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10 Steps You Can Take To Mitigate Your Risks

As the number of jurisdictions enacting antitrust laws surpasses 100, extraterritoriality (the ability of those outside a jurisdiction to be held liable within the jurisdiction) becomes a significant risk management issue for multi-national companies.

Conduct in one or just a few jurisdictions may end up being prosecuted around the world. A single instance of anticompetitive conduct may be subject to redress in multiple jurisdictions, levying a significant financial cost (legal fees, fines, and private damages) on defendants, forcing them to make multi-faceted leniency decisions and exposing them to the potential for divergent and/or contrasting legal requirements.

Furthermore, conduct that may be legally permissible within the host jurisdiction may be found to be illegal in other jurisdictions. This can have decided effects for multi-national companies and create significant headaches for chief risk officers and general counsels.

One need not look far to see indications of the increasingly transnational nature of anticompetitive behavior and the global consequences of collusion in structurally linked markets. Headlines during the past few months depicted international cartels in liquid crystal displays, financial services, auto parts, and mineral mining.

Many jurisdictions sanction the extraterritorial reach of their antitrust laws. The antitrust laws of the U.S. and EU apply to conduct that occurs outside the jurisdiction but that has substantial and intended effects within the jurisdiction.[1] Thus, companies engraining in cartel behavior outside of these jurisdictions (e.g., in Asia) may nonetheless face liability in the U.S. or EU if the effects of the conduct can be felt there.

The liquid crystal display cases, and specifically AU Optronics, are illustrative of this point. There, four Taiwan LCD manufacturers and two Korean LCD manufacturers allegedly met monthly in Taiwan and engaged in a conspiracy to fix the price of LCDs. Prosecution of the conspirators occurred in the U.S. and the EU.

The U.S. court applying the standard, “Section One of the Sherman Act applies to wholly foreign conduct which has a substantial and intended effect in the United States,” held that the conduct was actionable under the U.S. antitrust laws.[2]

The EU Commission similarly explained, “These agreements had a direct impact on customers in the European Economic Area because the vast majority of televisions,

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[1] *See, e.g., Minn-Chem Inc. v. Agrium Inc.*, 683 F.3d 845 (June 27, 2012).

[2] Order Denying Defendants’ Motion To Dismiss The Indictment, U.S. v. AU Optronics Corporation, M-07-1827SI, (N.D.Cal. Apr. 18, 2011) available at http://amlawdaily.typepad.com/Illstonauo.pdf.

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computer monitors and notebooks incorporating those LCD panels and sold in the EEA comes from Asia."[3] A similar situation exists around the conspiracy to fix automotive parts, which is being prosecuted in the US, EU and Japan.

Companies engaged in multinational conspiracies face the potential for fines in each affected jurisdiction, as well as potential liability in private lawsuits, which in some countries may be as large as treble damages. Corporate criminal prosecution is available in some jurisdictions. Company executives face potential fines and prison time. Cartel investigations may take years to wind down, exposing the company to business disruption and uncertainty.

Once a company engages in cartel behavior, there is little the company can do to outright eliminate liability. However there are 10 practical steps that a company can undertake to mitigate its risk and reduce its exposure.

1. Identify the problem early. Leniency in most jurisdictions is a race to agency front steps. Companies need to identify the problem, engage counsel, and gather facts in a timely and efficient manner. Having a plan in place that identifies the internal and external legal counsel to be contacted, the steps to gather the facts, and the methods of evidence preservation often expedites the process.
2. Conduct frequent antitrust training. This increases the likelihood that employees will step forward when there is a problem.
3. Assess the liability. Use external counsel to identify in which jurisdictions exposure lies.
4. Determine where the liability is greatest and develop a plan to minimize, to the extent possible, that liability. Be wary of jurisdictions where ripple effects occurred. Liability may exist in jurisdictions other than where the conduct occurred.
5. Develop a coordinated multi-jurisdictional approach to leniency. It is not enough to file in a company's home jurisdiction or where its main counsel are located. A company should file for leniency in every (or nearly every) jurisdiction where it faces potential liability. Leniency filings should be coordinated so that a helpful admission in one jurisdiction is not a harmful one in another.
6. Carefully draft leniency applications. Antitrust regulators share information across jurisdictions. The bounds of confidentiality may not the same among the jurisdictions where leniency is sought. Companies need to decide what facts can be disclosed without jeopardizing liability in other jurisdictions. If there are jurisdictions where leniency is not available, the company should ensure that its leniency applications provide sufficient facts to obtain leniency without at the same time exposing the company to greater liability than is necessary.
7. Manage communications. Have a plan in place so that when the conduct at issue becomes public, communications can be made in multiple jurisdictions.
8. Keep the investigation confidential and centralized. Antitrust investigations are disruptive to business. Preserving favorable evidence and testimony can be difficult when employees begin to discuss the investigation amongst themselves. Having multiple legal teams parading around the office creates confusion, and perhaps unwarranted concern. Keeping the legal process centralized permits cost containment and efficient use of resources, and avoids mixed messaging.

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[3] Press Release, European Commission, Antitrust: Commission fines six LCD panel producers €648 million for price fixing cartel, (December 8, 2010). *See also* United States Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations **(**April 1995) ("The reach of the U.S. antitrust laws is not limited, however, to conduct and transactions that occur within the boundaries of the United States. Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.").

9. Be wary of privilege. Jurisdictions have varying rules regarding privilege. Some treat internal interview as a corporate privilege, while others treat such interviews as a legal privilege. Knowing where a company's exposure lies will help define what privileges may be available.

10. Preserve evidence. Jurisdictions vary in the evidence preservation requirements. Play to the most onerous denominator. Decide which, among the jurisdictions where liability may exist, has the most onerous evidence preservation requirements and abide by those requirements. Evidence destruction is often uncovered and there is no sense in compounding conduct liability with obstruction of justice issues. Destruction of evidence can also jeopardize leniency.

Following these 10 practical steps should mitigate multi-jurisdictional antitrust liability for cartel activity and ensure that a company facing such liability is not over exposed.

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