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GLOBAL COMPETITION LAW COMPLIANCE: STRATEGIES FOR IDENTIFYING AND COPING WITH PROBLEMS

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The impact of competition law is on the rise. Government regulators are devoting enormous resources to cartel and other price-fixing investigations, and the criminal and civil exposure from these investigations has increased exponentially. In other areas, competition law is used in new ways, especially in the intellectual property arena. In this complicated environment, maintaining an effective compliance program and responding correctly to investigations is critical to minimize a company's exposure.

Companies must also cope with changes in the European antitrust landscape that increase their exposure. For example, the decentralization of the enforcement of the EC competition rules to the national level has resulted in a marked increase in the number of cases opened at the national level. This trend is likely to accelerate with the European Commission's push towards creating a more favorable climate for private antitrust enforcement.

The antitrust exposure of companies is also greater because the risk of fines has increased dramatically in the past years due to the European Commission's adoption of a corporate leniency program that creates strong incentives for whistleblowers. The leniency program has had the desired effect as it has resulted in the opening of an unprecedented number of cartel cases over the past few years.

Finally, and perhaps most importantly, recent changes in the law mean that company executives now face the possibility of jail time if they are involved in a cartel. While EC competition law does not impose criminal sanctions for participating in a cartel, various EU Member States recently have enacted legislation that criminalizes cartels. For example, under the UK's Enterprise Act 2002, individuals who participate in a cartel may be imprisoned for up to five years.

This paper examines the areas that are most likely to raise antitrust concerns. Thereafter, it provides some practical tips on how to successfully implement an effective compliance program and concludes with advice on how to respond to an investigation by the competition authorities and minimize the company's exposure to fines.

I. High-Risk Zones

A. Risks Associated With Pricing

1. Risk of Involvement in a Price-Fixing Cartel

How do you know whether your company is in the high-risk zone with respect to cartels? Although such predictions are difficult, the following self-help test may provide some useful indications:

- *Does your company's market have only a few sellers?* Collusion is more likely to occur in a market with only a few sellers or only a few large sellers with the remainder being fringe players. The fewer the number of sellers, the easier it is for them to agree on prices or on how to divide up territories or customers.

- *Is your product standardized?* The majority of international cartel cases have involved standardized products, such as cement, vitamins, steel, and chemicals, because competition for standardized products is based largely on price. With a nonstandardized product, cartel members would have to agree on a schedule of prices for different grades or features and other variables. Such differentiation not only makes a cartel more difficult to form and to police, but also more difficult to keep secret.

- *Is it difficult for new competitors to enter your market?* If market entry is easy, it is more difficult to sustain a cartel because new entrants will undercut the cartel's price. Entry can come from a neighboring product or geographic market. New entrants from neighboring regions can disrupt a cartel limited to a given region. Conversely, when a product is sold on a worldwide market with a few major players, a cartel is easier to sustain.

- *Is it difficult to expand capacity in your market?* If it is easy for fringe players on the market to expand capacity in the event of a price increase, it is more difficult to sustain a cartel.

- *Is your market characterized by sealed bidding?* A market characterized by sealed bidding lends itself to collusion because it is easier for conspirators to detect cheating. When a cartel member other than the predesignated member wins a bid, it is clear to all who the culprit is.

- *Is your market stable or declining?* It is easier to police a cartel in a stable or declining market than in a growing market. In a growing market, it may be difficult to tell whether a cartel member is getting more than its normal share of new business because it is cheating on the cartel, such as by undercutting the cartel's agreed-upon price, or because of the normal growth of its market share.

- *Have there been any antitrust investigations in your market or in related markets?* A history of antitrust investigations in a given market—whether in the United States or in other jurisdictions—suggests that the market lends itself to collusion. You should be on the alert if antitrust authorities have recently opened a cartel investigation in a neighboring product market. The DOJ and other antitrust agencies tend to focus on product markets related to those in which they have already uncovered problems.

- *Is your market experiencing a downturn?* The temptation to collude is much greater in times of recession when managers find themselves willing to consider any means to turn a profit.

- *Are you aware of any customer complaints about pricing?* If you hear of any customer complaints about prices or if they turn up in an internal antitrust audit, you could have a problem.

- *Are your customers and/or the regions in which you sell always the same?* It is normal for a company to establish stronger relationships with some customers than with others and to build a stronger presence in one region than another, but a suspicious lack of effort to sell to new customers or to expand into new regions could be a sign of trouble.

- *Do your executives attend trade association meetings?* Historically, trade associations provide the most ready cover for collusive activity. You should be particularly concerned if the group represents a narrow industrial sector with few companies.

If you answered "yes" to most of these questions, you are in a high-risk zone for cartels and it becomes increasingly important to ensure your compliance program is effective.

2. Resale Price Maintenance

Resale price maintenance occurs when a manufacturer reaches agreements with its distributors or retailers regarding resale prices. It is well established that setting minimum resale prices is per se illegal under EC law and the laws of many U.S. states. Agreements on maximum resale prices, while not necessarily lawful, may have pro-competitive benefits, and are evaluated under the rule of reason in the United States and the European Union.

In both the United States and the European Union, manufacturers are free to suggest resale prices, to advertise such prices, and to provide dealers with suggested price lists, as long as the dealer can independently determine whether it will adhere to the suggested prices. Manufacturers may not coerce dealers into accepting resale prices, and unduly aggressive efforts to compel such adherence – including retaliatory wholesale price increases or other sanctions – may be considered an antitrust violation.

3. Discounts and Rebates

Companies should also be aware of the antitrust risks associated with discounts and rebates. Under the antitrust laws, a manufacturer may not use rebates or dealer promotions as a means to implement or police resale price maintenance. Further, rebates or discounts are occasionally offered only on the condition that a customer agree not to buy competing products from another manufacturer. Rebates tied to achieving a particular market share or exclusive sourcing are particular common in the case of group purchasing organizations and should be analyzed carefully to ensure that they do not unfairly restrict options for competitors.

B. Risks Arising from Licensing and Collaboration Agreements

1. Licensing Agreements

Companies should be aware of the potential antitrust risks associated with licensing agreements related to intellectual property rights.[1] Any such agreement increases antitrust exposure if it can be seen as furthering the potential for price fixing, market allocation, restricting output or competitive innovation, or containing ancillary restrictions going beyond the licensed product itself. The particular risks often depend on whether the licensing agreement is "vertical" (i.e. within the supply chain) or "horizontal" (i.e. between competitors or potential competitors).

For vertical agreements, antitrust risks arise when the licensing agreement prevents the licensee from accessing competing intellectual property or developing its own competing products, or forecloses access to critical technologies or inputs. When the licensor has a dominant position or market power, it is much more likely that restrictive agreements will be challenged. For example, a royalty payment structure imposed by a dominant licensor that essentially precludes the licensee from using competing products or technologies could have significant anticompetitive effects.

For horizontal agreements, the main concern is whether the licensing of the patented product or process will restrain competition, or potential competition not just for currently available products, but also for the manufacture or development of new products or processes. Although exclusive patent licenses are generally acceptable under U.S. antitrust law, such agreements may be considered anticompetitive if they eliminate incentives for competition, especially if the parties to the agreement are the major players in the market. Horizontal agreements may also increase the risk that one of the parties could use the license to acquire or maintain significant market power. Finally, depending on the nature and likely economic significance of the agreement, it may also require a statutory filing with the U.S. antitrust agencies under pre-merger notification regimes.

While the treatment of patent licensing agreements is broadly the same under U.S. and EC antitrust laws, a global licensing agreement should be reviewed by both U.S. and EU antitrust counsel to minimize the risk of problems. The key difference is that territorial restrictions are much more likely to give rise to antitrust concerns in Europe because they are viewed as antithetical to the fundamental goal of achieving a common market. Other differences between the two regimes include the treatment of post-term royalties (more problematic in the United States) and exclusive grant-back and assignment clauses (more problematic in the European Union).

2. Research and Development Agreements

Research and development agreements, including joint ventures, are often considered pro-competitive, but should be carefully monitored. The assessment of a research and development agreement will depend on the market structure, the extent to which the agreement will promote greater advances than either party to the agreement could expect to

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[1] The DOJ and FTC have issued joint guidelines on intellectual property licensing. *See* U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (Apr. 6, 1995). The European Commission has issued Regulation No. 772/2004 on the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, OJ(2004) L123/11, as well as accompanying guidelines, OJ(2004) C101/2.

achieve independently, and the parties' market share. Agreements that are seen as restricting the development of new technologies are generally prohibited under both U.S. and EC competition rules. In particular, parties to a joint research and development agreement must be free to carry out independent research and development after the R&D phase has been completed, and restrictions on each party's ability to carry out research outside the scope of the collaboration are considered anticompetitive. The provisions in the agreement governing access to the results of the joint research should also be analyzed for antitrust concerns. In general, open access for all participants willing to either initially fund the joint research or pay a reasonable royalty to recover the costs expended is preferable. Of course, if the collaboration is seen as increasing the likelihood of price-fixing or otherwise restraining trade, it may give rise to the serious antitrust risks described above.

Territorial and customer restrictions present an issue that is particularly likely to raise problems in Europe. Under special rules applicable to research and development agreements,[2] territorial and customer restrictions between parties are generally permitted for a period of up to seven years from the time the products were first placed on the market. Restrictions for longer periods of time must be assessed on a case-by-case basis.

3. Co-Marketing and Co-Promotion Agreements

Co-marketing and co-promotion are forms of collaboration agreements. These agreements are particularly likely to give rise to antitrust concerns if the parties compete with respect to the products covered by the arrangement. Apart from this threshold issue of the competitive relationship of the parties, such agreements may give rise to other issues, including the coordination of pricing strategies, the exchange of sensitive information, and the allocation of territories and customers.

C. Risks Associated with Restrictions on Parallel Trade

Companies operating in the European Union should pay special attention to practices that have as their aim or effect the restriction of parallel trade among EU Member States. A guiding principle in the application of the EC competition rules is the need to achieve a common market, so that, not surprisingly, efforts by companies to limit parallel trade have traditionally been attacked by the European Commission. In general, the U.S. antitrust laws are more tolerant of "non-price vertical restraints" that restrict how and where a distributor may resell a manufacturer's product, but recent challenges to prohibitions on re-importation of pharmaceuticals from Canada demonstrate that such practices are not entirely risk-free.

II. Reducing Your Antitrust Exposure: Compliance Programs

A. Beyond Corporate Compliance Brochures

The purpose of a compliance program is to prevent competition issues from developing and to facilitate the early detection of violations that may still occur. A robust compliance program can also limit a company's exposure for violations. For example, the U.S. authorities will consider a company's antitrust compliance program in determining whether to bring criminal charges against the company itself for any violations committed by its executives.

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[2] Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, OJ (2000) L304/7.

To be effective, a compliance program should be user-friendly. Fifteen years ago, an antitrust compliance program consisted of simply handing out a compliance brochure drafted in dry legal prose by the company's antitrust counsel, which generally wound up at the bottom of the manager's desk drawer. The next step in the user-friendly evolution was to use plain English and to add pictures to the brochure. Companies willing to push the envelope even introduced humor into the brochures. When it became obvious that many managers were only looking at the pictures, mandatory training programs were gradually introduced. Today, compliance programs take a variety of forms and generally include some element of interactive training. Some companies have gone so far as to hire professionals to produce training videos. Others use Internet-based training modules.

In addition to being user-friendly, a good compliance program should be tailored to the company's business and the kinds of antitrust risk associated with that business. It is a waste of time to train managers about the antitrust do's and don'ts of retail distribution agreements when the company supplies products to a few large wholesalers. Similarly, there is no reason to train managers about the various pitfalls that dominant companies must avoid if the company has a small market share in a highly competitive market. Thus, in designing a compliance program, the initial effort should be focused on identifying where the antitrust risks lie.

In addition to identifying antitrust risks specific to a given business, the antitrust risks specific to a given jurisdiction should also be identified. For example, as already discussed, territorial restrictions imposed in the context of commercial arrangements pose high antitrust risks in Europe, while they pose virtually no problem in the United States.

Finally, even the most sophisticated program will be useless if it is not properly implemented over time. Many companies roll out excellent compliance programs, but then fail to follow up in subsequent periods with refresher training for legacy employees and initial training for new hires or reassigned employees.

An effective compliance program generally involves a set of "best practices" related to the initial design and implementation. As described below, these include the development of clear procedures, the imposition of internal sanctions on individuals that breach the procedures, the appointment of individuals responsible for ensuring the compatibility of company policies with the competition rules, and the performance of periodic audits.

B. Clear Procedures

A compliance program should include ongoing training for all personnel with commercial responsibilities, especially those involved in pricing or interactions with competitors. The main goal should be to ensure that all participants can identify situations likely to raise antitrust problems and that they are instructed to seek legal advice before acting. These training courses should also identify markets where the company has a potentially dominant position and explain the increased antitrust risks in these markets.

The company should set up a clear procedure to report alleged violations. In order to promote disclosure of unlawful practices, disclosing parties may be offered a guarantee that they will not be punished. In addition, the company may decide also to keep the report confidential.

Participation of the company's representatives in industry associations should be closely monitored by the legal department. In the first place, the participation of the company in an industry association should be subject to the approval of the legal department. In addition, employees attending industry meetings should be required to inform the legal department of the agenda of the meetings before the meeting takes place, and to supply a copy of the minutes once they are available. Finally, the attendees should be reminded not to engage in price or other improper discussions with competitors

It is also advisable that the company set up a document retention policy. A good retention policy should take into account requirements imposed by local jurisdictions but, in general, it should ensure that only documents that are necessary for commercial or legal reasons are kept. Similarly, the company should have procedures in place to quickly and effectively implement a document hold if it learns of an investigation or lawsuit that requires document retention.

Finally, employees should be instructed to bear in mind the competition rules when drafting their day-to-day communications. For instance, employees should avoid producing e-mails that could suggest the existence of a cartel or that over-emphasize the company's economic strength in the market. Inopportune comments in emails have been at the heart of several recent antitrust cases. Similarly, employees should be certain to ensure that potentially privileged or protected communications are clearly identified as such. In this connection, it is worth noting that the rules on privilege tend to be much more restrictive in Europe than in the United States, so that it cannot be assumed that a lawyer's advice is privileged in Europe. For example, in the European Union, antitrust advice from in-house lawyers as well as outside counsel who are not admitted to an EU bar is not privileged and may be seized in the event of an investigation. In some jurisdictions, such as Germany and Switzerland, even advice by outside antitrust counsel is generally not privileged.

C. Internal Sanctions

An internal system of sanctions is necessary to convey the message that compliance is important. Moreover, the credibility of the sanctions is an important part of the success of a compliance program. Sanctions may vary from mild (censure, denial of bonuses) when an employee violates compliance procedures (for instance, if the agenda of an industry meeting is not cleared with the legal department) to dismissal in case of participation in a cartel. However, as discussed further below, a company must balance the need for sanctions with the need to minimize its antitrust exposure, and this balancing may in some cases counsel against immediate dismissal of employees involved in a cartel.

D. On-Going Monitoring

A senior executive should be allocated responsibility for monitoring the company's compliance with the competition rules. This can be done by setting a yearly date on which the responsible person must report on the compatibility of the agreements and policies under his or her supervision.

On-going monitoring is particularly important in the case of products for which the company experiences an increase in market share. Practices that were lawful when they were initially implemented may become unlawful in light of the increased market share. In this regard, companies should regularly verify the list of products for which they may have a dominant position and review their policies accordingly. In addition, a review of agreements and practices is crucial when there are significant changes in the relevant competition rules.

E. Audits

Internal audits are designed to identify unlawful practices. They should be conducted from time to time to ensure the compliance program is being effectively implemented. In particular, internal audits should be carried out when the company suspects that there is on-going cartel activity and at regular intervals in those markets where the antitrust exposure is higher.

There are several tools that may be used to conduct an audit, from interviews to mock dawn raids. As a general rule, do not overdo audits. Specifically, mock dawn raids are not advisable unless there are clear suspicions of a specific violation. Conducting a mock dawn raid merely to search for possible infringements may be counter-productive because of the risk that documents will be destroyed and business will be disrupted.

Auditing files of key individuals and conducting interviews with sales managers on a regular basis are usually more appropriate regular first steps. Email audits can be a very effective tool to discover possible violations, but may be constrained by data protection rules or because of the volume of emails generated. The most effective means for conducting an email audit are to focus on key individuals and/or to search for keywords that may indicate the existence of an unlawful practice. For instance, the words "parallel sales," "grey traders," or "price" in the same sentence as the names of major competitors may be a good start.

F. Antitrust Compliance Checklist

Antitrust analysis depends on the circumstances of the case, in particular on the relevant markets affected. The following checklist is designed as a first tool when reviewing a company's antitrust compliance as part of a legal audit. It is not intended to be exhaustive.

- ✓ Do managers report contacts with competitors to the legal department?
- ✓ Does the legal department review intellectual property licensing agreements?
- ✓ Do managers inform the legal department before attending a meeting of an industry association? Does the legal department review the minutes of such meetings?
- ✓ Does the Company impose minimum resale prices or offer incentives to distributors that follow recommended prices?
- ✓ Are the pricing strategies for dominant products reviewed by the legal department?
- ✓ Has the Company entered into agreements involving allocation of territories or customers, non-competes, or long-term exclusivities?
- ✓ Does the Company's regulatory affairs department consult with the legal department regarding regulatory filings involving intellectual property or significant competitive issues?

Specific for Europe:

✓ Does the Company limit the amount of product available to each wholesaler or to stop supplies to specific wholesalers?

✓ Does the Company charge different prices depending on the final destination of the product (*e.g.* a rebate is granted if the products are not sold outside a specific territory or to a specific category of customers)?

✓ Does the Company prevent its distributors from selling in another EU Member State or to specific type of customers in response to unsolicited requests?

✓ Does the Company prevent its distributors from actively seeking customers outside their allocated territories or customer groups.

III. Limiting Your Exposure

You have just put into place your company's state-of-the-art antitrust compliance program, complete with user-friendly, online training modules that were tailor-made for you by software consultants, a videotape with real actors for use in training sessions, and a compliance manual peppered with illustrations and even a few jokes. To reinforce the message, you have held training sessions with your company's management, whom you enticed to attend with promises of a compliance certificate signed by you and suitable for framing. Although you are not naïve enough to think that an antitrust problem could not pop up from time to time, you believe that any such problems would be relatively minor and would not threaten your company's bottom line. In a post-Enron environment that places a premium on corporate compliance programs, you feel that you are in good shape.

Unfortunately, your sense of complacency is short-lived. During discussions in the hall with one of your senior sales managers, you learn that, just before annual contract negotiations with major customers, she had met with her counterparts from some of your major competitors. Because your industry has just a few, powerful customers, the sales managers thought that it was reasonable to get together to discuss pricing strategy in order to create a more level playing field. In the next few days, you learn that such discussions have been occurring annually for nearly a decade and involve a number of your company's key product lines. You begin to wonder whether these meetings and price discussions might constitute illegal collusion. What do you do now?

A. Managing A Crisis

Once you know that you have a problem, time becomes of the essence. You must move quickly to gauge the extent of the problem and to decide whether to approach the authorities and seek leniency. You must assume that your competitors also know of the problem and are considering leniency. Until you file a leniency application, you risk losing the race to the antitrust agency's door. In the United States, the first applicant wins all in this race, and the difference between being first and second can be tens of millions of dollars in fines and, in a big case, hundreds of millions of dollars in fines. There may be prison sentences for corporate executives at stake. In the EU, criminal sanctions are less likely; nevertheless, you still must move quickly because the difference between the fines imposed on the first and second applicants can be dramatic.

How should you proceed?

1. Establish an Internal Crisis Management Team

Start by quickly setting up an internal crisis management team that includes in-house counsel, a representative from the corporate communications department, and senior executives. You should make sure that none of the team members has had any personal involvement in the cartel. They must be able to act independently and in the best interests of the company.

2. Establish an Outside Legal Team and Determine Leniency Strategy

You should get your legal team in place almost immediately. If there is international exposure, you will need to set up a multijurisdictional team and ensure that coordination exists among its members, as well as between them and your in-house team. You might want to make one law firm responsible for international coordination. Coordination on your outside legal team is especially critical when you are considering leniency.

Managing a leniency application in an international cartel case is akin to playing a multitiered chess game in which the timer is running on all boards at once and the rules of play are slightly different on each board. You must be prepared to play on all boards simultaneously so as not to be beaten by the clock, and you must ensure that you have a coherent global strategy that takes into account the effects of your moves in one jurisdiction on your position in others. A strategy that focuses on one board at a time will not be successful: Not only is time likely to run out on at least some of the other boards, but even if you obtain amnesty in two out of three jurisdictions, you may lose the game if you incur a substantial fine in the third.

3. Maintain Your Independence

As in-house counsel, you will serve as the critical main point of contact between the in-house team and outside counsel. The combination of your independence and your knowledge of the company will be quite valuable in helping outside counsel to conduct the internal investigation.

You must maintain your independence. When your executives suddenly find themselves caught up in a high-stakes cartel investigation and face the prospect of going to prison, you will often be the first person to whom they turn for advice. You will need to explain to them the investigatory process and the advantages of coming forward. Be careful to explain to them that you act for the company and not for them as individuals.

4. Get the Facts

As quickly as possible, you must learn the facts in order to gauge the extent of the problem and to make a prompt, accurate decision about whether to seek leniency. This investigation will be time-consuming. At the very least, it will involve interviews with managers involved in the business. Sometimes, several rounds of interviews are necessary in order to convince managers to come forward. You also must review all relevant documents, which typically include volumes of email.

5. Gather and Preserve Documents

You must immediately take steps to ensure proper management of all relevant business records. Retrieve them quickly for the purposes of the internal investigation and then make sure that none are destroyed. Document destruction can give rise to separate criminal penalties and harm the ability of your company to defend itself in a private civil suit. Plaintiff's counsel can use the destruction to negate defenses that would otherwise be available or, more generally, to hurt your company's reputation.

6. Protect Attorney-Client Privilege

The rules on attorney-client privilege differ in various jurisdictions. You may need to take precautions beyond those that you would take in the United States to preserve the privilege. Under EU competition law, neither in-house counsel nor counsel qualified in jurisdictions outside of the EU enjoy privilege**.** Thus, if you or your U.S. outside counsel were to send a memorandum to your company's in-house European lawyer detailing the company's defense strategy or the findings of your internal investigation, for example, the European Commission could obtain this unprivileged document in a dawn raid. To protect the attorney-client privilege, you must make sure that all such communications come through your European outside counsel. In addition, you should try to limit the circulation of such sensitive documents, relying as much as possible on oral communications.

A closely related issue concerns the discoverability of documents. You should be aware that documents provided to foreign antitrust authorities in the context of a leniency application may be discoverable in the context of U.S. civil litigation. You will need to consider carefully the steps that you can take to limit discoverability, such as the use of oral proffers.

7. Prepare a Communications Strategy

One of your first priorities will be to ensure that a corporate communications strategy is put into place. News of a cartel investigation can drive down your company's stock price, damage your employees' morale, and strain relations with customers. Although your communications department will take the lead in formulating and implementing a strategy, you will need to stay involved. You may have to serve as arbiter in the event of tensions between those concerned with placating investors, employees, and customers and those handling the legal strategy. You should take the following steps:

- Identify the phases in the investigation when information is likely to become public and plan ahead accordingly. In Europe, for instance, a dawn raid is likely to occur several weeks after you have made a leniency application. These raids are widely reported in the financial press.

- Make sure that outside counsel check all communications going outside of the company.

- Keep all communications short. As a general rule, it is better to make corporate statements brief, particularly early in the investigation when you do not know all of the facts.

- Communicate with employees. A cartel investigation, particularly one involving a dawn raid, can be very unsettling for employees. You need to ensure that they receive an explanation of the process in order to reduce uncertainty.

B. Deciding Whether To Seek Leniency

Once you have learned the facts, you must decide whether to seek leniency or to stop the activity and put into place procedures to prevent it in the future, without contacting the authorities. This decision is complex; to evaluate the situation, ask yourself the following questions:

1. Where Is Leniency Available?

In the United States, the DOJ's Corporate Leniency Program grants full amnesty automatically to the first cartel applicant in the door, provided that the Antitrust Division had not already started an investigation, in which case a company can still apply for amnesty if it is the first in line and if the Antitrust Division does not yet have evidence that is likely to sustain a conviction. With amnesty, all officers, directors, and employees who cooperate will be protected from criminal prosecution. A company that is not eligible for amnesty can nevertheless still obtain a reduction of its fine by reporting a cartel in a separate, unrelated market, in which case the company and its executives will receive amnesty in the second case.

In Europe, the European Commission's 2006 Leniency Notice[3] grants upfront immunity to the first company to come forward with the requisite evidence. Further, a company may receive a percentage reduction even if it is not first in line, provided that it furnishes information that provides significant added value to the information held by the European Commission. Applicants receive a guaranteed percentage reduction in their fines, depending on where they are in line: a 30–50 percent reduction for second in line; 20–30 percent for third; and up to 20 percent for all others.

Many individual European countries have also enacted their own domestic leniency programs. A company that applies for EU leniency must also take care to apply for any leniency programs available in such countries. Its failure to do so could result in the company being given leniency by the European Commission (and, thus, receiving amnesty from administrative fines), but still being subject to administrative fines and criminal sanctions imposed by some national authorities.

2. What Is the Likelihood of an Enforcement Action?

The more likely it is that the cartel will come to the attention of the antitrust authorities, the more reason you have to apply for leniency. You will need to develop information about competitors and the relevant geographic and product markets in order to make a judgment about whether others will have the motivation and be in a position to seek amnesty. Define the geographic market broadly to include any relevant area of the world. Both the American company that limits its view to the United States and the European company that does not consider the United States are asking for trouble in this new world of cooperation among antitrust authorities.

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[3] *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Of (2006) C298/11, available at http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.

You also should consider whether authorities have opened cartel investigations in any related markets or in other markets in which your competitors are active. If they have, the risk of problems occurring in your market is greater. The DOJ initiated many of its investigations of international cartel activities with evidence that it had obtained as a result of investigations of completely separate industries, including cases in which a cooperating company had disclosed the existence of a second, unrelated conspiracy. Antitrust authorities have learned that, when they uncover a cartel in one market, they often expose cartels in related markets involving a similar group of competitors. As a matter of course, U.S. authorities will ask witnesses whether they have knowledge of any illegal activities in other markets. As discussed above, the DOJ's leniency programs provide extra incentives for a company to come forward with respect to other markets.

3. What Is Your Estimate of Damages in Private Civil Actions?

An important consideration in deciding whether to seek amnesty is your company's potential exposure in private civil actions. As discussed above, the exposure is greatest in the United States, because of the threat of treble damages, but the potential for damage claims in other jurisdictions is increasing. Sometimes, companies that apply for leniency can manage private civil litigation in a way that minimizes the damage. If, however, a reasonable estimate of these damages is so high that it threatens the health of your company, which would not be unusual in a large market, you have a powerful reason not to seek leniency.

4. What Will the Penalties Likely Be?

You also must consider the penalties that antitrust authorities will likely seek. As discussed, fines and prison time have been increasing in recent years. Leniency dramatically reduces fines and prison time.

5. What Other Anticompetitive Conduct Will You Reveal?

You should consider whether you would have to reveal a cartel in an unrelated market. As discussed, additional conduct means a greater universe of potential competitors and potential rivals for amnesty. It also raises the stakes with antitrust authorities, who will give you more credit if you reveal such conduct, but also exact greater penalties if you do not. In addition, anticompetitive conduct in other markets means more private civil actions and higher potential damages.

In order to obtain amnesty under the DOJ's program, the applicant must agree to cooperate with the Antitrust Division's investigation, which includes responding to questions about possible illegal activities in other markets. If, in fulfilling this obligation, the applicant reveals criminal conspiracies in another industry, the Antitrust Division will expand its investigation to cover that other industry, as well. This expansion can lead to hefty treble damage civil claims in the United States, assuming (as has to be assumed) that the existence of the conspiracy will become public knowledge once the DOJ has begun to prosecute other participants, based upon the information provided.

If an applying company fails to comply with its duty to cooperate, the consequences can be severe. The DOJ's official policy is to treat a company's failure to report known illegal conduct in a second industry as an aggravating sentencing factor that warrants fines and prison time at the upper end of the sentencing guidelines.

In March 1997, Hoffman-La Roche pled guilty to price-fixing in a citric acid cartel and paid a relatively modest $14 million fine. At the time, the Antitrust Division asked two company executives whether they were aware of a different cartel, this one involving the vitamins industry. Despite their pledge to cooperate, both answered "no." Each one ended up serving time in U.S. prisons for his role in falsely denying knowledge of the conspiracy.[4] Because the pharmaceutical giant flagrantly had failed to live up to its duty to cooperate, it later paid a record-setting $500 million price.

6. What Will Be the Drain on Your Corporate Resources?

Leniency applications can be very disruptive and resource-intensive. Your response to antitrust authorities' demands for documents and interviews will require a substantial commitment of resources and can become a full-time job for some managers. The process also may have an adverse effect on company morale as managers grapple with whether or not to come forward and find themselves having to implicate others with whom they have worked their entire careers, in many cases. You must evaluate this drain on resources.

7. Will There Be Pressure and Retaliation within the Industry?

In many countries, loyalty toward family and friends carries more weight than respect for antitrust law. Some do not view cartels as wrong. Companies in such cultures will be reluctant to seek leniency if coming forward means implicating other companies in the industry. This reluctance will be particularly strong in Europe and Asia where companies in the same industry traditionally have had close ties. A company also may fear retaliation by its competitors in other markets. You must take these factors into account.

IV. Conclusion

You may not believe that a cartel is operating in your company. In light of the ever-increasing stakes, however, it is worth your while to take measures to guard against such collusion. We suggest that you begin by determining whether you are at high-risk for a competition law violation. If you are, consider carrying out a mock dawn raid to spot-check managers' activities or periodically checking your firm's pricing and discount policy for unusual changes. If you find yourself in a crisis, you must move quickly to gauge the extent of the problem and to decide whether to seek leniency, an important strategic determination that many now regard as a preemptive strike. Establishing an internal crisis management team and an outside legal team are key steps to managing your crisis. You must also quickly ascertain the facts, arrange to gather and preserve relevant documents, protect attorney-client privilege, and ensure that a corporate communications strategy is put into effect. Once you understand the facts, you can reasonably evaluate your company's position vis-à-vis leniency.

A company can no longer afford to bury its head in the sand and hope that collusive activity will go unnoticed or be ignored. To minimize your company's exposure, and to prevent violations in the first place, you must try to ferret out problems and, if you find any, take immediate action. The race to the antitrust agency's door is one that you want to be sure to win.

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[4] *See* United States v. F. Hoffman-La Roche Ltd., Criminal No. 3:99-CR-184-R, Trade Reg. Rep. (CCH), U.S. Antitrust Cases-Summaries 45,099, at 45,427 (N.D. Tex. May 20, 1999); Press Release, U.S. Department of Justice, Apr. 6, 2000, at 2, available at www.usdoj.gov/ atr/public/press_releases/2000/4494.pdf.