitals retained the right to purchase "off contract" from other suppliers. The hospitals had at least two other potential suppliers of the same products who offered lower "off contract" prices and, according to the Eighth Circuit, were not foreclosed from competing for significant sales volumes.

Eaton also claims that the Third Circuit opinion flouts two important general principles from the Court regarding monopolization law. First, the "equally efficient competitor" principle allows pricing-related conduct, even by monopolists, that would not exclude an equally efficient competitor. Eaton quotes the Brooke Group Court explaining that "the exclusionary effect of prices above … costs reflects the lower cost structure of the alleged predator, and so represents competition on the merits." Here, Eaton should not be punished because ZFM and Meritor were unable or unwilling to compete with Eaton's above-cost prices. Second, Eaton claims the majority opinion violates the Court's oft-expressed guidance that antitrust rules should offer businesses clarity and predictability, especially regarding pricing practices. Eaton quotes *Pacific Bell Tel. Co*. v. *linkLine Communications, Inc*. (555 U.S. 438 2009)) for the proposition that clear guidance and safe harbors are necessary because without them "aggressive price competition" would be "chilled". Here, that guidance is violated because the majority opinion offers no explanation for what combination of a discount program and other factors will lead to the application of some test other than the price-cost test of Brooke Group.

Even if the Supreme Court does not use this case to clarify the standards in this area, this case is important for several reasons.

Importance of the Case

Even if the Supreme Court does not use this case to clarify the standards in this area, this case is important for several reasons. First, both the Third Circuit majority and dissent limit the reach of an earlier Third Circuit opinion, LePage's, that had been read (and criticized) by many commentators as potentially preventing pro-competitive conduct without any clear standards. (*LePage's Inc*. v. *3M*, 324 F. 3d 141 (3rd Cir. 2003)) In LePage's the court used a balancing approach, rather than applying Brooke Group, to condemn bundled discounts by a multi-product supplier to the detriment of a single product supplier. According to both the majority and dissent here, the LePage's analysis should be limited to bundling, and Brooke Group would apply to allegedly anticompetitive discounts when only a single product is involved and price is clearly the predominant mechanism of exclusion. Second, Eaton – and now the petition for certiorari – add additional exhaustive analyses of the case law to the numerous opinions and commentaries discussing the competitive effects of aggressive pricing, bundling or exclusive dealing tactics by powerful sellers. Finally, because such cases so often turn on the facts specific to the companies and industry involved, the case's lengthy discussion of the facts here will allow the application of the opinion to other cases.



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Making the Case for an Antitrust Compliance Program

John Bodrug and Erika Douglas

The case for a corporation to adopt an antitrust or competition law compliance program is compelling.

In Canada, the U.S., the E.U. and elsewhere, conduct contrary to antitrust laws can result in:

- Crippling fines and civil damages against the firm[1]
- Significant personal fines and, in some jurisdictions, prison terms for individual employees, including senior officers
- Prohibition orders or consent agreements that restrain a firm's marketplace conduct, potentially putting it at a significant disadvantage relative to competing firms that are not so constrained
- Lengthy and costly investigations, potentially in multiple jurisdictions, that divert employees and senior management from productive activities
- Disqualification from bidding on government contracts
- Damaging adverse publicity

Conversely, effective antitrust compliance policies can:

- Avoid conduct that leads to investigations, charges or lawsuits
- Result in earlier detection of problematic conduct, which provides options for minimizing the adverse consequences – potentially even obtaining immunity from government prosecution
- Provide confidence to employees about areas in which they are free to compete vigorously
- In some cases, provide a defence to prosecution

Nonetheless, the need to adopt and implement an antitrust compliance program may not appear as urgent as many other priorities that senior management deals with on a day-to-day basis, and that compete for limited time and resources.

We do not here address the many reasons for adopting an antitrust compliance program, the specific content of such programs, or the various means by which such a program can be implemented, e.g., computer-based or live presentations, or some combination of media. The January 2013 edition of The Antitrust Counselor included an article by John Terzaken and David Ernst on the lessons for an effective antitrust compliance program from the recent AU Optronics case.[2] This article addresses the related practical question of how in-house counsel can make the

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[1] In 2012, fines imposed for price `fixing and other criminal activity totalled $1.13 billion in the U.S., representing nearly a 50% increase over the amount of fines in 2011. In Canada, comparable cartel related fines were just over $22 million in 2012, up from $295,000 in 2011.

[2] For further information on designing an effective antitrust program, see ABA Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors* 2nd ed (ABA, 2010); William M. Hannay, *Designing an Effective Antitrust Compliance Program*, Volume 11, Corporate Compliance Series 2012 ed. (Thomson Reuters, 2012) or for a global perspective Anne Marie Cushmac, "Developing an Effective

case to senior management for approval to implement an antitrust compliance program. Indeed, senior management must sign on and participate for any compliance program to be effective.[3]

While in-house counsel will be best placed to understand a firm's priorities and what is most effective to get the attention of and persuade senior management, the following are some suggestions that may assist in demonstrating why it makes business sense to adopt an effective antitrust program:

- Make the issue concrete and close to home.
    - Where possible, point to examples of large fines or prison terms for antitrust offences, or major investigations or litigation in the firm's industry or a related industry – or point to experience of one of the firm's affiliates.[4] Management may harbour the sentiment (whether stated or not) that "our employees would not violate the antitrust laws" or "price fixing occurs only in other industries".
    - Examples of surprising antitrust challenges or seemingly inadvertent offences can help to address this sentiment. Depending on the industry, it might, for example, be helpful to point to the 2003 Three Tenors[5] case in which the U.S. Federal Trade Commission (FTC) held that an agreement between two joint venture partners not to advertise or discount two directly competitive products (two previous Three Tenors albums) for a 10 week period around the launch of a new joint venture product (a new Three Tenors album) was illegal under the U.S. conspiracy law.[6]
    - If possible, identify internal documents, such as minutes of trade association meetings or marketing reports, that include language susceptible of adverse interpretation by antitrust regulators – e.g., show how an actual document might be interpreted by an aggressive enforcer.
    - Conversely, the recent decision by the FTC to close an investigation of alleged bias in Google's search engine provides a good example of the benefits of educating employees to document the pro-competitive reasons for policies or actions that may be subject to future scrutiny. The FTC noted that the decision to close the investigation was supported by internal Google documents, such as documents demonstrating that the challenged practices were intended to improve product quality and the user experience.[7]

Global Antitrust Corporate Compliance Program" (Paper, delivered at the ABA Section of Antitrust Law, Spring Meeting, Washington DC 30 March 2011).

[3] See, for example, Competition Bureau, *Corporate Compliance Programs* (September 2010) at s. 4.1, see: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf.

[4] For an index of U.S. antitrust cases by industry see: http://www.stolaf.edu/people/becker/antitrust/by_product.html. For a searchable database of European antitrust cases by economic sector see: http://ec.europa.eu/competition/elojade/isef/index.cfm.

[5] The Three Tenors (Jose Carreras, Placido Domingo and Luciano Pavarotti) released audio and video recordings from concerts at three World Cup soccer events. Polygram distributed the recordings from the first Three Tenors concert in 1990. Warner distributed the recordings from the second concert in 1994. Polygram and Warner formed a joint venture to distribute the recordings from the third concert to be held at the 1998 World Cup.

[6] *Polygram Holdings, Inc.* FTC docket no. 9298 (July 24, 2003). Subsequently the Court of Appeals for the District Columbia Circuit denied Polygram's petition for review of the FTC decision: *Polygram Holdings Inc.* v. *Federal Trade Commission*, No. 03-1293 (D.C. Cir.) 2005.

[7] The FTC noted that "while Google's prominent display of its own vertical search results on its search results page had the effect in some cases of pushing other results "below the fold," the evidence suggests that Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information. For example, contemporaneous evidence demonstrates that Google would typically test, monitor, and carefully consider the effect of introducing its vertical content on

- Compare the proactive implementation of an antitrust program to other business activities to which the firm commits significant resources.
  - If a firm spends a large amount of time and money each year on maintenance for its plant and equipment, management is not waiting for a breakdown to occur before investing to avoid equipment damage and production delays. Particularly for a service based business, searches, subpoenas, and lawsuits alleging antitrust violations ("antitrust events") can diminish a firm's productive capacity in much the same way as, and perhaps more extensively than, an equipment failure for a hard goods manufacturer. Spending on maintenance or insurance is typically not up for debate – the same principle should apply to antitrust training.

- Compare the compliance program to other types of compliance training, such as environmental, HR or internal procedures, the need for which is accepted without debate. Contrary to some types of other accepted forms of compliance training, antitrust training affects many employees in their day-to-day business activities.
  - Like an undetected slow leak of a hazardous substance, the consequences of an ongoing antitrust violation can grow over time to increasingly problematic levels in the absence of an effective antitrust compliance program that encourages all relevant employees to identify and report conduct that raises issues.

- Point to past successes where an employee has raised a compliance issue (ideally but not necessarily in an antitrust context) that enabled the firm to take swift action to avoid a regulatory violation or the risk of a lawsuit.
  - For example: shutting down or clarifying the nature of a communication among competitors at a trade association meeting, or avoiding ambiguous communications in the context of a termination of a customer or the explanation of pricing changes.

  - Use external examples, such as the Canadian cartel prosecution of Edmonton land surveyors that was dismissed after a preliminary hearing (following a lengthy Competition Bureau investigation) largely because one participant at an industry meeting vocally and emphatically objected to a proposed common fee policy under discussion at the meeting.[8]

- Identify particularly litigious customers or suppliers who would not hesitate to include allegations of antitrust violations in a lawsuit.
- Quantify the bottom line impact of an antitrust event.
  - The time it takes to approve and implement an antitrust program is far less than the cost and diversion of management time and company resources associated with an antitrust event, even if the firm and its employees are proved innocent in the end. While it is difficult to obtain public information about the cost of complying with antitrust subpoenas or discovery obligations in litigation, the cost of responding to "second requests" from U.S. antitrust authorities in merger reviews may provide a useful benchmark. Some studies suggest that even as of 2005, the cost of responding to a second request

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the quality of its general search results, and would demote its own content to a less prominent location when a higher ranking adversely affected the user experience." See Statement of the Federal Trade Commission Regarding Google's Search Practices *In the Matter of Google Inc.*, FTC File Number 111-0163, January 3, 2013, at 2, available at: http://www.ftc.gov/opa/2013/01/google.shtm.

[8] See *R.* v. *Bayda and Associates Surveys Inc.* (1997) 78 C.P.R. (3d) 203 (Alberta Queens Bench).

ranged from U.S.$3.3 million (on average) to up to U.S.$20-25 million for the most complex cases.[9]

- Create a relevant hypothetical scenario and estimate the potential fine or civil damages in the event of a price fixing offence in respect of a key product for even a one year period. A common starting point for the calculation of cartel fines is 20% of the affected volume of commerce.[10]

- If government contracts are critical to the firm's business, estimate the lost revenues that would result from a disqualification of your firm and its affiliates from future government tenders.[11]

- Address unstated (or stated) fears that an antitrust compliance program would lead to paralysis and employee confusion. Consider providing senior management with a draft one-page list of the top 10 Dos and Don'ts as an example of the practical advice that can form part of the program.
  - The early identification of issues, and legal review if necessary, before parameters of a project are entrenched can save time and money – just as it is easier to fix a design problem in a new building before the concrete is poured. Many organizations can likely point to examples where some additional advance planning would have prevented the subsequent incurring of a significant expense.

- Make the decision easy. Come prepared with a specific proposal, e.g., adopt a written policy/post on the company website, incorporate it into an existing policy manual, a one hour presentation at the next regular sales meeting, and have a specific budget. If the organization is large, consider proposing to initially roll out a program to one business unit (e.g., one with relatively greater antitrust risk).
- Lastly, pick the right time to make the proposal. Recognize that if the firm is in the midst of some unusual crisis or particularly busy period, then antitrust compliance may not get to the top of the list.

Proactively addressing antitrust compliance makes business sense. Conversely, the absence of an antitrust compliance policy combined with behaviour that is off-side may well be considered by enforcement agencies as indicative of a corporate culture that condones unlawful conduct.

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[9] The American Bar Association – Responses to the Consultation on the Draft Enforcement Guidelines on the Revised Merger Review Process (May 2009) citing "Data Regarding the Burden Involved in Responding to HSR Second Request Investigations" (Letter to Antitrust Modernization Commission, dated February 22, 2007). A more recent study reported that an average of 1.8 million pages of documents were produced in such a response, all of which require review by the producing party or their counsel before being provided to competition authorities.

[10] 2012 United States Sentencing Commission Guidelines Manual, s. §2R1.1(d)., Competition Bureau, *Leniency Program* (September 2010), s. 3.2.

[11] Public Works Canada recently amended its policy to require that all bidders on federal government contracts represent that neither the bidder nor any of its affiliates has ever been convicted of, among other things, price fixing, bid rigging or misleading advertising offence under the *Competition Act* (Canada): http://www.tpsgc-pwgsc.gc.ca/biens-property/ci-ic-eng.html. The changes are explained in the policy notification available here: https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107.

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