105 Antitrust/Competition Law Compliance for Multinational Operations

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Previously Mr. Lindquist served as assistant group counsel for the Systems Integration Group of TRW Inc. and was a partner in the Los Angeles Office of Pepper, Hamilton & Scheetz.

Mr. Lindquist served as chair of the Antitrust Section of the Los Angeles County Bar Association and vice chair for publications of the State Bar of California Antitrust Section. He served as president of ACCA's Southern California Chapter and on ACCA's 2001 Nominating Committee. He also served on the executive committee of the Corporate Law Department Section of the Los Angeles County Bar Association.

Mr. Lindquist received a BA from Lawrence University and a JD from the University of Texas School of Law.

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Mr. Sanna started his career in private practice and later joined Texas Instruments Inc., as European counsel. He was then appointed director of legal services for the Italian subsidiary of Digital Equipment Corp. and then joined Reckitt & Colman PLC as legal director Europe.

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Corporate Compliance Programs

[PDF : 42 KB]

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Preface

This Bulletin provides the Competition Bureau's views about corporate programs designed to ensure compliance with the Competition Act.

It is well recognized that most firms do comply with the law. Nonetheless, all firms can benefit by implementing internal mechanisms to assist them to remain in compliance with the law. Equally, as prevention mechanisms may not ensure perfect compliance, a corporate compliance program can also facilitate detection and remedial action by the firm in instances when anti-competitive conduct occurs.

The Bulletin outlines the components of a credible and effective program. To be credible, a compliance program must demonstrate the company's commitment to conducting business in conformity with the Act. To be effective, it needs to inform employees, officers and directors about the content of the Act as it affects the company's business.

It makes good business sense to implement an effective program that addresses both the

criminal and civil reviewable provisions of the Act. A good corporate compliance program can help to identify the boundaries of permissible conduct, as well as identify situations where it would be advisable to seek legal advice. A pre-emptive identification of areas of potential risk can save time and money, preserve goodwill, and set a company on a good track for the future. Knowing the limits of illegal conduct can free a company and its employees to pursue innovative and profitable business practices.

Many firms have already developed comprehensive compliance programs. Still others have instituted some or all of the highlighted elements on an informal or ad hoc basis and, for them, it may simply be a question of supplementing or formalizing what already exists.

The decision to implement a compliance program is, of course, voluntary and the contents of a program are at the discretion of the firm implementing it.

The goal of the Competition Bureau's work in the area of in-house compliance programs is to contribute to a business culture of respect for, and compliance with, the Competition Act.

Konrad von Finckenstein, Q.C.
Director of Investigation and Research
Competition Act

Introduction

The Competition Bureau (the "Bureau") publishes bulletins, guidelines and pamphlets to explain the Competition Act (the "Act") [*Competition Act*, R.S.C. 1985, c.C-34] and Bureau enforcement policies, all with a view to promoting compliance with the Act. The purpose of this Bulletin is to provide guidance about measures that all businesses can take, through the implementation of internal corporate compliance programs, to prevent or minimize the risk of violations of the Act.

This Bulletin describes the elements that the Bureau considers to be essential in any compliance program, if it is to be effective in preventing and detecting anti-competitive conduct falling under either the criminal or civil reviewable provisions of the Act. They are also the evaluative criteria against which the Director of Investigation and Research (the "Director") makes assessments concerning the effectiveness of a particular compliance program for the purpose of alternate case resolutions and immunity and sentencing recommendations.

Because the Director often recommends the implementation of a compliance program as part of a criminal consent settlement or civil remedial order, it is also important that firms [For the purposes of this Bulletin, the terms "firm" and "company" are used interchangeably and include all forms of business organizations, whether or not incorporated.] have an understanding of the Director's expectations concerning the design of such programs.

The compliance program components described in this Bulletin are neither industry nor company specific. They are recommended as the baseline for the development of any effective in-house program. The Bureau also recognizes that compliance programs must be tailored to meet the specific needs of each firm, given the nature of its business and its organizational structure. Accordingly, where suggestions are included about the various ways in which the individual components can be implemented, they are provided merely as illustrations.

The views expressed herein are not a binding statement of the Director's position in any particular case. Individual enforcement decisions and alternate case resolutions are based upon the circumstances of each case.

This Bulletin does not give legal advice. Readers should refer to the Act when questions of law arise and, if a particular situation gives rise to concerns, should obtain legal advice.

Elements of an Effective Compliance Program

In the Bureau's view there are five elements that are fundamental to the success of any

corporate compliance program and which should be incorporated in every program, regardless of the particular model adopted or its level of complexity. These five essential elements are:

- the involvement and support of senior management;
- the development of relevant policies and procedures;
- the ongoing education of management and employees;
- monitoring, auditing and reporting mechanisms; and
- disciplinary procedures.

Senior Management Support

Senior management's clear and unequivocal support is the foundation of an effective compliance program.

The message that compliance with the law is a fundamental part of company policy needs to be clearly promoted. Senior management can establish a climate of respect within the company towards the Act by playing an active and visible role in relation to the compliance program. By demonstrating its commitment and involvement, senior management will send the message that violations of the Act are not accepted as a legitimate business practice.

Subsequent periodic statements to sustain the initial message, and management conduct that reinforces the message, will establish a positive behavioural model for all employees.

Relevant Policies and Procedures

The substantive content of a compliance program should be described in a company publication.

The development and documentation of compliance policies and procedures tailored to the firm's business operations are critical to the success of the program, as is the need to regularly update such policies and procedures to reflect changes in company operations and developments in competition law and policy. While the required detail and form may vary from firm to firm, some typical items include:

- a statement by the chief executive officer stressing the company's commitment to the policies and procedures contained therein, and its uncompromising adherence to the Act;
- a reference to the purpose of the Act;
- a general description of the Act and its enforcement, penalty and remedy provisions, with emphasis on those provisions of the Act that are most relevant to the company;
- clear examples to illustrate the specific practices that are prohibited, so that managers and staff at all levels can easily understand the potential application of the Act to their own duties;
- a practical code of conduct that identifies activities that are illegal or open to question;
- a statement outlining the consequences of breaching corporate policies;
- procedures that detail exactly what an employee should do when concerns arise out of certain situations, or when possible violations of the Act are suspected;
- an acknowledgement, signed by each employee, indicating they have read, understood, and will adhere to the policy.

Training and Education

An effective compliance program will include a training component that targets personnel at all levels who are in a position to engage in, or be exposed to, anti-competitive conduct.

Senior management and staff alike need to understand the limits of acceptable behaviour, both within the firm and on the part of other players in the industry and the marketplace.

The Bureau has a variety of publications that can be used in the training and education component of a firm's compliance program. Appendix 1 lists various of these publications, including a series of plain language pamphlets explaining various provisions of the Act, and

some detailed guidelines which address both technical details of the Act and Bureau enforcement policy concerning various provisions. In addition, there are periodical publications such as the Misleading Advertising Bulletin, Competition Communiqué, CompAct and the Annual Report, and speeches, news releases and other occasional papers which deal with current issues. The Bureau can also provide speakers on various topics. [Companies are encouraged to contact the Bureau's Information Centre to obtain information about Bureau publications, mailing lists, and the Fax-on-Demand and other services. The Centre's address and phone number are listed in Appendix 2.]Selected publications are available at the Bureau's website. Readers can also obtain copies of any Bureau publications by contacting the Bureau directly. The Bureau's postal address, telephone number, and website are listed in Appendix 2.

Monitoring, Auditing and Reporting Mechanisms

Monitoring, auditing and reporting mechanisms are vital to the success of any compliance program.

A credible review and assessment component is fundamental to an effective compliance program. Monitoring, auditing and reporting mechanisms function to prevent and detect anti-competitive conduct. They provide both employees and managers with tangible evidence that there is indeed a check on their activities. They can also be a means to measure how well the compliance program is being observed and to identify whether adjustments are needed in the program.

The format of this component will depend on the company's particular needs, given its line of business and the extent of its exposure to potential violations of the Act. The Bureau does not endorse any particular procedure or combination of procedures; rather, a company should be satisfied that the measures it implements are generally effective to prevent anti-competitive conduct, and to detect and address it if it does occur.

Monitoring is preventive in nature, being a continuous, systematic procedure implemented to check against potential violations of the Act. Monitoring can be valuable to support a due diligence defence. Advertising is an example of one area where continual monitoring could benefit many companies. For example, prior to being signed off, a company could require that all its advertisements, regardless of their form, be checked against a predetermined list of requirements for compliance with the Act.

Audits are designed to identify whether a violation of the Act has occurred and, if one has, that it is dealt with appropriately. Whether companies institute periodic, ad hoc, or event-triggered audits, or a combination of them, the aim is the same -- to ensure that problems are identified and resolved and that the company and its employees are in compliance with the law. The choice of audit approach likely will be determined according to what activities the individual firm considers will raise the greatest risk of violation of the Act. The company should also consider whether any of its internal activities, or external practices in the industry in which it operates, give rise to uncertainty about the law.

An internal reporting procedure -- that is, an unfettered ability to report conduct that is reasonably believed to be a contravention of the Act -- encourages employees to provide timely, reliable information that can be the basis for further investigation by the company. If the steps to be followed and the information required are clearly defined, the reporting procedure can identify existing or potential problems in order that timely remedial action can be taken.

Disciplinary Procedures

Disciplinary measures demonstrate the seriousness with which the company views anti-competitive conduct.

A disciplinary code or policy relating to individuals who initiate or participate in anti-competitive conduct is important not only for its deterrent effect, but also as a reflection of the firm's policy against such conduct. A compliance program should ensure that employees involved in anti-competitive activity are made aware of the consequences of their behaviour, and that disciplinary measures (e.g. suspension, fines, dismissal) are consistently applied.

Compliance Program Benefits

An effective program will:

- educate employees, directors and officers about the requirements of the Act and the current enforcement policies of the Bureau and reduce uncertainty about what is or is not legal conduct;
- give early warnings of potentially illegal conduct;
- reduce the exposure of corporate officers, directors and employees, and the corporation itself, to criminal and civil liability;
- reduce costs related to litigation, fines, adverse publicity, and the disruption to operations resulting from investigations and prosecutions before the Court or hearings before the Competition Tribunal;
- encourage innovative and pro-competitive marketplace behaviour as a means to effective participation in changing markets;
- increase the awareness of possible anti-competitive conduct by competitors, suppliers, or customers and thereby increase the likelihood of achieving an appropriate remedy, either in the market or by appropriate legal recourse, possibly under section 36 of the Act; and
- assist a company in its dealings with the Bureau, for example, by identifying violations of the Act early enough to allow the firm the opportunity to make a request for immunity in a criminal matter.

Bureau's Consideration of Compliance Programs

This Bulletin does not alter existing Bureau policies concerning enforcement, alternate case resolution, or immunity and sentencing recommendations. [Bureau enforcement policies are outlines in the guidelines listed in Appendix 1. For the Bureau's policy on immunity, see H. Chandler, Deputy Director of Investigation and Research, *Getting Down to Business: The Strategic Dimension of Criminal Competition Law Enforcement in Canada,* March 10, 1994 (speech). Bureau policy relating to matters touching upon prosecutorial discretion should be read in the broader context of the policies of the Attorney General of Canada and, in this regard, readers are referred to the *Crown Counsel Policy Manual,* Department of Justice, January 1993.]

The existence of a corporate compliance program does not immunize firms or individuals from enforcement action by the Director or from prosecution by the Attorney General of Canada. Whether or not a company has a compliance program will, of itself, play a limited role in any decisions by the Director to bring applications to the Competition Tribunal or to recommend to the Attorney General that charges be laid. Neither the Director nor the Attorney General can fetter their responsibilities when there is evidence of an offence.

However, an effective compliance program may better situate a company which has violated the Act to receive consideration for alternate case resolutions or favourable treatment. In determining the most appropriate means to resolve cases, the Director's position about alternate case resolution, immunity and sentencing recommendations may be influenced by the existence of an effective corporate compliance program if it causes the company to take remedial action.

For the Director to take account of a corporate compliance program in deliberations on a particular matter, there must be an affirmative answer to the question "Is this program effective and appropriate for this particular business?"

Exception for Senior Management Involvement

The existence of a compliance program will not influence the Director's deliberations about immunity or alternate case resolution if senior personnel -- the "directing minds" of the corporation -- either participated in or condoned the anti-competitive conduct. In this situation, it will be apparent that management's commitment to compliance was not serious and the program was neither effective nor meaningful.

Moreover, if a compliance program is a sham used to conceal or deflect liability, it could be

considered an aggravating factor in any sentence that the Director suggests the Attorney General recommend to the Court.

Due Diligence Defence

For certain misleading advertising offences under the Act it is open to the accused to raise the fact that it exercised due diligence to prevent the offence. Although an in-house compliance program is not, of itself, a defence to conduct that contravenes the Act, an effective program may enable a company to demonstrate that it took reasonable steps to avoid the commission of the offence. In this way, a compliance program can be beneficial to a claim of due diligence.

Alternative Case Resolution

Depending on the circumstances, both criminal conduct and reviewable practices may be resolved by something less than fully contested proceedings. Available measures include information visits and orders on consent. The Director will be more willing to consider an alternate form of resolution to that of contested proceedings if the company can demonstrate that:

- it terminated the anti-competitive conduct as soon as it came to light;
- it attempted to remedy the adverse effects of the conduct; and
- the conduct was not in keeping with corporate policy.

Although an in-house compliance program is not a prerequisite for alternative case resolution in either civil or criminal matters, the existence of an effective program may enable a company to satisfy these requirements and to demonstrate that it has done so. Other criteria will also be taken into account.[For a more detailed discussion of the Bureau's policy on alternative case resolution, see the Director of Investigation and Research's *Program of Compliance,* Information Bulletin No. 3 (Revised), March 1993.]

If it is determined that an alternative form of resolution is appropriate to settle a matter, and an effective corporate compliance program is not already in place, the Director may require the implementation of such a program as part of the resolution. Corporate compliance programs could be integrated into the settlement of matters in the following manner:

- The Director may resolve both civil and criminal cases following an information visit if it is found that no further inquiry is warranted due to the company's voluntary corrective action. Such corrective action may include the implementation of a compliance program that is appropriate for the particular company, given the circumstances of the alleged contravention.

- In respect of consent orders negotiated in reviewable matters or prohibition orders negotiated on consent in criminal matters, the Director will assess whether a compliance program would help to prevent future repetitions of the conduct in question, with a view to including a program as part of the resolution of the case.

When implementation of a compliance program forms part of the resolution of a matter, the company may be required to demonstrate that its program is likely to prevent anti-competitive conduct. Parties may wish to refer to the five compliance program components outlined earlier to evaluate whether their proposed program is likely to be effective.

Immunity from Prosecution

Those involved in activities that may violate the criminal law provisions of the Act can approach the Bureau for immunity consideration. Pursuant to the Bureau's policy on immunity, in some instances the Director will recommend that the Attorney General of Canada grant immunity in exchange for a party's disclosure of information and its co-operation during any investigation, prosecution or other legal proceedings.

Amongst other things, the Bureau's policy on immunity requires evidence confirming that, upon its discovery, the company took immediate steps to terminate the activity and report it

to the Director. [A more complete discussion about the Bureau's criteria for immunity recommendations is contained in Chandler, *supra*, note 4. For the Attorney General of Canada's policy on immunity, se "Witness Immunity" in *Crown Counsel Policy Manual*, *supra*, note 4.] An effective compliance program will improve the company's ability to demonstrate that it satisfies this particular criterion.

An effective compliance program that identifies possible violations of the Act can also create an opportunity to take advantage of the Director's program of immunity which otherwise might not be available. Although a compliance program is not a prerequisite to a request for immunity, without it the impugned conduct might not be detected early enough to enable the company to report it to the Bureau for the purpose of making the request. Because the timeliness of the provision of evidence is relevant to the Director's deliberations concerning immunity recommendations, the absence of a quick response capacity may compromise a firm's request.

Sentencing and Remedial Orders

Immunity from prosecution is but one form of favourable treatment. Favourable treatment means any penalty or obligation that is less severe than that which would be sought in the absence of disclosure and co-operation from the party who may be in contravention of a criminal provision of the Act.

When a guilty plea is entered, an effective compliance program may lend support to a reduction in the sentence that the Director would otherwise suggest to the Attorney General for recommendation to the Court. The existence of an effective program may enable a firm to demonstrate mitigating conduct for sentencing purposes, including evidence that the activity for which it was convicted was contrary to company policy and to the actions and statements of management, and was terminated as soon as it became known to the company.

In reviewable matters involving abuse of dominant position, exclusive dealing, and tied selling, the Director may apply to the Competition Tribunal for a remedial order. These orders can encompass any term necessary to overcome the effects of the conduct in the market. The Director will seek a term requiring the implementation of a compliance program, or modifications to an existing program, if the circumstances of the case suggest it could prevent future recurrence.

Conclusion

The importance of a compliance program in avoiding anti-competitive conduct under the Act, and in detecting and dealing with such behaviour, should not be underestimated. The procedures put in place as the result of a compliance program serve not only to identify unlawful or questionable conduct, but also to promote awareness that will result in ethical standards of conduct.

Implementing an effective compliance program which addresses both criminal behaviour and civil reviewable conduct is good business. It can help a company avoid the adverse publicity and financial costs associated with contraventions of the Act. A compliance program will also enhance understanding of what is acceptable behaviour so that legitimate competitive practices can be vigorously pursued without unwarranted concerns of contravening the Act.

Appendix 1: Selected Competition Bureau Publications

- An Overview of Canada's Competition Act (1993)
- Merger Enforcement Guidelines (1997)
- Misleading Advertising Guidelines (1991)
- Predatory Pricing Enforcement Guidelines (1992)
- Price Discrimination Enforcement Guidelines (1992)

- Program of Compliance (1993)
- Strategic Alliances under the Competition Act (1995)
- Pamphlets

Appendix 2: How To Contact the Competition Bureau

You may contact the Director or a member of the Bureau at the address and telephone numbers below to obtain general information, make a complaint under the provisions of the *Competition Act*, or request an advisory opinion:

Information Centre
Competition Bureau
Industry Canada
50 Victoria Street
Hull, Québec
K1A OC9

Telephone:
National Capital Region: (819) 997-4282
Long distance (toll free): 1-800-348-5358
TDD service: 1-800-642-3844

Facsimile: (819) 997-0324
FAX-on-demand: (819) 997-2869

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Publication Date: 1997-07-03
Author: Industry Canada - Competition Bureau

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http://www.accc.gov.au/compliance/content.html

cartoon

'Businessmen, particularly those at senior levels, who remain in ignorance of the Trade Practices Act, do so at their peril.'

This comment was made by Justice Spender in the Federal Court in 1987 and it remains just as relevant some twelve years later. Increasingly the Federal Court is looking to the effectiveness of trade practices compliance programs in assessing penalty when companies have breached the Act. It's the ACCC's main task to ensure that Australian business complies with the Trade Practices Act. Whilst it uses enforcement action as a means of obtaining compliance, its preferred option is to show business how to take preventative steps to ensure that contraventions do not occur. This part of the ACCC home page is designed to help you with this task.

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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.

This article is an updated excerpt from and 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.

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 dispersement *(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?

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.,* 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 then 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 Guidelinesfor Organiza-tions. The Rote of Ethics Prograrns* (1993) (surveys history and status of corporate ethics programs).

/8/ Beckstein, see Note 3

GUIDE FROM THE TRENCHES: USING TRAINING AS A TOOL FOR ANTITRUST COMPLIANCE*

*Steven P. ReynoIds***

An important part of the job of an attorney is to assist clients in maintaining legal compliance. Business is risky enough. No one who really reflects on the issue wants to increase business complexities by adding in the cost and burden of lawsuits, government investigations, and possibly criminal prosecutions. However, compliance does not happen on its own. You must cultivate it. One tool for handling this job is the use of client training techniques. The details of one specific approach to antitrust training provide not only the nuts and bolts of a particular program but, hopefully, some insight for drawing conclusions on the training process itself.

I. Training - Why Should You Do It?

Antitrust laws cover a broad range of conduct and influence many areas of business activity. No one is born with an innate sense of what the Sherman and Clayton Acts say and mean. Additionally, the application of these laws changes over time as courts shift their understanding in response to changing business conditions and economic theories. In order to comply with the antitrust laws, employees must understand the laws and how they apply to their day-to-day jobs. Every company must have a system for communicating relevant information about antitrust laws to its employees. Otherwise, the business is simply testing its luck in an environment that includes treble damage awards in private litigation and criminal penalties for wrongdoing.

Training is a form of communication that may or may not be appropriate to communicate a given message to a particular audience. Communications techniques include informal briefings, memoranda manuals, handbooks, pamphlets, posters, and stand-alone media (video and audio). Many companies rely on written methods of communication to reach a broad audience with a basic antitrust compliance message. These methods can range from a simple pamphlet to a complex antitrust handbook. Other approaches use nonwritten media, especially video. Written communications very efficiently spread a broad message to a large audience. This may also be the best way to communicate a very detailed message to a smaller audience.

So you still want to train your clients? Training has certain advantages over passive communications techniques. The trainer can observe the students as they work through the material; the students can interact with the trainer and participate actively in the learning process by asking questions or sharing personal experiences. Some lawyers also find training desirable because it creates "face-time" with their customers.

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II. Developing Effective Training Programs - One Lawyer's Journey

When I began my in-house legal career, my clients asked me to deliver "training" on antitrust issues.

Looking through old files, I found examples from past years. These tended to be overhead transparency presentations with mostly text (no graphics or pictures) and many references to statutes and cases. Much work went into preparing these materials, but there was something wrong with this approach. By working with colleagues who had some practical training expertise and by attending nonlegal training courses, the inadequacy of traditional training techniques became obvious. To be fair, it was quite a bit harder to create interesting foils in the days before today's desktop-publishing-quality presentation software. Nevertheless, let's be honest -much of the material used by lawyers for years was absolutely terrible. Just in case you think that I am making this up, here is a portion of the text from a single overhead used in an antitrust training program.

Consequences of Violation Criminal penalties -600 businessmen in last fifteen years named as defendants in Sherman Act prosecutions

> Antitrust Procedures and Penalties Act of 1974 imposes three years in prison
> $1OOK fine for individuals $1M fine for corporations
> Felony - loss of voting rights, opportunity to hold public office
> Treble damage judgments
> Class actions *orparens patriae* lawsuits under the Hart-Scott-Rodino
> Antitrust Improvements Act of 1976

This slide contained eight additional items, but by now you get the point. This one overhead included over 100 words and would be extremely difficult to read from the back of a classroom (not to mention from this page). It referenced two statutes by name and even used a little Latin. Other slides were even more difficult to follow because of footnotes and case cites (in Blue Book form) at the bottom of the overhead. As my first step, I purged this type of slide from my presentations. Even without fancy software, you can create a more readable foil. Below is one of my first efforts from 1991 on the same subject as the slide shown above:

CONSEQUENCES OF VIOLATION Potential Large Verdicts, Treble Damages
Injunctions, Divestiture and other Penalties, Possible Criminal Prosecution

You can remove most of the verbiage and still make the same point. After all, you need to have something to say. If the teacher just reads his overheads, then perhaps the message could be more effectively delivered by simply mailing a packet of the slides to the students to read at their leisure.

Many lawyers supplement their materials by showing videotapes. Commercially purchased materials, such as "The Price" and "Connections" from Commonwealth Films, provide "real life" drama by placing you in the world of a salesman or a buyer. Both films demonstrate the problems that both a company and an individual can face by failing to comply with the antitrust laws.

I began teaching antitrust programs by using transparencies carefully created to improve their readability (large font size, graphics, and no legalisms) and using one of these films. This can be a very good way of conducting antitrust training; however, I believe it has weaknesses. Observing nonlegal training courses that actively engaged the student increased my suspicion. Someone was on to something. One of my colleagues, Susie Hoeller, helped to develop a training program to teach contract law to purchasers. She did this in collaboration with training professionals, and it revolutionized my whole concept of good legal training.

The students actively participated. They formed small groups and discussed hypothetical situations. They also scrutinized descriptions of actual cases, trying to determine how a court would analyze the situation. Case studies foster class participation. Familiarity with the process, by both the students and lawyer/teachers, promotes participation. The examples become more realistic when tailored to the audience's needs and experiences and can be quite memorable (especially compared to remembering the exact name of a given antitrust statute).

Case studies also encourage discussion and interpretation, which is exactly why both law and business schools use this method as their primary form of instruction.

III. Rules for the Trainer

The next step in my development was to attend a "train the trainer" class. Not every lawyer wants to use some of his professional development time and resource for this purpose, but I highly recommend it. Among other things, I learned to pay attention to the following rules.

Rule 1

Course design is critical, not just a matter of putting together slides. It should involve a detailed process of determining your objectives, building a design model, developing activities, and then creating your material.

Rule 2

Administrative details and creature comforts must not be forgotten. Training simply will not happen if the equipment does not work. Just like babies, students are happiest (and learn best) when they are warm, dry, and full.

Rule 3

Teach at adult levels. Make sure that you incorporate adult learning concepts into your program. Adult students want useful information to which they can relate. They may also have valuable experiences they want to share with the class. Adults respond best to informal instructor relationships and retain more when they participate in the process.

Rule 4

Develop skills as a presenter, a facilitator, and a teacher; they are critical to success. Not every lawyer skillfully practices these arts; nonetheless every lawyer can improve such abilities.

Rule 5

Develop some form of measurement system to gauge student reactions, both to the course and to the instructor.

Only through disciplined use of a metric and an analysis of the data over time can you accurately determine if you are continuously improving both your materials and your own skills. I decided to take my earlier version of an antitrust training class and rework it, following the above rules. The result of that effort formed the basis of the course that I have used ever since. I will explain how it works by describing a fictional day in the life of a lawyer-trainer.

IV. A Day in the Life - Seeing How a Program Works

Woke up, got out of bed, dragged a comb across my head. From there it was on to work - this time at a regional office of one of my company's businesses. Following Rule 2, I had earlier taken care of all the administrative details, such as room and equipment, by coordinating my class with the human resources person who handles training activities at that site. Smaller companies may have fewer people to lean on; the point is to enlist some help.

My Antitrust Workshop was to begin at 9:00 a.m. to a group of twenty-four businesspeople, which included engineering, marketing, and sales managers. When the class arrived, I greeted them and passed out a sign-in sheet - a simple first step towards data collection, as in Rule 5.1 then began to finalize my preparation steps. The night before I carefully reviewed my materials, even though I had developed them and had taught the workshop many times. An effective teacher must be prepared, following Rule 4.

Because I teach this course to different businesses, I have developed slightly tailored variations in the material. (Part of Rule 1 is to constantly improve, modify, and customize the design and materials.) I always try to begin the class with something to get the audience's attention. It makes sense to use varying approaches and to try to keep them timely. On this particular day I used a favorite - I pulled out the day's newspaper. It just happened to contain an article on a government antitrust investigation of a well-known company. (When writing fiction, you can craft remarkable coincidences. In real life, I would suggest building a file of starters). Video clips might also prove attractive. I have a video from a conference where Anne Bingaman spoke on Department of Justice enforcement actions. I have often thought that showing just a couple minutes of her speech might be a wonderful way to get people's attention. I am somewhat skeptical of the value of full-length, thirty minute films. However, I believe that video clips can be an excellent device for illustrating and dramatizing certain points.

The antitrust program I used in this presentation contains six sections - four substantive, plus an introduction and conclusion. Each section, including the introduction and conclusion, had an exercise. Through these exercises, plus question-and-answers, I implemented Rule 3. Exercises are critical to the success of a workshop. During the brief introduction, I began asking the students what they expected or wanted to gain from the session and then briefly explained the antitrust laws and why the students should care.

Next, I introduced the "foundation exercise." I returned to this same exercise at the conclusion and referenced it throughout. The exercise uses a tricolor graphic of a bull's-eye. The red inner circle represents per se illegal conduct. The surrounding yellow circle represents "rule of reason" analysis. Finally, the green background represents conduct that does not raise antitrust issues. I then explained to the students my four factors of antitrust. This model simplifies antitrust analysis by making it accessible to students and easily memorable to students. The four factors are:

(1) horizontal versus vertical,
(2) price versus nonprice,
(3) conspiracy versus unilateral conduct, and
(4) market power.

Each factor contains a higher risk alternative:

(1) horizontal,
(2) price,
(3) conspiracy, and
(4) high market share - using this as a surrogate for market power.

According to my model, if any of these higher risk factors exists, then the situation moves from the "green" to the "yellow" category. If two or more of these factors are present, the situation moves from "yellow" to "red." Just like the familiar, and universal, traffic signal, red means stop and yellow means caution (or in this case, talk with your friendly legal counsel).

I then gave each student a card describing a hypothetical situation. A couple of the examples that I used follow:

> BRASS TACKS: "A company makes and sells five of every six nails in the United States. Their Vice President of Marketing implements a plan to sell nails only to those customers who also buy screws from the company."
>
> WALKING COMPENDIUM: "Your manager tells you to obtain intelligence about competitive pricing from marketplace sources. You obtain the information from customers, third-party sources, and published information."

I then asked each student to write down the color green, yellow, or red - based on the risk factor. We then put those answers aside to return to them at the end of the program. During the session, I make continuous reference to this model, often using a color overhead or even a poster-sized version.

The next four segments of the training program focused on business relationships. They are

(1) dealing with competitors,
(2) dealing with customers and suppliers,
(3) special situations, and
(4) on our own.

I used a few overheads, generally four per section, with just a few comments on each slide. A brief outline of the overheads follows:

Introduction:
(I)Purpose of Class;
(2) Antitrust Laws: What and Why;
(3) Consequences of Violation; and
(4) Decision Making Model.

Dealing with Competitors:
(I)What Is a Conspiracy;
(2) Restraint of Trade;
(3) Price Restraints; and
(4) Nonprice Restraints.

Dealing with Customers and Suppliers:
(1) Vertical Price Restraints;
(2) Vertical Nonprice Restraints;
(3) & (4) Examples Covering Exclusivity, Refusals to Deal, Tying, etc.

Special Situations Section:
(1) Trade Associations;
(2) Standards;
(3) Intellectual Property Licensing;
(4) Joint Ventures and Alliances; and
(5) Mergers and Acquisitions.

On Our Own:
(1) What Is Monopoly;
(2) Market Definition; and
(3) Abuses.

Conclusion:
(1) Miscellaneous Issues (examples include state enforcement, extraterritoriality, etc.); and
(2) Using the Legal Department.

The overheads above could be customized for each audience by deleting or adding additional overheads.

While presenting the material, I tried to supplement it with examples, stories, and other information to elaborate on the brief text and help make the information relevant and interesting to the students. Such examples can come from cases, newspaper reports, or actual company experiences. At the end of each section, we did an exercise. I try to vary exercises over time and make them imaginative, both for variety and freshness. Critical factors for a successful exercise include brevity, relevance, and the opportunity for student participation.

Case studies make excellent section-ending exercises. Other techniques, such as document review, are also useful. Try to develop a form document, *e.g.,* a letter from a distributor complaining about certain practices and a follow-up letter back from the supplier. Have the class divide into smaller groups, review the letters, and suggest modifications to the response letter. After a few minutes, have one group present its result to everyone. Use this time to draw out opinions and reinforce the lesson. Another exercise is to ask small groups to develop an overhead (either on paper or with transparencies and markers) for a future management briefing based on given facts. They must present their information on a single foil. You can fill the facts with lots of market data and market share estimates from both internal and third-party sources.

Have one group present their creation to the class and then use it to discuss the issue of market definition, market share, and the importance of these concepts in evaluating a variety of antitrust issues. You can also make points about the danger of creating documents that could later prove harmful in litigation.

I also have a more unorthodox training exercise. If the trainer really wants to bring home the point of the risk of criminal prosecution for price fixing, one option is to try to make it seem real. I have created a short "play" exercise for this purpose. Select from the students a few volunteer "actors" and give them cue cards containing their lines. Set the stage: they are all members of a trade association and are at their annual awards dinner. Introduce the characters and then have them read the script. In the script, you will create circumstantial evidence of a price-fixing conspiracy, perhaps having some actors being gung-ho, others silent but consenting, and one radical who speaks out against the discussion. Conclude the performance and continue the exercise by announcing that the U.S. Department of Justice has just announced indictments against the alleged conspirators in a price-fixing cartel. I have actually dramatized this point by preparing mock legal papers and "serving" them on the students who acted in the play. This illustrates the risks of falling into a conspiracy, and then the implications of being involved in a criminal prosecution can be discussed.

Finally, we reached the conclusion of our session (do not forget Rule 2 - a restroom break at some point) and returned to our foundation exercise. I asked the class to again look at their example and written answer - green, yellow, or red. A couple of students read their examples, and the class discussed their proposed answers, letting as many students as possible participate as time allowed. We discussed specific questions and compared the examples to actual situations facing the audience. The students then handed in their two guesses. (This data can be read by the trainer at a later time to be used as an informal pre- and post-test to measure the knowledge gained.)

I completed the session by handing out a brief evaluation form, asking a couple of questions each on both the course and the instructor. A database of the evaluation forms can prove helpful in analyzing the strengths and weaknesses of a training program.

V. Variations on the Theme

Attorneys can use many other approaches. The one discussed here is simply the one I know best. This antitrust program adapts easily, and can be used as a "game" by actually conducting a contest between different groups of employees. It can also be taught in modules, tailoring it for a specific audience and time allot-ment. With limited time and a large audience, the foundation exercise can be used as a stand-alone presentation. Volunteers can be chosen from the audience, the decision factors explained, and their answers used as the basis for the trainer's comments. There are many possibilities.

VI.Conclusion

I have attempted to offer practical advice on designing, developing, and delivering antitrust training programs. Although the discussion focuses on a single methodology for training students, the tips offered should prove helpful in a variety of situations. Readers should experiment with their own ideas and develop programs that work with their clients.

*[Author's Note*Since I wrote "Guide from the Trenches" in 1996, based on my experiences teaching antitrust awareness courses during the first part of the I 990s, I have continued to work on the techniques discussed in the article and have delivered programs for both American and European students. One critical addition to this material is needed. A weakness of the program described in the article is that it remains, however participatory and interactive, removed from the day-to-day tasks of the students. In some instances, particularly where a compliance problem (or high potentiality) exists, instructors may want to focus more specifically on areas of concern (skipping, if necessary, less urgent topics) and increase the "realism" of the program. The latter is a difficult task.

One suggestion is to use a modified version of the "play" exercise discussed in IV. Either scripted or partially unscripted "plays" simulating "the trenches" of business practice can provide meaningful "real world" simulations. One quick example illustrates the concept. Sales people could be put into a "play" situation where they confront a buyer (played by an instructor) trying to pressure the students to cut-off a discounter and impose resale price minimums. Scripted roles for the students could illustrate recommended and nonrecommended conduct in the situation, and unscripted roles would let the students show how they would react in the situation. Used to train new sales people, or to refresh veterans, this program would be a useful supplement to an antitrust compliance program built around the principles discussed in this article.]

A Competition Law Compliance Programme to keep your Company out of trouble

Giuseppe Sanna

ACCA 2001 Conference San Diego

Why your Company needs a Compliance Programme

- to avoid rendering agreements null and void
- to avoid potential fines or mitigate them
- to limit indirect costs
- to avoid potential private actions
- to assist in case of investigation by the competition authorities or in case of litigation

Fomulating a Compliance Programme

Most programmes aim to cover:

- education and training of staff
- clearance procedure for certain actions
- documentation retention and destruction
- inspections by competition authorities

Drawing up the Programme

- Ensure commitment of BoD and Senior Management
- Establish dialogue with department/ business unit heads
- Consult IT and Training, understand where and for how long documents and emails are retained

Implementing the Programme

- Mission or Policy Statement
- Compliance Manual:
  - after consultation with management you should be in a good position to identify the kind of material employees will find useful
  - determine what activities are prohibited, which require clearance and those which are OK
  - state that a breach of rules can lead to disciplinary measures

Education and Training

- Decide audience and frequency of training
- Set up a held desk to assist employees with "grey" areas
- Identify an individual within each department as initial point of contact
- Make sure all queries are registered

Clearance Procedure

- Identify the situations which are generally risk-free and those which are potentially anti-competitive and require clearance and those which are strictly prohibited
- Block amendments to standard forms and require that clearance from Legal Department is obtained beforehand
- Require clearance for activities such as joining or attending trade association meetings, exchange of competitive information, granting of discounts or rebates and business co-operation with competitors

- Contact Reports
- Document Retention and Destruction Programme
  - warn employees against destruction of incriminating documents
- Raise awareness over use of language
- Monitor the compliance programme through
  - period review of commercial agreements
  - examination of files and computer records
  - record findings and implement corrective actions

Effectiveness of a Compliance Programme

- The risk of competition law violations may not be perceived as real to people who come from environments with limited enforcement history and particularly from countries where there is no criminal prosecution for individuals
- Cultural differences have a significant impact and can affect employee perception of the compliance programme

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Creating and Maintaining a Global Competition Law Compliance Program:

From Bombay to Buenos Aires to Budapest

Rob Lindquist

2001 ACCA Annual Meeting

October 16, 2001

www.ingrammicro.com

1977 versus 2001

- **1977**
  - **U.S. was the only active antitrust regime**
- **2001**
  - **By some counts, 80 competition law regimes**
- **Competition law is a global phenomenon**

Can Uniformity Be Achieved?

- By and large, certain key points are addressed by all competition law regimes
  - Horizontal issues
    - Price-fixing
    - Dangers of contacts with competitors
    - Division of markets
  - Vertical issue
    - Resale price maintenance
- No Robinson-Patman Act!!

Argentinean Competition Law: Basic Principles

- The Argentinean competition law prohibits:
  - Price-fixing
  - Allocating markets or customers with other competitors
- Illegal price-fixing includes:
  - Fixing margins
  - Fixing rebates

The Key Concern is Price-Fixing

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- Illegal Price-fixing includes:
  - Margin fixing
  - Fixing maximum discounts to be granted to customers
  - Linking prices to those of competitors
  - Fixing prices to be paid to vendors
- Price-fixing carries with it the strictest penalties
  - In some countries, the penalty may include prison time

The Key Concern is Price-Fixing

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- Illegal Price-fixing includes:
  - Margin fixing
  - Maximum discounts to be granted to customers
  - Making rebates conditioned upon respecting price levels
  - Linking prices to those of competitors

What Varies

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- Enforcement mechanisms and penalties
  - Criminal versus civil
- Attitude toward compliance
  - Bureaucratic regulation versus corruption of the marketplace
- Vertical issues
  - Dealer terminations
- Market dominance issues
- The export orientation of the business
  - Do they export overseas?

Developing the Program: Drafting the Policies

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- The old model: send a letter off to Buenos Aires
- The new model
  - Draft the policy
  - Run it by outside counsel as a check

Developing the Program

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- Much material is:
  - On the web
  - In English
    - http://europa.eu.int/comm/competition/
    - http://strategis.ic.gc.ca/SSG/ct01250e.html
    - http://www.accc.gov.au/
    - http://www.oft.gov.uk/html/comp-act/index.html
- Again, the key principles are uniform
- Other resources
  - *Global Competition Review*

Maintaining the Program: Education

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- Get the word out
- Company intranet site
- Newsletter
- Emails
- Web-based training

The Most Powerful Educational Tool: On-Site Visits

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- Reference local laws
- Emphasize local prosecutions and trans-national prosecutions
- Can combine with other compliance and legal topics
- Use local languages

Cumprimento da Lei de Concorrência Brasileira

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- A lei de concorrência brasileira proíbe:
  - A fixação de preços
  - A alocação de mercados ou clientes com outros concorrentes
  - Acordos entre concorrentes para não comprar de um determinado fornecedor
  - Acordos entre concorrentes para não vender a um determinado cliente
  - Fixação do preço de revenda (ou manutenção do preço de revenda)
  - Abuso de uma posição dominante no mercado
    - A questão de distribuidores exclusivos

Creating a Global Message

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- Competition law is not only the concern of American executives living in America
- Competition law compliance should be everyone's concern

The Importance Of Competition Law Compliance

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- US$750 million fine against Swiss and German vitamin producers (Hoffman-La Roche and BASF)
  - Companies engaged in price-fixing and customer allocation scheme worldwide
  - Under settlement, 6 Swiss and German executives must come to United States for four-month prison term
- $341.5M in fines imposed by Italian competition agency, Autorità Garante, against auto insurers for price-fixing

On-Site Visits: Additional Benefits

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- Developing relationships
- Sending a message

Follow-Up Is Critical

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- Audits
- Repeat visits
- Emails

Global Competition Law Compliance Means:

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A lot of time on airplanes

But

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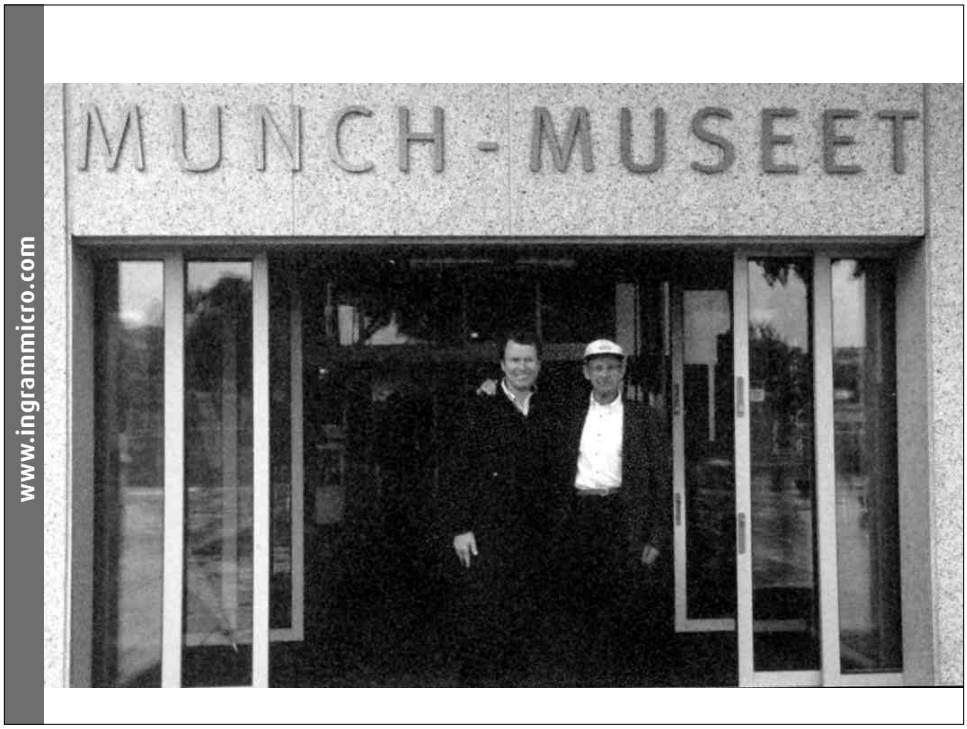

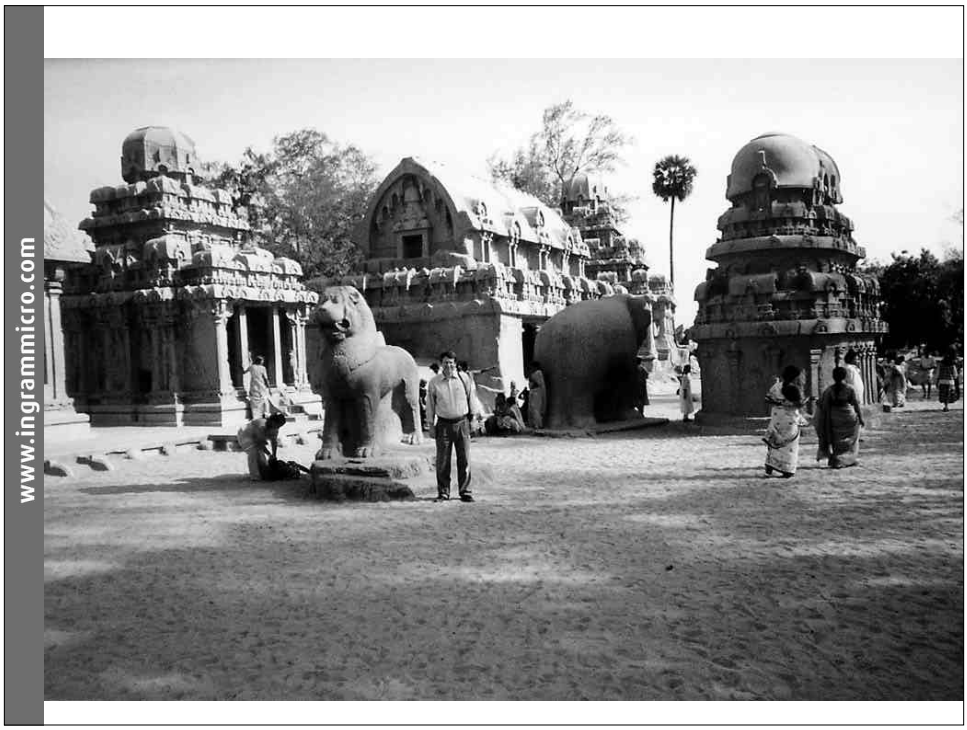

Global Competition Law Compliance

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An integrated, global program is achievable

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