

The Benefits of Conducting Antitrust Audits

Why Are Antitrust Audits Important?

The risks of violating antitrust laws have never been higher, with enhanced cross-border coordination of investigations, ever increasing financial penalties, litigation, criminal sanctions and damage to shareholder value and customer goodwill. In the United States, potential penalties for antitrust law violations are severe: companies may incur a fine of \$100 million or twice the company's gain or loss to victims from the entire conspiracy--whichever is higher; individuals may face up to ten years in prison and incur a fine of \$1 million or twice the individual's gain or loss to victims of the entire conspiracy. The U.S. Department of Justice obtained more than \$1 billion from criminal antitrust offenders in 2011, which is up 78% from 2010. In addition, the European Commission imposed over €12 billion in fines between 2006 and 2011. There is also exposure to significant civil liability from follow-on class action lawsuits, which include automatic treble damages in the United States. Furthermore, an increasing number of countries worldwide are adopting, proposing or strengthening antitrust enforcement. Over 120 countries now have some form of antitrust law, including Denmark.

This toughened enforcement environment has prompted companies to undertake antitrust audits to assess and manage antitrust risks and to take affirmative steps towards antitrust compliance. Key issues include: (i) what is an antitrust audit; (ii) when might an antitrust audit be appropriate; (iii) what are the legal and practical issues arising in antitrust audits; and (iv) how do antitrust audits fit with a wider compliance strategy? When properly designed and targeted to a company's specific operations, antitrust audits can reveal possible areas of exposure, determine or confirm the nature and extent of potential antitrust law violations, identify business practices that present heightened risks, and assess the effectiveness of a company's antitrust compliance and training.

Most significantly, where an antitrust audit uncovers a potential criminal violation, the company has the likely advantage of being the first conspirator to discover the conduct and the opportunity to enter the DOJ Antitrust Division's leniency program and face no fine, no prison time for anyone in the company, and a possible single damages limitation in follow-on civil litigation in the United States. Effective compliance programs that include routine audits can also help companies manage legal risks that may arise in association with investigations by other federal agencies for non-antitrust violations, such as the SEC and the DOJ Criminal Division.

Antitrust audits are not, of course, a substitute for an effective antitrust compliance and training program. If the audit uncovers an actual violation of the antitrust laws, by definition, other preventative steps have not been effective. The audit itself may suggest areas where the existing compliance program can be improved.

What Is An Antitrust Audit?

An antitrust audit is a review of business activities and practices aimed to detect actual or potential violations of antitrust laws before a company faces an investigation or challenge by a third party or government antitrust authority. Antitrust audits can also help to identify business practices that present risks and assess the effectiveness of a company's antitrust compliance and training. An antitrust audit usually entails a review of select documents and personnel that likely would be examined in discovery or picked up through a search warrant or dawn raid. The audit might focus on certain business units that are prone to higher levels of risk or that are located in jurisdictions where the local antitrust authorities are known to be targeting the sector. In any case, there should be a well-conceived prioritization of areas of potential review.

What Are The Key Risk Areas?

Cartels or agreements between competitors to fix prices or other terms and conditions, to share markets, or to rig bids have traditionally been regarded as the most serious antitrust violations.

However, the antitrust laws cover more than just cartel activity and include areas such as: distribution (agreements with suppliers or customers); pricing; joint ventures and strategic alliances falling short of mergers; and information exchanges.

Companies with market power also need to be vigilant that their conduct does not conflict with prohibitions on abuse of market power or "dominance," which is an area where the antitrust laws differ most internationally. This difference inevitably makes global antitrust compliance more complicated and emphasizes the importance of being aware of the rules in all the specific countries where a company operates or where its activities have an effect.

When Might An Antitrust Audit Be Appropriate?

Some businesses will elect to conduct an antitrust audit as a matter of routine compliance, while others might reserve such exercises if there is reason to believe that a special examination is warranted. Answers to the following questions will assist a company and its legal counsel to determine whether an antitrust audit is appropriate:

- Whether the industry sector is "high risk" for antitrust issues. Among the factors indicating an exposure to a risk of antitrust issues are: highly concentrated markets; standardized/commodity products; minimal competition on price; pricing changes by industry participants that are close in time; stable or declining markets; purchasing and/or supply agreements with competitors; joint ventures; or other interactions with competitors such as in trade associations.
- Whether the industry sector is subject to or has a history of investigation by a government antitrust authority.

- Whether there is a proposed or pending investigation or litigation raising antitrust issues.
- Whether the company has conducted an antitrust audit in the recent past (*e.g.*, within five years).
- Whether the company is threatened with an antitrust complaint.
- Whether the company is confident that all employees are familiar with their antitrust compliance responsibilities and company procedures.
- Whether the company has undergone recent major reorganization (*e.g.*, acquisition of a new business, business expansion into new territories and products/services, new procedures, new hires, or staff redeployment).

Who Should Conduct An Antitrust Audit?

If a company decides that an antitrust audit is appropriate, it should engage counsel that has a degree of independence and deep familiarity with the principles of antitrust law to recognize some of the subtleties of antitrust issues.

It is also important to have counsel oversee and conduct the audit to ensure that the company can resist disclosure of communications produced during and for the purposes of the audit in court, regulatory, or investigatory proceedings. Note that the precise scope of legal privilege tends to differ depending on the jurisdiction, regulatory procedure, and, in some cases, the type of legal counsel involved. Legal advice should be sought in determining the scope of applicable privilege (if any) in specific situations to seek to avoid unwarranted disclosure or regulatory challenge for an unjustified claim of privilege. In addition, different jurisdictions may have different rules concerning data protection and employee privacy, which should be checked before conducting any searches of employee documents and electronic files. In some cases, it will be necessary to obtain specific employee consent before conducting a review of personal files.

What To Do If The Audit Uncovers Evidence Of A Possible Antitrust Violation?

If the audit uncovers an actual or potential antitrust violation, legal counsel should be involved in the assessment of the extent and gravity of the risk and the steps to be taken. While there is no substitute for a careful examination of a specific situation, the following are among the risk management and mitigation strategies that may be considered following an audit:

- Considering how the company might improve its internal procedures and training if there is evidence that employees are not sufficiently aware of their responsibilities or are unclear how to escalate questions/concerns.
- Conducting further interviews with management and staff to seek to obtain further information.

- Conducting a more detailed document search or forensic IT investigation of specific electronic files.
- Conducting a risk assessment for making a disclosure to a relevant antitrust authority to apply for amnesty from the imposition of potential penalties where the company is the first to come forward with material evidence on an antitrust violation.

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