Fisher Broyles

CLIENT ALERT
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THE CASE FOR A STRONG ANTITRUST COMPLIANCE PROGRAM

An Ounce Of Prevention Is Worth A Pound Of Cure

Antitrust enforcement agencies have been in the news lately with blockbuster lawsuits against Big Tech companies such as Google, Amazon, and Facebook's parent Meta. But while these cases have garnered the major headlines, the fact is that hundreds of antitrust cases are filed each year in federal and state courts challenging a broad range of conduct that government and private party plaintiffs claim harms competition.

For example, antitrust lawsuits target collaborative relationships among competitors such as joint ventures, trade associations, information exchanges, and industry standards bodies that allegedly step over the line from permissible collaborations among competitors to vehicles for anti-competitive collusion. Antitrust lawsuits also target business relationships among manufacturers, vendors, dealers, and end customers that involve intellectual property license restrictions, exclusivity agreements, tying or bundling products together, predatory pricing, and other technical or economic market entry barriers to competition. And some antitrust lawsuits challenge alleged attempts by monopolists to thwart new competitors from entering markets in which the monopolists operate.

There are many minefields in antitrust law that could trip companies up in their day-to-day business activities if they are not careful. And that requires awareness of what those minefields are and how to avoid them. Ignorance of the law is not an excuse for a violation. For this reason, a strong, comprehensive antitrust compliance program tailored to a business's particular circumstances is a practical necessity in today's highly litigious environment.

FisherBroyles' antitrust practice includes working with its clients to build such an antitrust compliance program. The purpose is not to turn a client's business folks into antitrust experts or to replace case-by-case consultation with antitrust counsel as specific issues arise that could raise antitrust concerns. The purpose is to sensitize the client's directors, managers, and employees involved in competitively sensitive activities such as marketing, sales, strategic planning, and product development to hot button antitrust issues. That way, they will hopefully make their concerns known internally through the appropriate

channels, including the client's legal counsel, before unknowingly leaping ahead with conduct that puts the client into serious legal jeopardy.

Why Firms Without an Effective Antitrust Compliance Program are Living Dangerously

Businesses and their personnel can get into antitrust hot water without even realizing the legal problems they face until it is too late. The Department of Justice is aggressively investigating and prosecuting companies in competition with each other who join together in some manner to raise, depress, peg, or stabilize prices, or to divide up markets. It makes no difference how big the companies are, how much money they make, or what industries are involved.

Proof of an agreement that is formal or in writing among competitors is not necessary to establish antitrust liability. Casual conversations, exchanges of competitively sensitive information, or use of a proprietary pricing algorithm in common by competitors can lead to an inference of concerted action for anti-competitive purposes that could lead to criminal prosecution.

A criminal antitrust violation can result in fines to companies of up to $100 million or double the loss or gain from the violation, while individuals could be fined up to $1 million or double the loss or gain as well as face potential jail time of as much as ten years.

Even if businesses that violate the antitrust laws do not face criminal charges, they can still face very serious legal consequences. Civil lawsuits brought by enforcement agencies can result in monetary damages and/or injunctive relief. Moreover, any business or customer alleging injury caused by a company's anti-competitive conduct can bring its own private party action against that company and recover treble damages if the defendant is found to be liable for an antitrust violation. For example, the National Association of Realtors was hit recently with a whopping jury verdict in federal court, which found that the association and some member real estate brokerages had engaged in a price-fixing conspiracy involving the setting of real estate agent commissions. The jury awarded damages of $1.8 billion, which may be trebled to more than $5 billion.

Most antitrust cases fall into more ambiguous areas of the law than outright cartels and are analyzed under what the courts have called the Rule of Reason. This intensive, fact-based analysis requires the court to weigh the conduct's anti-competitive effects that harm consumers in a defined relevant market

against the conduct's pro-competitive benefits such as greater production efficiencies of scale or sharing the costs of complex, expensive research and development.

Collaborations among competitors such as joint ventures, trade associations, and industry standards bodies are ordinarily analyzed under the Rule of Reason unless they are obviously being used to cloak a price-fixing or market division conspiracy. Business relationships among manufacturers, vendors, dealers, distributors, and end customers are also most often analyzed under the Rule of Reason. These cases are iffy propositions, especially when the businesses involved are deemed to have any market power. Many of them have ended badly for defendants, resulting in significant adverse financial and reputational consequences.

How the Right Antitrust Compliance Program Helps Businesses Stay Out of Trouble

A robust, comprehensive antitrust compliance program is the best preventive measure that businesses can take to avoid significant antitrust pitfalls arising from their interactions with competitors, customers, vendors, dealers, distributors, and other third parties. An effective antitrust compliance program consists of tailored antitrust guidelines, annual antitrust training programs, follow-up procedures, and regular reviews by antitrust counsel of business activities that may affect the competitiveness of the markets in which the businesses operate.

The Department of Justice has recently adopted a policy that gives more attention to whether a business charged with a criminal violation of the antitrust laws has a strong antitrust compliance program when determining whether to bring charges, negotiating a plea or other agreements, and recommending an appropriate sentence. Under this policy, prosecutors are instructed to "examine the comprehensiveness of the compliance program, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce."

Before giving the company any credit for its antitrust compliance program, the Department of Justice looks at its quality, comprehensiveness, reach, and follow-up. A compliance program that the senior management and employees treat simply as a "check the box" exercise will not cut it. The Department must be satisfied that the company's senior management is committed to what the Department calls a "culture of compliance" throughout the company.

This same “culture of compliance” can prevent missteps that may not be criminal in nature but nevertheless fall into the category of anti-competitive conduct under a Rule of Reason analysis that can result in a treble damages verdict against the defendant.

In short, without the right antitrust compliance program, a company is at far greater risk of stepping over the line and violating the antitrust laws, which could cost the company dearly.

What an Acceptable Antitrust Compliance Program Should Look Like

This section summarizes key considerations identified by the Department of Justice in determining the effectiveness of a company’s antitrust compliance program in sensitizing its personnel to the types of conduct that violate the antitrust laws and the consequences of such violations:

1. Is the program adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and is senior corporate management directly involved in enforcing the program? What company resources are dedicated to monitoring antitrust compliance? How are these resources used to ensure detection and remediation of a possible violation, especially in areas of high risk such as interactions with competitors and handling of competitively sensitive information (e.g., sales, strategic market planning, and pricing) as well as business arrangements and terms of dealing that could potentially foreclose competitors from access to customers, suppliers, or a critical asset needed to remain viable in a relevant market?

2. What methodology and information has the company used to identify, analyze, and address the antitrust risks it faces?

3. What is the company’s process for designing and implementing new policies and procedures and updating existing policies and procedures to take account of these antitrust risks?

4. Is the compliance program reviewed periodically and updated to reflect any relevant changes in the company’s business, markets, legal landscape, and associated antitrust risks?

5. What antitrust guidelines and training have been provided to the company's directors, management, and relevant employees, such as marketing, sales, and product development personnel, that are sufficiently tailored to the company's business to alert them to what potential misconduct to look for? What steps has the company taken to document that they have received and understand the antitrust guidelines (including all revised versions) and have also attended training programs at least once a year?

6. Have supervisory employees and employees who are engaged in the most high-risk activities received any supplementary training?

7. Has the training been offered in the form and language appropriate for the audience and is there an opportunity for attendees to ask questions?

8. Have the antitrust training materials and guidelines been updated to address evolving business developments and lessons learned from prior compliance incidents?

9. What guidance has been provided on how to obtain antitrust legal advice on a case-by-case basis as needs arise?

10. What mechanism is in place by which employees can report and escalate anonymously or confidentially, without fear of retaliation, any concerns they may have regarding problematic behavior they learn of within the company that could heighten the risk of an antitrust violation? What is the company's process for investigating such reports and holding those responsible for bad behavior accountable?

The Department of Justice uses these considerations to evaluate whether a criminal defendant's antitrust compliance program is good enough to merit more lenient treatment for the defendant. But businesses found liable for engaging in anti-competitive conduct in violation of the antitrust laws will face serious financial and reputational consequences irrespective of whether the conduct crosses over the line into criminal territory. That is why it is so important for all companies engaged in any business activities that could possibly affect competition in one or more markets in which they operate to develop, implement, maintain, and update a robust, comprehensive antitrust compliance program.

Antitrust counsel should be involved to make sure that the compliance program is fit for purpose. This is where FisherBroyles, the world's first and largest distributed, full-service law firm partnership, comes in. FisherBroyles offers legal counsel to its clients on a wide range of antitrust issues that businesses face in their day-to-day activities and dealings with other businesses and customers. Its antitrust practice includes the preparation of client-focused, gold standard antitrust compliance written guidelines, training, and follow-up procedures. We are here to assist our clients in any way that we can to significantly lessen their antitrust risks while still being able to successfully pursue their business objectives.

For additional information, please contact Joseph Klein at joseph.klein@fisherbroyles.com, with any questions or more specific situations.

About FisherBroyles, LLP

Founded in 2002, FisherBroyles, LLP is the first and world's largest distributed law firm partnership. The Next Generation Law Firm® has grown to hundreds of partners practicing in 24 markets globally. The FisherBroyles' efficient and cost-effective Law Firm 2.0® model leverages talent and technology instead of unnecessary overhead that does not add value to our clients, all without sacrificing BigLaw quality. Visit our website at www.fisherbroyles.com to learn more about our firm's unique approach and how we can best meet your legal needs.