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Perspectives on Antitrust Compliance

Anne Riley, Andreas Stephan, Anny Tubbs

Foreword by John WH Denton AO

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PERSPECTIVES ON ANTITRUST COMPLIANCE

Foreword by John WH Denton AO

Edited by

Anne Riley
Andreas Stephan
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Foreword

JOHN WH DENTON AO

Secretary General, International Chamber of Commerce

At the time I am writing this foreword, the COVID-19 pandemic has redefined nearly every policy discussion in countless economic sectors and realms, weighing in as much on the way companies conduct business as on the methods espoused by governments and regulators in responding to these new challenges. At the International Chamber of Commerce (ICC), rethinking global trade to help millions of businesses in developed and developing countries address the daunting impediments to economic growth has become one of our key priorities for the next decades. Rooted in a hundred-year-old history, during which we have witnessed the power of international trade in responding to a global crisis and in rebuilding nations, our renewed mission – to promote global trade and investment as drivers for inclusive growth and prosperity to the benefit of all – has never been more relevant.

Preserving the nascent growth of economies and enabling global business to remain on the recovery slope means placing sustainability, resilience and ethical corporate conduct at the heart of business strategies. The last few decades have seen a prolific increase in compliance and legal requirements related to antitrust law on a global scale, a trend that has affected the way companies – whether multinationals or small and medium-sized enterprises (SMEs) – operate. While effective antitrust enforcement is well recognised and sought, the role that antitrust compliance programmes play in antitrust enforcement continues to be an important issue on numerous antitrust enforcers' agendas, as well as those of international bodies such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN). Within the business community, companies' understanding of how best to tailor antitrust compliance programmes is often overestimated.

So, what can we do, going forward, especially when the COVID-19 crisis has prompted us to think and live our lives differently? Looking forward, businesses must have the right tools and guidelines to develop and set up robust antitrust compliance programmes. Clear and consistent guidance from antitrust enforcers supporting such programmes is key.

Foreword

This publication crowds in the immense knowledge of a selection of renowned international antitrust compliance experts including academics, in-house counsel, private practitioners, economists, consulting firms and antitrust enforcement agency senior officials. It aims to demystify corporate antitrust compliance programmes on the one hand, and to address antitrust compliance and enforcement in the new era, on the other.

ICC is honoured to partner with Concurrences on the publication of *Perspectives on Antitrust Compliance*. With a tremendous amount of insights on antitrust compliance and related topics, this book is a fabulous reference and an invaluable, forward-looking contribution to the debates.

About the Editors

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Anne Riley was Head of Shell plc’s global antitrust group until she retired at the end of February 2019. Anne was also a member of Shell’s Group Ethics and Compliance Office Leadership Team until her retirement. Anne is currently Co-Chair of the International Chamber of Commerce (ICC) Task Force on Antitrust Compliance policy harmonisation and is a Non-Governmental Adviser (NGA) to the European Union (DG COMP) for the International Competition Network. She has been awarded several Legal and Compliance Awards, including “Women in Compliance, Innovator of the Year”, and received the Society of Compliance and Ethics Special Recognition Award in 2019 on behalf of the ICC.

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Chapter 1

Introduction

ANNE RILEY, ANDREAS STEPHAN AND ANNY TUBBS

This book makes an original and timely contribution to the important long-standing debate surrounding the function and design of antitrust compliance programmes. It captures a wide cross-section of research and practical insights from academics, practitioners, in-house counsel, competition authority staff and NGOs. This collection is unique because it includes a very diverse and multi-disciplinary set of views on what constitutes good compliance. Unlike some of the previous literature on this subject, it seeks to embrace varied perspectives from compliance and does not seek to prescribe or champion one particular vision of what good antitrust compliance should look like. It is important (in particular) to remember that every industry and corporate entity faces unique compliance risks and that an approach that works well for one business may be less appropriate and effective for another.

The timing of this collection is significant. Companies around the world are arguably at a crossroads where global societal compliance challenges need our attention as never before. The impact of big tech and increasing automation of business practices is resulting in an increasingly fluid regulatory landscape, in which legislators are beginning to look beyond traditional competition law tools of enforcement. The climate emergency has also focused the minds of competition regulators and business on whether greater cooperation on sustainability goals is being hampered by the threat (or even the perceived threat) of antitrust enforcement. Policy changes on climate will need careful management, while the response of companies to these challenges presents its own compliance dilemmas. An important element here is to avoid the “chilling effect” that a fear of non-predictable antitrust enforcement can have in preventing legitimate cooperation between competitors (including sustainability initiatives and more widely). Finally, the COVID-19

pandemic caused significant disruption to businesses and may have fundamentally changed the way in which many businesses operate – for example in accelerating a move towards more flexible home-working patterns.

As well as having to negotiate these challenges, businesses must face up to the fact that compliance is no longer the preserve of antitrust and other regulated areas: the need to embed a culture of “doing the right thing” extends far beyond. Antitrust compliance cannot be viewed in isolation or succeed in a vacuum. Antitrust compliance is (of course) important, but it is necessary to understand that it is one of many compliance challenges facing companies today. Over the last decade there has been increased focus on the environment, sustainability and good corporate governance generally, in many ways prompted by shareholder action and activism. This has led to an increased focus by many companies on the need to conduct business ethically and with integrity. In turn there has been an “explosion” of new (or materially strengthened) laws in many compliance disciplines – such as laws relating to anti-bribery and corruption (ABC), anti-money laundering (AML) and data privacy, and increasingly in other areas such as the prevention of human slavery and trafficking, and the proliferation of trade controls and sanctions laws.

To encourage appropriate internal resource allocation (particularly to compliance teams and advisers not traditionally thought of as “business-generating”), regulators behind many compliance disciplines outside the antitrust field recognise (and in some cases give credit for) the adoption of “adequate (compliance) procedures” and genuine compliance efforts. At the same time, there has been a recognition (particularly among larger companies) that compliance efforts need to be more holistic. Accordingly, antitrust compliance is increasingly seen by companies not as a standalone topic, but as part of a suite of compliance efforts needed by companies to ensure that they comply with societal and shareholder expectations.

For many, the approach of antitrust agencies is at odds with this trend and with the thinking and culture in other areas of compliance. While there are competition authorities who actively encourage and reward genuine compliance efforts through discounts in fines, there is no clear movement in this direction internationally. Indeed, while some (most notably the US Department of Justice) have become more willing to recognise genuine compliance efforts, other agencies have chosen to abandon pro-compliance adjustments to fines. The majority view among antitrust agencies still appears to be that the threat of very significant fines provides incentive enough for companies to invest in antitrust compliance and take it seriously.

Some antitrust agencies point to how genuine compliance can generally give companies an edge in coming forward and benefiting from leniency, and that competition law is unique in offering complete immunity from public fines to the first party to an anticompetitive agreement to approach the competition

authority.¹ A key flaw in this view is that it implies even a single failure by an individual within a company amounts to a “failure” in compliance, however robust and sincerely embraced by the company’s senior management. This is heightened by the fact competition law infringements do not generally have regard to the intentions of the parties, whether an anticompetitive arrangement was properly implemented or if it had any actual effect on the market. When dealing with such widely drawn prohibitions there is no such thing as “zero risk”, and antitrust is generally acknowledged to be more difficult and complex to interpret than other compliance fields. This makes it particularly challenging for small and medium-sized businesses, who may have limited resources and knowledge of this area of regulation.

Despite this divergence in compliance cultures, the last decade has seen increased engagement between the business community and antitrust agencies on the importance of promoting and encouraging antitrust compliance efforts. This debate has been facilitated by increased agency advocacy, discussions at the International Competition Network (ICN), the OECD, UNCTAD and compliance publications from business organisations such as the International Chamber of Commerce,² among others.³ A genuine compliance programme is a substantial, ongoing commitment. It requires significant time and resources from individuals at all levels of the business if it is to be successful. The temptation, in the current climate, may be to regard such efforts as an expensive luxury. The reality is that compliance programmes have never been more necessary. Prudent organisations should see them not merely as a cost, but as an investment in risk management. We must also be aware of a broader priority – to achieve compliance with the law because it is “the right thing to do” and not principally because of fear of enforcement and significant fines.

This publication is therefore designed to assist all stakeholders, whether these be in-house competition law experts and compliance officers, external counsel advising on competition law and compliance or indeed regulators, policymakers and academic researchers. After setting out the rationale for competition law design and enforcement, as well as the elements of a credible compliance programme (Part I), the book provides some academic perspectives (Part II). These include the uneasy relationship between antitrust and business strategy (Ennis), the use of screening in antitrust compliance (Abrantes-Metz and Metz), the important role of normative values (Gentile and Tubbs), the use of behavioural tools (Banuri), and the interaction between detection, sanction and compliance

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- 1 For a discussion of the extent to which this may be true in relation to the chemicals industry, see Gianni De Stefano and Andreas Stephan, “The Impact of Cartel Enforcement on Compliance in the Chemical Industry” (2022) JECL & E (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3922923>.
 - 2 ICC Antitrust Compliance Toolkit (*ICC*, 2013) <iccwbo.org>; ICC SME Toolkit: Why complying with competition law is good for business (*ICC*, 27 April 2015) <<https://iccwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business/>>.
 - 3 See, e.g., ABA, *The Antitrust Compliance Handbook: A Practitioner's Guide* (ABA 2019).

(Combe and Monnier). We then turn to practical perspectives (Part III) on the role of compliance and its effectiveness at protecting businesses from exposure to antitrust fines and damages. This includes contributions from competition authorities (Competition Bureau Canada, CADE, Hong Kong Competition Commission), in-house counsel (AB InBev, Ericsson, BHP Billiton, Grupo Tasa Logística, Intesa Sanpaolo), law firms (Baker McKenzie, Norton Rose Fulbright, BakerHostetler, Caminati Bueno Advogados), consultancies (Fingleton, PwC), examples of those seeking change (Miazad, Medicines for Europe, Basel Institute on Governance, Maritime Anti-Corruption Network, International Chamber of Commerce, Unilever) and a unique insight into the perspective of the price-fixer (Stephan). Finally, Part IV focuses on the interaction between antitrust and other areas of compliance, including anti-bribery and corruption (McBride, Shvets and McIver) and a broader perspective by Murphy.

With such a diverse spectrum of perspectives on antitrust compliance, some of the views presented in this book cannot be easily reconciled and sometimes even appear contradictory. The conclusion seeks to highlight the key contributions and learnings of this collection of essays and how they further our understanding and knowledge of antitrust compliance. It identifies where the contributions appear to pull in different directions, but leaves it open to the reader to decide which perspective is more convincing or better informs the compliance challenge for a particular business or industry. We hope this book will provide a useful platform to foster further constructive debate, exchange of knowledge and future research on the topic.

Perspectives on Antitrust Compliance

Anne Riley, Andreas Stephan, Anny Tubbs

Foreword by John WH Denton AO

Companies around the world are arguably at a crossroads where global compliance challenges need attention as never before. Increasingly, antitrust compliance is seen by companies not as a standalone topic, but as part of a suite of compliance efforts needed by companies to ensure that they comply with societal and shareholder expectations.

This book makes an original and timely contribution to the important debate surrounding the function and design of antitrust compliance programmes. Crowding in the immense knowledge of a selection of renowned international antitrust compliance experts including academics, in-house counsel, private practitioners, economists, consulting firms and regulators, it seeks to embrace varied perspectives rather than championing one particular vision of what good antitrust compliance should look like. The publication is designed to assist all stakeholders, while appreciating that every industry and corporate entity faces unique compliance risks and that an approach that works well for one business may be less appropriate and effective for another.

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