

“Risks and Reward: Building an Antitrust Compliance Program,”

a working paper by

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Like many Americans experiencing the current global pandemic, I found myself binge watching television shows previously overlooked. One recent show took on a familiar topic: corporate compliance. In this particular tale, a storied CEO explains to his chief compliance officer that the purpose of a legal compliance program is to assess and advise of the legal risks to allow the company to make informed decisions. Ultimately, the company decides what level of risk it is willing to take on.

Simple enough advice, and accurate. The complicated subtext to that directive, however, is how to lay the foundation to get to the point where the company, key stakeholders in particular, trusts and appreciates the legal risks and guidance an antitrust compliance team identifies.

The fundamentals for a successful antitrust compliance program can be divided into three categories: objectives, tools and resources, and implementation. First, the compliance program’s objectives must be set. The objectives frame the issues with which the company is trying to comply. Next, identify the tools and resources at the compliance program’s disposal. The tools and resources, in turn, determine how robust a program can be developed. Finally, commit to implementation. Implementing a compliance program that meets business needs and allows for continuity and reinforcement will have a lasting, positive impact on the company.

There are many resources available which discuss these and other aspects of a successful antitrust compliance program. This paper gives a cursory overview of three elements and offers practical tips to incorporate them.

Objectives

The first step in creating an antitrust compliance program is determining the program’s objectives. The legal goals should consider and be designed to help the business achieve its goals. For some companies, the goal is seemingly simple but broad: detect and prevent antitrust violations before they occur. In those cases, identifying specific needs and milestones can help frame the issues for a comprehensive program. For other companies, compliance issues present themselves in the midst of an ongoing government investigation or private civil action, intertwined with ongoing business activities. In those cases, specific compliance objectives may be harder to determine and separate from the ongoing legal crisis; adhering to broader principles may help navigate the current issues and create a lasting program by default.

In the antitrust context, different companies face different types of legal risk. For instance, cartel behavior could expose the company to both criminal and civil liability. Monopolization issues could force a company to overhaul an entire business unit. Other companies require antitrust compliance as they move through merger and acquisition cycles or consider distribution issues. Antitrust risk also varies depending on the region and industry in which the company operates. All of these factors inform the type of compliance program to develop, along with three overarching themes: prevention, detection and mitigation.

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Preventing employees from engaging in conduct that may violate the antitrust laws reduces risk of:²

- Criminal penalties brought by antitrust enforcement agencies. The U.S. Department of Justice (DOJ), for instance, levies criminal penalties against companies and individuals who engage in cartel behavior such as agreeing to fix prices, bid rig, reduce output or allocate customers, which can include jail time and fines upwards of \$100 million.
- Treble damages. In the United States, companies subject to civil antitrust lawsuits can incur damages up to three times the plaintiffs' actual damages, plus attorneys' fees. In the class action context, such damages awards can be substantial, and may include joint and several liability.
- Major business disruptions. Findings of antitrust liability or anticompetitive conduct could force companies to modify business practices or relationships with others in the value chain or, in worst case scenarios, completely overhaul or divest entire business units.
- Reputational Harm. Even the mere threat of anticompetitive behavior can be disruptive to business, causing customers and suppliers to question the longevity of the relationship. Customers may also feel wronged, and seek to terminate the relationship, negotiate different contract terms, or file civil suit of their own.³

Prompt and early detection enables the antitrust compliance team to:⁴

- Assess and advise stakeholders of all risks at an early enough stage to minimize legal exposure and align expectations.
- Take advantage of programs such as leniency applications in a cartel context or icebreaker settlements. The former can lead to immunity from or reductions in fines and prison sentences, and reduced damages in follow-on civil actions.
- Formulate a litigation strategy that can proactively defend the company instead of being reactionary to the allegations levied against it. In some instances, early detection allows the company to undertake an internal investigation that may identify likely allegations before complaints are filed.⁵

Mitigating future risk can:⁶

- Reduce legal liability by implementing measures to deter potentially unlawful conduct at the outset.
- Reduce exposure during criminal antitrust investigations. An effective compliance program is considered during charging and sentencing stages.
- Create corporate efficiencies and cost savings by reducing the scope of future complaints and investigations.
- Help the company understand its risk profile. Not all decisions are binary in that a company can pursue a course of either zero or significant risk. Practically, many businesses include some level

² See Antitrust Compliance Programs, Practical Law Antitrust, Practical Law Practice Note (2020).

³ *Id.* See also Eleanor Tyler, *ANALYSIS: The Big Trend in Antitrust 2020 is Uncertainty*, Bloomberg Law 2020 (Nov. 4, 2019) available at <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-big-trend-in-antitrust-2020-is-uncertainty> (discussing uncertainty policy disagreements among antitrust regulators can create and import of antitrust compliance efforts).

⁴ See Antitrust Compliance Programs, Practical Law Antitrust, Practical Law Practice Note (2020).

⁵ *Id.*

⁶ See Antitrust Compliance Programs, Practical Law Antitrust, Practical Law Practice Note (2020); Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

of antitrust risk, and the determination is whether the company is comfortable proceeding with that level of risk.

- Allow for informed decisions within a company. With the antitrust risk properly assessed and reduced to the extent possible, executives can undertake business objectives well-informed of the related benefits and legal risks, monetary and non-monetary.⁷

Tools and Resources

Once objectives have been determined, the next step is to identify the tools and resources available to formulate the antitrust compliance program. Compliance programs range in scope and complexity, depending on the company's size, needs and risk profile. Some common elements of a compliance program include:⁸

- Strong internal leadership, whether through a chief compliance officer or robust compliance team, with buy-in from business executives;
- Established and documented procedures to easily and confidentially report internal violations;
- Ongoing training and communication;
- Oversight by independent third parties;
- Monitoring and auditing program effectiveness; and
- Ongoing risk assessment.⁹

The resources a company may draw upon to incorporate these elements also vary, depending on need, capital (both human and financial) and overall program and company size. A relatively small company with fewer financial resources to devote to a compliance program may look to online resources, which can include:

- Online tools such as The Model Antitrust Compliance Manual published by the American Bar Association¹⁰ or, for international programs, the Guidance on Enhancing Cross-Border Leniency Cooperation published by the International Competition Network;¹¹
- Practical Law guides, such as those referenced in this note;¹² and

⁷ See Antitrust Compliance Programs, Practical Law Antitrust, Practical Law Practice Note (2020); Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

⁸ Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

⁹ *Id.* See also Magdalena Jakubicz, Creating and Implementing an Antitrust Compliance Program, Association of Corporate Counsel (Jan./Feb. 2017).

¹⁰ Kirk S. Jordan, Model Antitrust Compliance Manual, C900-ALI-ABA 283 (1994).

¹¹ International Competition network Cartel Working Group, Guidance on Enhancing Cross-Border Leniency Cooperation (2020), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf?utm_medium=email&utm_source=govdelivery.

¹² See, e.g., Antitrust Compliance Programs, Practical Law Antitrust, Practical Law Practice Note 9-500-4178; Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

- Online and publicly available statements by regulatory agencies, such as the DOJ Criminal Division’s Evaluation of Corporate Compliance Programs.¹³

Agency publications can be particularly helpful. For instance, the DOJ’s Evaluation of Corporate Compliance Programs lists three fundamental questions used to guide its assessment of a program’s effectiveness (which can have mitigating effects):

- “Is the corporation’s compliance program well designed?”
- Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
- Does the corporation’s compliance program work in practice?”¹⁴

Other publications, such as agencies’ guidance on intellectual property, human resources practices, or international operations,¹⁵ can help identify where employee training may be more critical within the company.

More robust compliance programs may incorporate additional tools such as:

- Software programs that implement controls to proactively prevent employees from engaging in potentially unlawful conduct;
- Engaging internal audit teams to test implemented controls as well as the compliance program generally; and
- Engaging outside counsel to advise on the efficacy of the compliance program.

Regardless of the amount of resources and tools, two key components to any successful compliance program are training and executive sponsorship. Simple but effective, employee trainings reinforce the compliance program’s objectives and help communicate potential risk. Trainings can be easily developed with scarce resources and tailored to fit the business needs, no matter how large or small the company. Sponsorship at the executive level ensures that the trainings and compliance program guideposts are internalized and followed by all employees at all levels.

Implementation

A compliance program’s success depends on its implementation. If implemented well, a compliance program survives beyond the immediate antitrust issues to have a lasting impact on the company, aligning

¹³ U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (2020) available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

¹⁴ *Id.* See also Robert M. Langer, Benjamin H. Diessel, Timothy Cowan, *The Important New Guidance – How an Effective Antitrust Compliance Program Could Prevent Criminal Charges Against Your Company*, *The National Law Review*, (Nov. 8, 2019) available at <https://www.natlawreview.com/article/important-new-guidance-how-effective-antitrust-compliance-program-could-prevent>.

¹⁵ See, e.g., U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017), available at https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf; U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (2016), available at <https://www.justice.gov/atr/file/903511/download>; U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for international Enforcement and Cooperation (2017), available at <https://www.justice.gov/atr/internationalguidelines/download>.

company and legal objectives as well as stakeholders. To do so, the compliance program's objectives must be visible, known, and reiterated and reinforced often. The benefits from such implementation can include:

Improved company operations.¹⁶ Among other things, a well-implemented antitrust compliance program can reduce inefficiencies by eliminating unnecessary tasks, reducing costs associated with post-hoc investigations, and optimizing resource allocation by identifying areas of higher risk and devoting financial and human capital to the areas in need.¹⁷ A well-considered and executed compliance program also minimizes future business disruptions, with business records and employees potentially subject to antitrust issues identified and properly trained.

Trust between company stakeholders and the legal team.¹⁸ A significant benefit from successfully implementing an antitrust compliance program is stakeholder trust. If executed correctly, the compliance program increases transparency about the importance of complying with the antitrust laws as well as the importance of communication at the highest levels. With those elements in place, stakeholders become more willing to bring potential antitrust concerns to the legal team, allowing the legal team to assess the risk and advise on the appropriate next steps.

A culture of compliance, facilitating early detection and deterrence. All of the above culminates in a culture of compliance. Employees who are attending trainings, buying in to compliance objectives, and internalizing the value of complying with antitrust laws are less likely to engage in conduct that subjects the company to antitrust investigations. They are more likely to proactively raise issues to the compliance organization. While antitrust investigations and complaints may not go away, resolving them will be less burdensome on all involved, taking less time and financial resources away from company operations.

¹⁶ Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

¹⁷ Advantages of Implementing a Legal Compliance Program, Practical Law Commercial Transactions, Practical Law Practical Note (2020).

¹⁸ *Id.*