



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

DESIGNING AN INTERNATIONAL ANTITRUST COMPLIANCE PROGRAM*

Steven P. Reynolds**

I. Strategies for Compliance

Assuming that a company has an existing U.S. antitrust compliance program and is struggling with how to deal with compliance issues for their operations in other countries, this process should begin with an evaluation of the existing program, move to a needs assessment, and then to plan-development efforts. It is critical to keep in mind that an effective program has to work in its own environment, and so cannot be simply taken off a shelf or from any guidebook (including this article). This is both a curse and a blessing. The benefit is that counsel has great flexibility (assuming management buy-in) to develop the program.

A. Evaluating the Existing Program

Compliance with the U.S. laws is an appropriate and necessary starting point. It remains the most important and dangerous jurisdiction, given its relatively high levels of government enforcement activity, private litigation climate, risks of criminal prosecution, and expansive extraterritorial reach. This argues persuasively for a "fix your own house" starting point. Counsel should use this opportunity to decide if their existing U.S. compliance program is adequate, or whether it could use improvement. There is a large and growing body of literature on compliance programs. Readers can review this literature and experiment with different techniques. U.S. companies should start with the Federal Sentencing Guidelines.

B. Needs Assessment

The next step is to assess your client's needs for a program covering issues beyond U.S. legal compliance. Sometimes, it may be sufficient to simply export your U.S. program. A company might decide that their operations everywhere need to understand U.S. antitrust principles. However, in most situations the problem is more complicated. There is no one-size-fits-all answer. Some factors to consider include the type of business, the position in the market, its antitrust history, and the locations involved. In the multinational setting, a particularly important factor to consider is where the company does business. For example, which markets does your company sell into? You might also consider whether you should create different programs for different national subsidiaries, or even different business lines.

* Copyright 1966 and 2000, Steven P. Reynolds. All rights reserved

This article is an updated excerpt from an article which first appears in "International Quarterly" (Jan.y 1996).

*** Mr. Reynolds, Senior Counsel, Law Department, Texas Instruments Incorporated, Attleboro, Massachusetts, is interested in hearing from readers who are involved in training. He can be contacted via E-mail at <s-reynoldsl@ti.com> or by phone at (508) 236-3245.*

C. Plan Design

Once this process is completed, you can begin plan design. This article discusses three nonexclusive strategies that should be incorporated as appropriate into any compliance program. These are communications, audit and reporting, and control strategies. But first a brief detour.

Once this process is completed, you can begin plan design. This article discusses three nonexclusive strategies that should be incorporated as appropriate into any compliance program. These are communications, audit and reporting, and control strategies. But first a brief detour.

II. Cultural and Other Factors to Consider

There are a variety of factors that will influence the effectiveness of a compliance program, particularly when you are working with non-American employees. Several of these issues are worth discussing before getting into the specifics of plan design.

One important problem is understanding that a competitive market environment, with antitrust laws as the policing principle, is new to a great many countries. We should also remember that not all antitrust regimes share the American emphasis on economic efficiency and consumer welfare. We should consider also the impact on compliance strategies. A communications program in the United States might focus on the important value of antitrust law toward promoting free enterprise and competition. This may make it easier to convince employees that the law is just. /1/ But what about a foreign audience? This may argue for a localization of the message, or a somewhat different focus than might work with an American audience.

You must also consider that the risks of antitrust violations may not seem as real to people who come from environments without any enforcement history. This problem is compounded in countries where there is no risk of criminal prosecution for individuals, and where employee protection legislation mitigates the penalty, even for job termination. At one level, this is a challenge to the communication strategy, as it removes the practical usefulness of the "fear" technique. There is probably an entire generation of corporate counsel whose antitrust compliance communications program consisted of showing Commonwealth Film's "The Price," and adding a few comments on company policy at the end./2/ There is no denying the value of fear of imprisonment to instill compliance among law abiding citizens. /3/ However, there are limits to how far this will get you, even in the domestic setting. /4/ Drawbacks to the "fear" technique are compounded in the multinational setting. The culture of diminished personal risk to employees also poses a challenge to the compliance program's other strategies. In fact, it argues strongly for building audit and reporting (and perhaps even control) features into a multinational compliance plan.

You must consider the degree to which cultural differences affect employee receptiveness to the program, effectiveness of the communications materials and techniques, and respect for company policies and external requirements. Most large multinational companies assume that their people are all the same (or at least have been made the same by a process of socialization in the company's strong culture). The literature suggests that these assumptions are incorrect. Even in the strongest company cultures, national cultural differences have an enormous impact. Cultural attitudes may result in tremendous differences in viewpoints on key issues, such as respecting laws and telling the truth.

III. Communications Strategies

The communication aspects of a compliance program are probably the most important. For some companies, it may be all there is to the program. There are a couple of important reasons for having a good communications program. First, employees have a better chance of obeying laws when they understand what they are and what they mean. This is both an issue of effectiveness (avoiding mistakes of ignorance) and fairness (preparing employees who face penalties such as loss of job or even imprisonment for failure to comply with the laws). Second, a communication strategy is the only way to act preventively without limiting business flexibility. There are many aspects to consider including:

1. One-size-fits-all messages for all the company's employees require that the messages be brief.
2. An effective plan must also consider how to identify those employees who need more detailed information and develop ways to get the appropriate information to them in a cost-effective manner.
3. How much detail should be included?
4. Which laws should be discussed?
5. Is there a potential need for multiple-language materials?
6. How do you deliver the message, especially to a globally dispersed audience? This may make classroom training practically impossible and require a company to consider methods that allow wider dispersment (*e.g.*, videotape, software, satellite broadcasts).
7. Can you embed antitrust compliance information into other nonlegal communications programs?
8. Should you require employee participation in programs regularly?

8. Should you require employee participation in programs regularly?

9. Some companies take advantage of annual events, like a field sales meeting at an annual trade show, to ensure that the message gets across. This technique probably means several meetings in different countries, if it is to be done globally.

10. You need to consider the different vehicles for delivering communications and their advantages and disadvantages. The author recommends that a program incorporate a wide range of techniques, recognizing that people learn in different ways. /5/

It would not be fair to simply leave the reader with these comments and guidelines without some suggestions on a recommended course of action. My review of the compliance literature, which fortunately in recent years has revealed quite a bit about the practices of leading U.S. companies, suggests that this model is industry standard among large companies. /6/

1. *Begin with a simple, broad set of principles and communicate these to all employees in all countries.* This can be as basic as, "We will comply with the antitrust laws of the countries in which we do business," but more practically should include some simple "don'ts." One approach would be to briefly mention the worst antitrust sins and prohibit them. The company can choose its own list, but the obvious first candidate is to prohibit agreements with competitors to fix prices and allocate markets. While technically this practice may be legal in some countries (those lacking antitrust laws or those that may exempt certain cartels), it is probably wise to develop some broad global principles. The needs of the company, the jurisdictions in which it does business, and its history (previous problems or the existence of consent decree obligations) may determine if other items should be added to the list.

2. *Consider tying the broad principles to a notion of ethics and good company practice, and also legal compliance.* There is substantial research suggesting that a legal compliance message can be strengthened by placing it within the larger framework of ethical practice. /7/ While cultural differences and attitudes abound, a strong case can be made that there is agreement between cultures on certain fundamental ethical positions. It is probably impossible to deal with all the details of an antitrust compliance program in this manner, but some broad principles may fit.

3. *Communicate more detailed information to employees who need it.* It is not enough to simply communicate broad principles. The antitrust laws are complex, particularly in a multinational situation, so some employees need to know more. The company should identify these people and offer information to them. For example, all employees who wish to serve as representatives to a trade association should learn about the antitrust issues involved. Field sales organizations might be useful targets for additional information on avoiding appearances of horizontal conspiracies. Marketing organizations might need detailed information on vertical restraints and price discrimination laws. The point is to customize materials and information to be useful. It is not helpful to overload people with legal details that they do not need to know. For example, a field sales person needs to know about price-fixing but does not need to know about premerger notification rules. Consider also the international issues involved. For example, marketing personnel in the United States might need to know something about EC vertical restraints law if they develop plans for use overseas.

4. *Use a wide range of vehicles, including written materials, classroom training, and other methods.* The successful program is likely to use a variety of materials to accomplish the goal of being both broad (communicating basics to everyone) and specific (getting the right information to those who need to know more). This task will be made easier, and more effective, if a variety of media are used. This might mean something easily duplicable, such as a handbook or videotape, for expressing the broad message. It may mean that you need to think about other options for more specific information. While high-tech answers offer great promise, counsel should not discount the value of the old-fashioned legal memo (especially for complex areas like government notification procedures) or face-to-face discussions.

The company should localize materials for the intended audience. This may mean different materials for different national audiences, or merely modifications as necessary. Design and development of these materials is extremely important, and even more complicated in a multinational environment, so appropriate attention should be paid to the effort.

IV. Audit and Reporting Strategies

Human nature suggests that educating employees is not enough, as sometimes people knowingly violate the law. Every company must consider this limitation on communications strategies and supplement them with some type of checkup system. The easiest is an informal one. Counsel, or even knowledgeable managers, can draw some conclusions based

on the types of questions that are asked (or not asked) of them by employees. Most methods require greater precision and organization. The first category is the use of audits. Companies are used to the need for financial audits, but some may not see the benefit of having auditors look also for issues of legal compliance (or more accurately, compliance with company policies and procedures). Most large companies have done so. This creates both a feedback loop, identifying problem areas for incorporation into the communications program, and a means of detecting serious problems before they go too far. The second category is the use of reporting systems. This means developing systems to encourage employees to report suspected wrongdoing to management. This may help to identify problems that have not been found through auditing. These methods may be particularly necessary in environments where compliance attitudes may be lax, as often happens in countries where there has been little or no enforcement history. This factor argues strongly for, at a minimum, expanding a company's auditing efforts to include compliance concerns on a global basis.

V. Control Strategies

Some smaller companies, and certainly all large ones, incorporate some elements of control strategies into their programs. At a basic level, this means creating a review process for certain types of actions or decisions. For example, a company may require certain management-level approvals for contracts, or the involvement of legal counsel. There are many potential examples, involving even greater levels of restrictions or limitations on business flexibility. Examples include

- (1) restricting trade association membership (a mild form might require higher management approvals and required training, while a harsher form would ban employee membership altogether);
- (2) mandatory rotation of field sales personnel through geographic territories;
- (3) reporting to management and/or legal counsel of all competitor contacts;
- (4) a variety of restrictions on operating managers' pricing freedom (*e.g.*, requiring that all prices cover full allocated costs, requiring higher management approval and/or legal review of all price discounts, a policy of uniform pricing for certain regions); or
- (5) adopting vertical dealing policies, such as doing business with any vendor that meets certain quality criteria on a nondiscriminatory basis, even where national laws might permit greater restrictions.

As may be obvious to the reader, enforcing these policies would result in overcompliance. They represent attempts to keep far from the flame to avoid inadvertent mistakes and limit the ability of "bad actor" employees to violate the law.

The primary problem with control strategies is that they all reduce business flexibility. A company must consider the degree to which this is acceptable. The cost of this conservative approach might be lost business, increased bureaucracy, and stifled employee initiative. Companies burned by antitrust lawsuits or investigations in the past will be more likely to develop strong control strategies. /8/ It might be interesting to see whether companies that initiated control strategies maintained them long after the immediacy of these events had passed and the hidden costs of the strategies manifested themselves.

On the other hand the experience of these companies may suggest that there are limits to the effectiveness of communications and audit/reporting strategies, and that control strategies have a role to play. The author's belief is that certain control strategies are necessary for any company. For example, compliance with Community vertical restraints law calls out for some control over distribution contracts to ensure that either restraints do not exist, that the appropriate block exemption applies, or that the company handles its notification obligations properly. Similar considerations argue for review of licensing agreements, dealer termination decisions, and agreements with competitors. Nevertheless, a company must carefully balance the benefits of control in terms of reduced legal risk, with the costs of limited business flexibility.

VI. Summary and Conclusion

The U.S. antitrust environment remains the most challenging and poses the greatest risk to company compliance efforts; therefore, a good starting point is to ensure that the company has an effective program at home.

In a multinational environment, counsel must have some working knowledge of foreign antitrust laws. Subscribing to a general publication covering international antitrust developments is a good start. For EC law, there are many good reference materials available in English, including the annual reports of the Commission (available from the EC's offices in New York City and Washington, D.C.), and one of the British hornbook texts on EC competition law (*e.g.*, *Ballamy & Child, Common Market Law of Competition*), which should be available through Canadian offices of UK

Bellamy & Child, Common Market Law of Competition), which should be available through Canadian offices of UK publishers.

Counsel must consider the issues of market effects, restrictions of U.S. export trade, the potential for multiple jurisdictional enforcement, and other factors in the international arena.

It is good policy to develop a core set of principles (*e.g.*, not to conspire with competitors to fix prices or allocate markets) that is appropriate for your business and adopt it globally. This should be communicated to all employees.

You must also determine which employees need additional information.

This can mean teaching U.S. law to Europeans, and Community law to Americans. It requires target marketing. Consider using a variety of communications vehicles, and spend some time thinking about their cultural acceptance and effectiveness for your different audiences.

Think seriously about the potential benefits of a tie-in between legal compliance and ethical business practice. This can make your efforts easier to sell, and help to improve the total compliance culture if taken seriously by management and employees. Use audit and reporting systems to establish a checkup and feedback system. Consider the need for control features, even if only very basic ones, such as required reviews of certain types of contracts. This is especially needed where national laws include required notification provisions. The international area adds new layers of complexity to the same problems. Do not let that intimidate you.

ENDNOTES

/1/ Despite government efforts to enforce the laws, the reality is that legal compliance depends primarily on voluntary adherence. Company compliance programs depend on this same principle. Academic research supports that employees will pay more attention (all things being equal) to laws that they respect than those that they feel are arbitrary and unnecessary.

/2/ The author considers this product to be an excellent one, but merely wants to point out its limitations especially in an international context.

/3/ Beckstein, Gabel, and Roberts, "An Executive's Guide to Antitrust Compliance," *Harv. Bus. Rev.*, Sept.-Oct. 1983 at 94. The authors surveyed 200 executives of large U.S. corporations and determined that the number one factor in terms of deterrence value was the probability of prison sentences.

/4/ It can be too effective and can scare people into not being able to act independently. It also can prove less than effective if it becomes to some audiences unreal, almost funny, or to a cynic who views the program as nothing more than an executive insurance program (*i.e.*, the real reason for the program is to keep the top brass out of jail).

/5/ Reynolds, "A Survey of Best Practices: Innovative Communications

Techniques for Corporate Antitrust Compliance," *Antitrust* (Fall 1994), at

33 (gives practical examples of a variety of techniques); Reynolds and

Hoeller, "Preventive Law Through Client Training," *56 Tex. B.J.* 148

(Feb. 1993) (discussion of techniques and adult learning principles).

/6/ In 1996, the six largest U.S. industrial companies were General Motors, Ford, Exxon, General Electric, AT&T, and IBM. All these companies have multinational operations and have had some history of antitrust litigation. From my reading of the published literature, they all appear to follow a model of communications program (as described herein), plus both audit/reporting and control strategies. There is substantial material on large company practices, but probably not enough on how smaller companies are dealing with the same issues.

/7/ Paine, "Managing for Organizational Integrity," *Harv. Bus. Rev.*, Mar.-Apr. 1994 at 106 (argues for importance of an ethics-based compliance program and gives examples of outstanding corporate programs); Council of Ethical Organizations, *The Federal Sentencing Guidelines for Organizations. The Role of Ethics Programs* (1993) (surveys

Organizations, *The Federal Sentencing Guidelines for Organizations. The Role of Ethics Programs* (1993) (surveys history and status of corporate ethics programs).

/8/ Beckstein, see Note 3

This material is protected by copyright. Copyright © 2000 various authors and the American Corporate Counsel Association (ACCA).