Global Litigation & Arbitration Group

Milbank

Global Antitrust and Litigation Briefing

Credit for Robust Competition Law Compliance Programs in the United States and Europe

2 August 2021

Key Contacts

Fiona Schaeffer
Partner
+1 212.530.5172
fschaeffer@milbank.com

Alexander Rinne
Partner
+49 89.25559.3686
arinne@milbank.com

William Charles
Partner
+44 20.7615.3076
wcharles@milbank.com

Andrew Wellin
Special Counsel
+1 212.530.5432
awellin@milbank.com

Nils Bremer
Associate
+49 89.25559.3689
nbremer@milbank.com

Vasiliki Katsarou
Associate
+44 20.7615.3082
vkatsarou@milbank.com

There are significant and concrete advantages for firms putting antitrust/competition law compliance high on the agenda. This is particularly the case in circumstances where authorities in major jurisdictions (including the US, the UK and Germany) now provide credit to companies facing enforcement action which are able to demonstrate robust competition compliance programs. There is, moreover, a consensus among these authorities that regular audits are an essential component of any robust antitrust compliance program.

An effective antitrust audit reviews and evaluates a company's potential antitrust risk areas and provides recommendations for ways to eliminate or reduce those risks. An antitrust audit allows companies to test whether their compliance program is working, identify problematic conduct and take proactive steps to avoid or minimize legal exposure. In addition, an antitrust audit can provide important information on whether a compliance program needs to be re-calibrated to take into account the effects of changes in working patterns, including any increased difficulty in monitoring employee conduct while working from home and/or any temporary relaxation of existing compliance measures as a result of the COVID-19 pandemic. Relatedly, notwithstanding any temporary relaxation of some elements of competition law in the context of the health crisis, authorities across the globe have made clear that firms must comply in full with their competition law obligations, particularly as the exigencies of the pandemic recede.[1]

[1] See, for example, our previous client alert "*Antitrust in the Time of COVID-19: Update on Antitrust Agencies' Response to the Pandemic*", dated 16 November 2020.

(i) The United States Perspective

Following a major policy change in July 2019, the US Department of Justice Antitrust Division ("**DOJ**") has now sought to incentivize proper investment in competition compliance by providing credit to companies that self-report antitrust violations *and* demonstrate that they have robust compliance programs in place. Such credit may be available even if the companies are not 'first in the door' and do not therefore qualify for US leniency. This was a significant change in the DOJ's leniency program, which did not previously give companies any credit for their compliance programs, no matter how effective.

Accordingly, a robust program (including through regular antitrust audits) will be considered by the DOJ in determining whether to file criminal charges and the amount of any fine in relation to antitrust violations. In addition, if charges are nonetheless brought against the company, a robust compliance program may help it to qualify for a deferred prosecution agreement ("**DPA**"). Under a DPA, provided that the company, for example, admits wrongdoing, pays a fine and complies with certain requirements within a stipulated period, charges will be dismissed and the company will avoid being convicted. This is not to say, however, that the existence of an extensive antitrust compliance program will guarantee a DPA: it is just one of a number of factors which will inform the DOJ's decision-making concerning charging; and the DOJ will "*conduct a fact-specific inquiry into "whether the program [at issue] is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees".*"[2]

In June 2020, the DOJ published revised guidance on the "*Evaluation of Corporate Compliance Programs*", including antitrust compliance programs, for the purposes of determining the appropriate form of any resolution or prosecution, monetary penalty (if any), and compliance obligations.[3] This guidance emphasised a number of points in relation to whether a program will be considered adequate and effective, including the following (among others): (i) there is no 'one size fits all' model for compliance programs and the DOJ will make individualised determinations, based on the company's size, industry and geographic footprint (among other things); (ii) whether the program is "*adequately resourced and empowered to function effectively*"; (iii) tailored training and communications; and (iv) periodic updates and revisions to risk assessments and compliance measures.

Interestingly, under the terms of a number of recent DPAs, the companies in question were required to maintain compliance programs designed to prevent and detect the relevant antitrust violations (without any express recognition by the DOJ that the existing programs were adequate and effective).[4] Accordingly, while implementing, maintaining and updating a robust antitrust compliance program is clearly essential, it is only one part of the 'good corporate citizenship' which must be demonstrated for a DPA to be available (e.g., alongside self-reporting, full co-operation, and appropriate remedial measures).

Overall, the policy change is particularly significant given that antitrust violations expose companies to significant liability in the US, including:

- corporate criminal fines of up to $100 million per offence or twice the gain/loss from the unlawful conduct;

---

[2] See: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[3] See: https://www.justice.gov/criminal-fraud/page/file/937501/download.

[4] See, e.g., *US v Heritage Pharmaceuticals Inc.* (https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false); *US v Sandoz Inc.* (https://www.justice.gov/opa/pr/major-generic-pharmaceutical-company-admits-antitrust-crimes); *US v Florida Cancer Specialists & Research Institute* (https://www.justice.gov/atr/case/us-v-florida-cancer-specialists-research-institute-llc).

- fines for individuals of up to $1 million;
- jail terms up to 10 years for complicit officers, directors or employees;
- treble (3x) damages in civil class action litigation; and
- loss of shareholder value.

Therefore, from a US perspective, a proactive approach to mitigating antitrust risk can save millions of dollars in the long run and prevent incalculable reputational repercussions as a result of government investigations and/or prosecutions.

(ii) The United Kingdom Perspective

In the UK, the Competition & Markets Authority ("**CMA**") (and the Financial Conduct Authority ("**FCA**") under its concurrent powers) will generally consider evidence of a company's compliance activities as a potential mitigating factor in the context of assessing a penalty. In particular, the CMA "*will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10%.*"[5]

The mere existence of compliance activities will not be treated as a mitigating factor. However, "[c]*ompliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down).*"[6] Such activities will be expected to include (among other things):

- appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities, including making a public statement regarding a commitment to compliance on the company's relevant website(s) and conducting periodic reviews of its compliance activities (and reporting that to the CMA); and
- presenting evidence on the steps the company has taken to review its compliance activities, and change them as appropriate, in light of the events that led to a particular investigation.[7]

Implementing, and being able to demonstrate, an effective compliance program is particularly important when set against the serious consequences if a company is found to have infringed UK competition law. Such consequences may include:

- corporate fines of up to 10% of a company's worldwide turnover for the previous business year;
- criminal conviction of individuals for engaging in prohibited cartel activity, punishable by up to 5 years' imprisonment and/or an unlimited fine;
- disqualification of directors for up to 15 years;

---

[5] See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf.
[6] *Ibid.* The CMA has also published separate guidance for all businesses, as well as sector-specific guides: https://www.gov.uk/government/collections/competing-fairly-in-business-advice-for-small-businesses.
[7] See CMA: https://www.gov.uk/government/publications/competition-law-risk-a-short-guide/competition-law-risk-a-short-guide#a-risk-based-approach-to-ensure-your-business-is-compliant

- damages claims by customers, competitors and/or consumers in the UK courts;
- potential exclusion from government procurement procedures for up to 3 years; and/or
- loss of shareholder value and reputational damage.[8]

Overall, taking proactive steps to mitigate the risk of competition law infringements by implementing, and regularly auditing, a robust competition law compliance program, can have very significant advantages for firms in terms of potentially avoiding regulatory action (and resulting litigation), or at least reducing financial penalties.

(iii) The German perspective

In Germany, the national legislator, by way of its recent amendment of the German Act Against Restraints of Competition ("**ARC**") of 19 January 2021, incentivizes the implementation of effective compliance programs by treating effective antitrust compliance as a mitigating factor when it comes to determining fines for infringements of antitrust law. When calculating fines for such infringements, the German Federal Cartel Office ("**FCO**") must now take into account reasonable and effective precautions taken to prevent and detect antitrust infringements (*ex ante*) as well as precautions taken after an infringement (*ex post*).[9] In order to achieve a mitigation of fines, it is necessary that all objectively necessary precautions to effectively prevent violations of competition law are implemented.

The FCO has recently published draft guidelines on the standards of effective compliance measures.[10] Based on this, in order for compliance measures to be effective, these should include, among others: (i) a comprehensive risk analysis; (ii) depending on the outcome of the risk analysis, potential adjustments to the organizational and supervisory structure; (iii) management's explicit commitment to compliance; (iv) the careful selection, training, and monitoring of employees; (v) the implementation of a whistleblower-system; and (vi) incentives for observing compliance requirements as well as penalties for violations.

(iv) The European Commission perspective

The European Commission has not yet followed the recent developments described above. In the past, it has generally not taken into account compliance measures as a mitigating factor when determining fines for infringements of antitrust law.[11] It has expressly stated that "[i]*f a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No.*"[12]

---

[8] On 20 July 2021, the UK Government published a consultation on a number of potentially significant reforms to UK competition law enforcement, including (among other things) enhancing the CMA's information gathering powers and its ability to impose interim measures, as well as increasing the territorial scope of UK competition law. Interested parties have until 1 October 2021 to provide feedback.

[9] See Sec. 81d para. 1 no. 4 and 5 ARC.

[10] These draft guidelines have been published in the context of the request of companies for early deletion from the competition register based on successful "self-cleaning" measures, which include the implementation of sufficient compliance measures. The guidelines also provide useful background on how the FCO will assess the effectiveness of compliance systems in general. See: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/WettbewReg/Konsultation_Selbstreinigung_Praktische_Hinweise.pdf?__blob=publicationFile&v=4.

[11] In line with the case law of the European courts. See, for example, General Court, Joined Cases T-101/05 and T-111/05, BASF and UCB, paragraph 52.

[12] See: European Commission, Compliance matters, 2012, 21 (https://op.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a).

However, it remains to be seen whether the European Commission will revise its approach in light of the developments at the EU Member States' national level (e.g., Germany), as well as in other jurisdictions such as the UK and the US.

(v) Common Areas of Antitrust Risk

Antitrust audits can focus on a range of different practices and potential issues that may trigger antitrust concerns, and should be tailored to the circumstances at hand. Such practices and issues may include (among others):

- communications with other market participants which could give rise to concerns about some level of coordination between competitors;
- sharing information with competitors (where such information could be considered commercially sensitive to any extent);
- pricing practices (e.g., understandings between competitors to maintain prices for particular products or services at a particular level);
- exclusive arrangements (e.g., agreements or understandings between suppliers and purchasers to hinder a competitor's distribution channels, or between market participants to share customers or markets);
- participation in trade associations (e.g., where such associations could be considered vehicles for coordinated activity between competitors);
- bidding practices (e.g., agreements or understandings between competitors to coordinate in relation to bidding procedures);
- market dominance issues (e.g., where a firm with a dominant economic position in the relevant market imposes certain trading terms, or refuses to supply certain products or services to particular parties);
- marketing practices (e.g., agreements or understandings to promote relationships with certain businesses, especially in cases where a company holds a dominant position in the market);
- joint ventures and collaborations with competitors, where there is a risk of improper coordination;
- ambiguous or problematic statements in internal documents, which could give rise to antitrust concerns; and
- insufficient awareness among employees about competition law, the types of behaviour covered, and the associated risks.

(vi) Customizing an audit to meet individual requirements

There is no single model for an antitrust compliance program which will be appropriate for all companies across all jurisdictions. However, best practice will involve applying the following key principles and implementing measures which are tailored to the company (or the relevant part of the company) in question:

- commitment to compliance and senior management (and board-level) 'buy-in', including the establishment of a culture of competition law compliance throughout the organisation;
- risk identification, involving a focused, in-depth review of a company's business (or the relevant part of its business) to identify areas of antitrust risk;

- risk assessment, including a structured review of the severity of the identified risks (including both quantitative and qualitative classification of risks, and identifying those employees with the greatest level of exposure to them);

- risk mitigation, involving the implementation of effective measures designed to remediate the specific risks identified, including (among others): the review, updating and dissemination of appropriate policies and procedures; providing tailored training for employees and business units (focusing not only on the legal framework, but also on its practical application to the relevant employees' business activities); and monitoring protocols (e.g., across electronic communication channels and in relation to trading data); and

- review (in particular, establishing a regular review process for the measures implemented, enabling the company to assess the effectiveness of those measures, and to refine them over time and as its business develops).

Within the above framework, an antitrust audit can range from a targeted review of the practices of a few employees in a particular business unit or functional area, to a comprehensive review of business operations on a global basis (and, if appropriate, different areas of the business can be audited over time, rather than conducting a single, full-scale audit at one time). In addition, antitrust audits can be customised to address each firm's substantive goals and relevant factors, including the areas of risk identified, whether specific complaints or concerns have been raised, the scope of the business or area selected for audit, and cost considerations.

In particular, antitrust audits can be customised in respect of the following key parameters and activities (among others):

- Focusing the audit on specific business areas where, for example, elevated risks have been identified (e.g., based on the compliance risk assessment) and/or there has been any suggestion of breaches of internal policies or other improper conduct. Auditing higher-risk business units can be prioritised, with other business areas being audited subsequently and on a rolling basis.

- Identifying the individuals to be included within the scope of the audit, including those with greater risk exposure (e.g., employees who have day-to-day contact with competitors, who are involved in trade association/industry initiatives, who are engaged in bidding, and/or who have pricing authority).

- Coordinating the antitrust audit with the wider compliance program to avoid overlapping reviews of other risk areas and/or to combine the audit with other, related reviews (e.g., for anti-corruption compliance in a particular location).

- Identifying the sources of potentially relevant data (e.g., external and/or internal communications, trade data covering orders and sales of particular products or services, historical pricing data, marketing materials, contracts, minutes of internal meetings, etc.), and where and how this information is stored (and whether any additional measures for ongoing preservation should be taken).

- Deploying data-mining analytics software and other technologies to facilitate the identification and review of relevant material in a robust, cost-effective and timely manner, including (for example):

    - using concept clustering to help identify potentially relevant information, even where appropriate search terms are not (yet) apparent, and/or to assist in formulating tailored search terms;

    - applying search terms shown to be effective in the context of other antitrust audits and investigations;

- analysing the communications network (i.e., a visual representation of electronic communications between certain individuals and/or domain names) in order to identify, for example, the volume and timing of communications, the most frequently occurring concepts, and any additional individuals whose roles should be factored into the audit; and

- applying technology-assisted review techniques (e.g., predictive coding or continuous active learning), which involve reviewing and coding a subset of documents to create a model that assigns weight to particular terms and scores the remaining population based on this weighting, thereby helping to locate documents similar to those already identified as relevant.

- Assessing the requirement for third party expertise, such as forensic accountants to conduct a detailed review of financial records, and/or individual subject matter experts (internal and/or external) to provide detailed background information on the business and the market in which it operates, which may be helpful in tailoring the focus of the audit and/or analysing any potential issues which are identified.

- Conducting employee interviews, including planning the sequencing, prioritisation and content of the interviews, as well as ensuring that interviews are conducted in accordance with applicable rules, including employment law and professional standards.

- Developing a targeted, robust plan for remediating any risks or control gaps identified in the course of the audit.

- Finally, but importantly, taking all appropriate steps to seek to ensure that legal privilege extends to communications made, and materials generated, in the context of the audit, including involving internal and/or external counsel as appropriate.

Overall, as a matter of best practice, taking into account the substantial potential benefits across jurisdictions, companies would be well-advised to develop a robust audit plan that is tailored to their individual requirements and objectives.

Global Litigation Contacts

London | 10 Gresham Street, London EC2V 7JD

Tom Canning	tcanning@milbank.com	+44 20.7615.3047
William Charles	wcharles@milbank.com	+44 20.7615.3076
Charles Evans	cevans@milbank.com	+44 20.7615.3090
Julian Stait	jstait@milbank.com	+44 20.7615.3005
Mona Vaswani	mvaswani@milbank.com	+44 20.7615.3002

New York | 55 Hudson Yards, New York, NY 10001-2163

George S. Canellos, *Global Head of Litigation*	gcanellos@milbank.com	+1 212.530.5792
Daniel Perry, *Practice Group Leader*	dperry@milbank.com	+1 212.530.5083
Wayne M. Aaron	waaron@milbank.com	+1 212.530.5284
Antonia M. Apps	aapps@milbank.com	+1 212.530.5357
Thomas A. Arena	tarena@milbank.com	+1 212.530.5828
James G. Cavoli	jcavoli@milbank.com	+1 212.530.5172
Scott A. Edelman, *Firm Chairman*	sedelman@milbank.com	+1 212.530.5149
Adam Fee	afee@milbank.com	+1 212.530.5101
Christopher J. Gaspar	cgaspar@milbank.com	+1 212.530.5019
David R. Gelfand	dgelfand@milbank.com	+1 212.530.5520
Robert C. Hora	rhora@milbank.com	+1 212.530.5170
Alexander Lees	alees@milbank.com	+1 212.530.5161
Grant Mainland	gmainland@milbank.com	+1 212.530.5251
Atara Miller	amiller@milbank.com	+1 212.530.5421
Sean M. Murphy	smurphy@milbank.com	+1 212.530.5688
Tawfiq S. Rangwala	trangwala@milbank.com	+1 212.530.5587
Stacey J. Rappaport	srappaport@milbank.com	+1 212.530.5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1 212.530.5651
Jed M. Schwartz	jschwartz@milbank.com	+1 212.530.5283
Alan J. Stone	astone@milbank.com	+1 212.530.5285

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1 202.835.7517
Andrew M. Leblanc	aleblanc@milbank.com	+1 202.835.7574
Michael D. Nolan	mnolan@milbank.com	+1 202.835.7524
Aaron L. Renenger	arenenger@milbank.com	+1 202.835.7505

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Lauren N. Drake	ldrake@milbank.com	+1 424.386.4320
Gary N. Frischling	gfrischling@milbank.com	+1 424.386.4316
David I. Gindler	dgindler@milbank.com	+1 424.386.4313
Robert J. Liubicic	rliubicic@milbank.com	+1 424.386.4525
Y. John Lu	jlu@milbank.com	+1 424.386.4318
Alex G. Romain	aromain@milbank.com	+1 424.386.4374

Munich | **Maximilianstraße 15, 80539 Munich**

Ulrike Friese-Dormann	ufriese@milbank.com	+49 89.25559.3646
Peter Nussbaum	pnussbaum@milbank.com	+49 89.25559.3636
Alexander Rinne	arinne@milbank.com	+49 89.25559.3686
Christoph Rothenfusser	crothenfusser@milbank.com	+49 89.25559.3656

Litigation & Arbitration Group

Please feel free to discuss any aspects of this Dispute Resolution Briefing with your regular Milbank contacts or any of the members of our global Litigation & Arbitration Group.

This Dispute Resolution Briefing is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Dispute Resolution Briefing without consulting counsel.