ANTITRUST COMPLIANCE TOOLS FOR IN HOUSE LAWYERS

In-house lawyers have access to a number of different tools to monitor and encourage antitrust compliance. This article briefly introduces those different compliance tools.

Businesses of all sizes, at all levels of the supply chain, require effective competition law compliance policies, guidelines and strategies. Over 130 jurisdictions worldwide have enacted competition laws, with the majority of these laws applying extraterritorially. The American, European and Chinese regulators have each imposed record breaking fines in recent years, more often than not levied against companies that are not headquartered in the fining jurisdiction but merely sell products into the global stream of commerce; for example, the US Department of Justice fined AU Optronics Corporation of Taiwan USD 500 million and the European Commission fined LG Electronics EUR 687 million. Moreover, in 2017, the US Department of Justice fined Citigroup USD 925 million for cartel conduct in relation to foreign exchange trading. In 2016, the European Commission fined Daimler EUR 1,008 million for its participation in the trucks cartel. In 2015, the Chinese regulator fined Qualcomm USD 975 million for anti-competitive practices. By encouraging awareness and developing an internal culture of compliance, competition law policies can minimise the risk of infringement and ultimately reduce the potentially staggering costs associated with anti-competitive behaviour.

Antitrust compliance tools: The implementation of compliance guidelines and standards

As a first step, every firm should implement compliance guidelines and standards to educate its business personnel on their obligations under the law. In-house lawyers should, at a minimum, have separate policies addressing both (i) overall antitrust compliance; and (ii) guidelines to follow in the case of a potential raid or surprise information request from an investigating regulator (i.e., "Dawn Raid" manual/policy).

An antitrust compliance policy

An antitrust compliance policy acts as an initial reference point for all employees and must be properly introduced and easily accessible. It needs to provide practical examples relevant to the business while summarising in layman's terms (or those most appropriate to the business) the pillars of competition law. While competition law terminology may slightly differ, or be nuanced from jurisdiction to jurisdiction, the fundamental principle remains the same: protection of consumers from unfair pricing and other anti-competitive conduct that could reduce consumer choice or innovation. Competition laws accomplish this through (i) prohibition of anti-competitive agreements (e.g., price fixing, output restrictions, market sharing and bid rigging); (ii) prohibition of abuse of dominance or market power (e.g., through discriminatory pricing, exclusionary behaviour, or other monopolistic conduct); and (iii) regulating and monitoring mergers, acquisitions and joint ventures, to prevent the accumulation of too much market power.

Competition law also applies across all levels of the supply chain – not only to horizontal agreements between or amongst competitors, but also to vertical relationships up and down the production chain (from supply of raw material or inputs to manufacture and assembly to distribution and retail).

While the overarching antitrust compliance policy can be incorporated into a general code of conduct which employees agree to adhere to, it may also benefit from the added attention and focus of standing alone as a separate document demanding its own training and acknowledgement (which may also emphasise the importance of the policy).

A company's antitrust compliance policy should include practical examples taken from real-world situations that confront employees on a regular basis. Large, potentially dominant companies should focus on negotiations with customers and suppliers, as well as unilateral internal decisions that could endanger a company (for example, engaging in exclusionary rebates or predatory pricing in order to eliminate competitors). Ordinary market participants should focus on potential touch points with competitors (such as participation in trade associations, casual meetings outside the scope of work, and sharing of competitively sensitive information in any forum or format).

The antitrust compliance policy and related training should make clear that these examples cannot be comprehensive. While competition laws set forth clear "per se" offences which are so harmful as to be presumed anti-competitive regardless of intent or effect (e.g., price-fixing, horizontal market allocation, customer allocation and bid-rigging), many grey areas also exist. Employees must be able to identify issues and raise concerns to the relevant compliance officer/legal representative based on the general educational principles and training guidelines in the antitrust compliance policy.

Dawn raid policy/manual

A dawn raid policy/manual sets out processes and procedures to follow in the event of an unannounced, on-site government investigation of an alleged competition offence. Antitrust regulators often already know what documents, records and information they are looking for when they arrive at the premises and have broad powers of inspection to ask questions, access IT files, read emails, and enter homes and offices of employees. Dawn raids can last several days and significantly disrupt business for an unprepared company.

As such, in house lawyers should work with outside counsel to prepare a competition law dawn raid policy/manual that:

- addresses procedures to follow in the event of an unannounced inspection;
- provides guidance on privilege laws in each relevant jurisdiction;
- outlines what materials can and cannot be taken by the regulator;
- lists out key contacts within the company that should be notified of the dawn raid; and
- designates specialist outside counsel to help oversee the process and protect the company's interests.

In house lawyers should also take care to brief employees in reception/front office staff, IT and security on how to engage with regulators when they arrive and also how to preserve the inspection site at the end of each day of the investigation.

In house lawyers should also consider whether other antitrust polices are necessary, for example, guidelines on competition considerations related to mergers, acquisitions or joint ventures or guidance on exchange of competitively sensitive information.

In short, in house lawyers should tailor a program to identify areas of high, moderate and low risk for the particular company, avoiding a broader (and less meaningful) one-size-fits-all approach.

A commitment from management to prioritise antitrust compliance

Senior management should also help to create a culture of antitrust compliance and awareness by setting the tone and emphasising the

importance of adhering to competition laws on a company-wide basis. Many antitrust authorities, including the European Commission, acknowledge that "unequivocal senior management support is vital". When senior management clearly sets antitrust compliance as a priority, employees follow suit because it is the right thing to do, not just out of fear of being caught or reprimanded. Moreover, employees will feel more comfortable raising potential issues (or self-reporting) if they know that senior management supports the cause. Senior management should circulate antitrust policies, reminders and updates to the business on a regular basis.

The appointment of a compliance officer/legal representative/champion for competition law

Small to medium sized businesses will not always have the resources to employ a full time in house competition lawyer. Such businesses may benefit from appointing another employee as the designated compliance officer/legal representative. This will ensure that 1) employees have an internal contact to reach out to in case of questions and 2) someone is actively responsible for implementing and maintaining the antitrust compliance policies and programs in place.

Control/reporting systems and procedures

Control and reporting systems allow translation of the legal theories into practical implementation of business procedures. Such systems play an important role in monitoring antitrust compliance, as they allow employees, compliance officers/legal representatives to identify competition law risks before they become widespread.

Training

The business should implement and regularly refresh training sessions on competition law principles, including practical examples of how these principles apply. Training should include real-life industry specific examples of fines and penalties and 'do's and don'ts' for the business. Training should target a selected group of employees, and in-house lawyers should tailor invitations accordingly. For example, a back-office IT manager may not need training on tying and bundling practices related to sales and marketing, whereas a manager who regularly attends trade association meetings would particularly benefit from additional training on interactions with competitors and the exchange of competitively sensitive information.

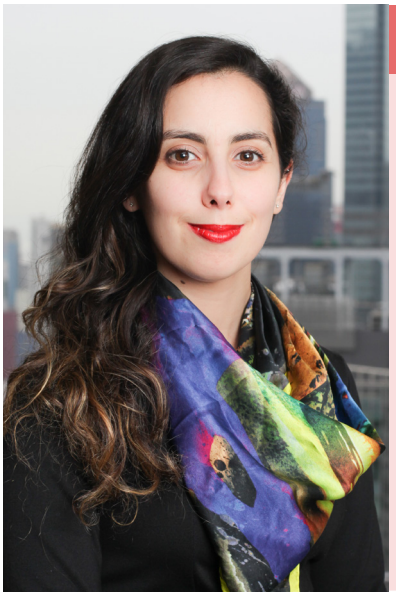
Auditing and monitoring compliance efforts

No compliance policy is complete without objective auditing and monitoring. The business should regularly test performance against internal control/reporting systems and procedures, and the compliance team should follow up with key employees to evaluate whether they understand competition law risk. Moreover, a compliance audit can uncover whether there have been any actual breaches of competition law – this can involve a review of key contracts and external relationships, and various internal questionnaires to better understand how the business adheres to competition law.

Rewards and incentives for employees

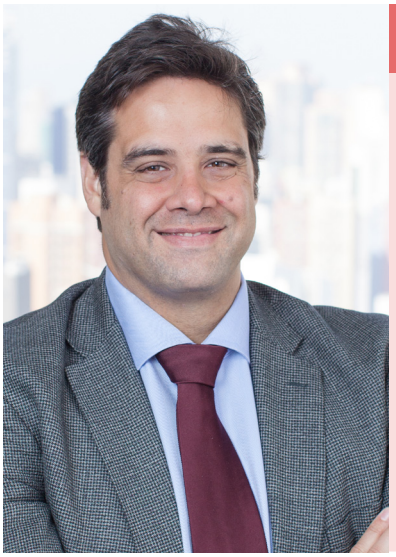
Employees must also be able to report any suspected anti-competitive behaviour confidentially and anonymously, or else breaches may go unreported for fear of retaliation. If breaches are uncovered and proven, employees should be subject to internal disciplinary measures for non-compliance with competition law policies. An internal policy that does not have a track record of internal enforcement with consequences for discovered breaches will not be well regarded by authorities in the event of an investigation. Therefore, in house lawyers need to assess the avenues available for reporting an issue and also the incentives offered for doing so within your compliance structure.

Given the astronomical fines that a company may now risk for engaging in anti-competitive behaviour, in house legal teams cannot afford not to take proactive steps to implement compliance policies and procedures. A successful antitrust compliance program should encourage ethical behaviour whilst highlighting the serious legal implications of non-compliance. Antitrust compliance programs need to strike the right balance between education and cultural change; implementation will take time and trial and error within any organisation. Over time, with strong support from senior management, implementation and maintenance of antitrust compliance programs can help a company avoid tens or even hundreds of millions in fines down the road.



Jacqueline Arena

As an advisor on international competition and EU antitrust issues at Skaddens, Jacqueline represents multinational clients across different industry sectors, including financial services and pharmaceuticals. From the Hong Kong office Jacqueline has worked on a number of merger transactions involving notifications to the European Commission and regulators around the world. In 2015, she undertook a client secondment with a Hong Kong bank to advise on compliance with and implications of the new Hong Kong competition regime.



Andrew Foster

Having been repeatedly selected for inclusion as a leading competition lawyer in Chambers Global, Chambers Asia Pacific and Who's Who Legal: Competition, Andrew Foster is recognised as a leader in international merger control practice, and has published widely on global competition issues. Andrew currently leads Skadden's Antitrust and Competition Group in Asia-Pacific, practicing in Beijing and Hong Kong.