

Antitrust Compliance Can Help Cut Costs Amid Pandemic

By **Pat Pascarella** (July 16, 2020, 4:52 PM EDT)

In these trying economic times, companies are under immense pressure to cut costs. And legal services, with a balance sheet cost column but seldom a revenue column, likely will make the short list of candidates.

Companies and law firms undoubtedly will explore various forms of alternative fee arrangements, preferred-provider plans, increasing or decreasing reliance on in-house attorneys, etc. And they likely will come up with some creative and effective solutions. But during this push for new cost-saving ideas, don't forget an old but effective one, compliance.



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Antitrust compliance programs are not new. They are not sexy. And you may not receive accolades for implementing an effective program. But, when properly designed and implemented, antitrust compliance programs work, and the savings is significant. They prevent inadvertent as well as intentional violations of the antitrust laws — an expensive misstep. And almost as importantly, particularly in the current environment, they prevent appearances of impropriety that can be almost as costly.

Why are they important in this environment? In volatile markets parallel actions by competitors relating to pricing, production, capacity, procurement and employment are more likely as rivals react similarly to common crisis-market stimuli. Parallel, or seemingly coordinated, conduct is of course an important element in pleading a conspiracy in restraint of trade under the Sherman Act.

And while parallel conduct by itself typically will not suffice to support such a claim, certain other conduct by companies that has increased during these past months may provide the plausible plus factor. That conduct, in short, is communications with competitors aka the opportunity to collude — a commonly plead plus factor.

The incidence of communications between competitors has increased in the past months as companies scramble to identify best practices, consider pandemic-related collaborations and simply share frustrations. Likewise, public announcements regarding future business plans and strategies — sometimes viewed by courts as surreptitious communications with competitors — also are on the rise as companies attempt to quell concerns about the pandemic's impact on their businesses.

To be clear, there are many economically rational explanations for similarly situated companies

responding in similar manner to the same market conditions. Likewise, there are legitimate reasons for issuing a press release, and lawful, even pro-competitive, reasons for competitors to communicate. Still, the optic is there and may be sufficient to trigger a government inquiry or permit a plaintiff to survive a motion to dismiss.

Other pandemic-related facts that further increase the risk:

- Stress clouds judgement. And in these volatile times, stress is high as executives and managers face immense pressure to identify and implement creative solutions to restarting or maintaining businesses.
- Market structures or business practices may have changed rendering earlier guidance and guidelines potentially in need of updating.
- A lot more inter- and intracompany communications are now in discoverable formats. Moreover, some of the platforms and applications being used to facilitate communications could undermine privilege claims.
- As the pandemic dust settles there will be a lot of people looking for others to blame.

And one final factor. Perhaps misinterpreting press reports of competitors collaborating under the auspices of the Defense Production Act — which in fact has very specific and rigorous requirements for antitrust immunity — or via collaborations precleared by the U.S. Department of Justice or the Federal Trade Commission, some businesses are operating under the mistaken belief that the antitrust laws have been somehow suspended or relaxed during the pandemic.

All of these factors combine to create a significant opportunity for mischief — and expense.

Given that, the following actions are recommended:

Pandemic-Specific Tips

- Determine whether there have been any changes to your business practices, or the markets in which your company competes both for sales as well as supplies and distribution, that may necessitate amending or updating your current guidelines.
- Reinforce guidelines related to communications with competitors underscoring that they have not changed and that such communications may in fact create even more significant risk in the present environment.
- Remind clients that public statements regarding shifts in business strategies or future plans — particularly those relating to pricing, capacity, production, market segments served and employment practices — may be viewed as indirect communications with competitors and so should be precleared through the legal department.
- Consider requiring business rationales for any crisis-driven or otherwise out-of-the-ordinary actions including (1) collaborations or information exchanges with competitors, including hiring practices and salaries; (2) price changes or decisions to maintain prices in the face of uncertain

demand or overcapacity; (3) decisions relating to production or amount of capacity to restart; and (4) changes in positions or agreements with suppliers or channels.

- Remind clients that anything they commit to writing — or anything said during an audio or video conference — should be something they wouldn't mind the DOJ reading or watching two years from now.

Additional Tips for an Effective Compliance Program

Below are some additional suggestions for creating and implementing an effective compliance program. A number of these suggestions incorporate practices identified by the DOJ as factors they will consider in determining whether a company's antitrust compliance program entitles it to lenience at the charging or sentencing stages of a criminal antitrust prosecution.^[1]

Senior management support is critical.

Recall a September 2014 speech by then-Deputy Assistant Attorney General Brent Snyder in which he insightfully noted:

If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one.

Five years later in the above-referenced charging and sentencing guidelines, the DOJ underscored the importance of a culture of compliance.

Active and vocal support from the company's executives and managers is critical to the success of an antitrust compliance program — particularly in times of economic volatility with immense pressure to perform.

In this environment, what is more likely to guide an employee's conduct — pleasing his or her boss who controls salaries, bonuses and promotions, or following some rules promulgated by a faceless antitrust attorney? It is incumbent upon senior management to make it clear to employees that failure to comply with the antitrust guidelines, or failure to involve an attorney when there is even a question of legality, are not career-enhancing practices.

Legal support should be sufficient and empathetic.

Relatedly, active support from executives and managers is more likely if the legal team can avoid being viewed as a bottleneck. Not that most legal departments are looking for something else to do during these demanding times, but slow response times and turnaround will impact the clients' willingness to seek legal guidance in the first place.

In addition, clients must perceive that their attorneys are on their side. Yes, even in-house counsel must engage in a bit of marketing. Regardless of the ultimate advice on any particular issue, attorneys and other individuals responsible for compliance must work constantly to cultivate a team atmosphere with their clients.

Guidelines should be easy to understand and relevant.

Having reviewed and edited numerous antitrust guidelines this advice apparently is not as obvious as it sounds. For a compliance program to be effective it must be easy to understand and relevant. Anyone who has read the federal antitrust laws themselves knows they are not exactly a model of clarity. Statements of blackletter law are not helpful. Effective guidelines must include discussions and examples of scenarios that employees are likely to encounter in their day-to-day duties.

Don't create a plaintiff's exhibit.

That said, there are few things more atmospherically impactful at trial than plaintiffs counsel introducing a company's own antitrust guidelines that appear to condemn the allegedly illegal act. While of course not substantively relevant, there are simple ways to avoid this drama. For starters, the guidelines should clearly indicate that they are intentionally conservative to avoid even the appearance of impropriety.

The actions or communications proscribed are included so that employees will seek legal guidance before engaging in them — not because they are necessarily illegal in all circumstances. Also, do not hesitate to include a few self-serving statements that render the document a less-than-desirable plaintiff's exhibit.

Consider mandatory antitrust review.

Companies may consider making legal review mandatory for certain proposed actions. The usual candidates for such treatment are:

- Competitor interactions;
- New pricing or price changes; and
- Certain press releases or public announcements.

While in some instances this may be a necessary and prudent course, a little advice. If you are going to require legal review of certain proposed actions make certain that you understand the scope of your undertaking — which in turn requires an understanding of the processes your clients go through before the review-triggering action occurs.

I have seen numerous companies implement mandatory review requirements only to ultimately abandon or ignore them because they failed to identify the most efficient way to add this layer of protection resulting in unanticipated increases in workload and delay.

Include DOJ sentencing and lenience requirements.

Finally, as you review and update your antitrust guidelines and compliance program, make sure to check your revised program against the Antitrust Division's recent charging and sentencing policy statement regarding effective compliance programs. While the best compliance program is one that works, there is no reason not to include in your program as many relevant DOJ-identified factors as possible.

And while the DOJ explicitly recognizes that not all factors will be relevant in every case and that "a company's size [may affect] the resources allocated to antitrust compliance and the breadth of the company's compliance program," if you opt not to adopt a particular DOJ-identified factor, you should be prepared to explain the rationale for doing so.

Antitrust litigation is expensive in terms of dollars, employee and management time, and impact to

reputation. An effective, up-to-date compliance program will help you avoid those costs — a significant, albeit unquantifiable, savings.

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[1] Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, Department of Justice, Antitrust Division (July 2019).