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An ALM Website corpcounsel.com | March 19, 2018

Safeguarding Your Company: Preventing and Detecting Antitrust Violations

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In the past several years, anticompetitive activity has impacted a wide range of industries around the world. In 2016, global cartel fines across industries reached almost $8 billion, and more than $4 billion in 2017. Against this backdrop, there are initiatives that in-house counsel and business employees can implement to make their organizations less susceptible to anticompetitive conduct, and to facilitate early detection when they have been targeted.

Recent investigations by the Antitrust Division of the U.S. Department of Justice (DOJ) and other competition authorities have uncovered long-running collusion in a variety of industries, including automotive, shipping and electronics. The DOJ has characterized its investigation into automotive parts suppliers as the largest criminal investigation in DOJ history, and the EU competition commissioner suspects that nearly all parts of the car have been impacted by cartel conduct. These government actions have spawned significant civil litigations, including *In re Automotive Parts Antitrust Litigation*, *In re Vehicle Carrier Services Antitrust Litigation* and *In re Capacitors Antitrust Litigation*.

A variety of industries may be susceptible to collusion, in particular, those that are highly concentrated, where few players control a large percentage of the market share, and where there are high barriers to entry because significant capital investments and technical expertise are required. Markets characterized by inelastic demand—where an increase in price results in minimal or no decline in the number of products purchased—can also be vulnerable to collusion. In such a market, the customer usually does not have alternatives for purchasing the product other than from the conspirators, despite any price increases.

Businesses should be aware of the three most common types of anticompetitive conduct so that they can implement procedures to detect and prevent collusion: price-fixing; bid-rigging; and allocation of customers or markets.

When conspirators engage in price-fixing, they agree to raise, fix or maintain the price of their products or services. Conspirators may agree not to lower prices below a certain level, develop a pre-determined formula for calculating prices, or agree on how much to charge for particular products. Price-fixing may also involve an agreement not to provide any customer discounts, or to maintain any discounts offered at a particular level.

Where a customer uses a competitive bidding process to choose a supplier, conspirators who engage in bid-rigging agree on which company will submit the winning bid, and then will submit bids designed to effectuate their unlawful agreement. A conspirator may agree not to bid at all, or may submit an intentionally high or "complementary" bid to give the false appearance of competition but eliminating any risk of winning the business.

In a customer or market allocation scheme, conspirators agree on which company should supply goods or services to certain customers, or divide the market geographically. For example, Conspirator X will supply the product to Victim A, in exchange for Conspirator Y supplying the product to Victim B, or Conspirator X will agree not to compete in the United States, in exchange for Conspirator Y not competing in Europe.

In-house counsel and business employees should examine their internal policies and procedures to determine the measures that can be taken to make their organizations less susceptible to anti-competitive conduct, and to facilitate early detection of anticompetitive conduct to minimize damages. Adjustments should be made to the: sourcing process; manner in which bidding information is internally monitored and analyzed; (3) maintenance of records; and training of employees.

First, companies should utilize a competitive bidding process to select suppliers wherever practicable. Ideally, companies should encourage bidding among at least three suppliers, and should periodically introduce new suppliers into the supply base. This type of rotation encourages a competitive element and reduces the likelihood of effective collusion among repeat suppliers.

Second, once bids are received, they should be analyzed for indications of anticompetitive conduct. One tell-tale sign is when suppliers repeatedly finish in the same order in consecutive rounds of bidding, which could indicate an allocation agreement. Suppliers rotating position in a systematic order or standard differences between bids may also be indicative of collusion. Inexplicable variation in prices in different markets may also result from an allocation agreement. Refusals to bid or clearly non-competitive bids from qualified suppliers should be questioned, and the explanations provided by suppliers should be critically evaluated. Potentially pre-textual justifications such as inopportune timing or manufacturing capacity issues should be supported by credible detail.

Third, to properly analyze patterns of bidding behavior, it is crucial for the company to maintain complete historical records of bidding history. This should include not only final bids, but records of which suppliers were invited to bid, what bids were submitted in each round of bidding, and any communications regarding failure to bid or non-competitive bids. This information should be periodically reviewed for signs of collusion, and transferred to future employees, who should educate themselves as to patterns in bidding history. These documents can also be valuable in pursing affirmative recovery actions, which can potentially result in sizeable recoveries, should the company find itself the victim of collusion.

Finally, companies should educate those employees who deal with suppliers on a daily basis, to make them aware of the risks of anticompetitive conduct, and to encourage them to look for warning signs. Collusion is occasionally facilitated by supplier employees moving back and forth between or among competitors, and a company's employees should request that such supplier employees be segregated from their account.

The bottom line is that internal education and employee training is key to prevention and early detection of anticompetitive conduct. A presentation from an outside law firm, which outlines possible red flags and prophylactic measures, can be crucial to minimizing damages from anticompetitive conduct.

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