

MANAGING ANTITRUST COMPLIANCE THROUGH THE CONTINUING SURGE IN GLOBAL ENFORCEMENT

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I. INTRODUCTION

Antitrust¹ law enforcement is continuing its forceful expansion and intensification around the world. From its original stronghold in the United States, new laws and diverse enforcement enhancements continue to spread throughout Asia, Europe, Latin America, and beyond. This continuing proliferation of increasingly potent antitrust enforcement weapons is showing signs of acceleration, if anything, following an uninterrupted two-decade global surge. This trend will create ever-increasing compliance challenges for the rising proportion of businesses that operate across national boundaries within the increasingly integrated global economy.

This article describes the origin and nature of the antitrust compliance challenge facing this growing population of multinational business firms. The ultimate message of the recent Microsoft antitrust experience is simple: “We All Live in Redmond.” The day after the near-meltdown at the Three Mile Island (TMI) nuclear plant near Harrisburg, Pennsylvania, in 1979, anti-nuclear protesters marched in West Germany carrying the banner, “We All Live in Harrisburg”—meaning, what happened at TMI directly impacts everyone, everywhere. The consequences of an antitrust meltdown are similar: what happens to a significant global enterprise like Microsoft has direct effects throughout the world economy. Moreover, just as the TMI incident served as a warning to nuclear plant operators everywhere, the same type of critical antitrust

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¹ Different jurisdictions use different terms to refer to the system of laws, treaty provisions, or other public rules governing competitive behavior—“antitrust law” and “competition rules” being the most common. For convenience, this article uses “antitrust” as the stand-in for all such terms.

confrontation that engulfed Microsoft can happen anywhere in the world, and to virtually any substantial business enterprise.

Continuing and dramatic antitrust expansionism requires corresponding increases in management vigilance and deployment of legal resources to deal with antitrust issues and disputes that might arise from a broad range of business conduct in an expanding portion of the world's jurisdictions and markets. Proliferating notification requirements, as well as increasingly thorough scrutiny in many jurisdictions, sweeps in thousands of mergers, acquisitions, and joint ventures annually. Any of the numerous and diverse types of vertical and horizontal business cooperation—procurement and supply relationships, intellectual property licenses, franchise and distribution agreements, promotional cooperation, trade association activities, standard-setting and facility-sharing arrangements, to name only some of the most common—require scrupulous attention to rules on restrictive agreements. Finally, and most consequentially, incantation against the evils of cartel activity is now a near-universal part of enforcement agency rituals throughout the world. New and more effective methods of investigation and prosecution, and increasing civil, criminal, and administrative remedies for firms and individuals guilty of price fixing and similar offenses, are now a constant and rising drumbeat as bureaucrats from 100 jurisdictions scour the globe in search of competition law quarry. Fines and damage awards running well into the billions of dollars, as well as consistent public acceptance and support, assure the continuation of these trends for the foreseeable future.

Viewed against this tidal wave of continuing antitrust expansion, the recent resolution of the current generation of antitrust proceedings against Microsoft—marked by the formal conclusion of both the first major EU dominance proceeding² and the impending termination of the U.S. decree, which capped the litigation phase³ of Microsoft's most significant U.S. monopolization proceeding—conveys at least three important messages: First, monopolization and abuse of dominance rules, like the rules governing restrictive agreements and structural transactions, create profound challenges for industry-leading multinational

² At this writing several new complaints against Microsoft are reportedly under investigation by the Directorate General for Competition of the European Union. The first is by the makers of Opera, an Internet browser, the second by the European Committee for Interoperable Systems. See Press Release, European Comm'n, Antitrust: Commission Initiates Formal Investigations Against Microsoft in Two Cases of Suspected Abuse of Dominant Market Position (Jan. 14, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19>.

³ The U.S. district court administering the decree has determined to extend the decree until 2009. *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 170–75 (D.D.C. 2008).

businesses. Second, Microsoft's experience of international antitrust enforcement seems destined to become a model not only for the most visible leading firms of the world, but for a rising number of other global businesses. Wherever firms go exploring for new customers and suppliers, antitrust is becoming an increasingly significant and assertive part of the legal environment they encounter. Finally, antitrust is assuming new, more complex, and more potent forms as it expands and evolves within this fertile multijurisdictional growth environment.

This article identifies some key compliance challenges and describes the main tasks facing the increasing number of businesses forced to confront the realities of the continuing global antitrust enforcement surge. The subject matter is divided into three broad categories: (1) awareness and acceptance—the process by which an enterprise reaches full comprehension of the heavy potential impact of globally intensifying antitrust enforcement and how (or whether) it decides to undertake significant compliance efforts; (2) finding compliance resources—identifying and obtaining the resources needed to achieve an acceptable degree of antitrust risk control; (3) managing those resources—a uniquely challenging task in light of (a) the proliferating sources of enforcement initiatives, the varying legal standards and procedures, and the broader political and social context prevailing in each distinct jurisdiction whose antitrust rules must be confronted, and (b) the enormous range and diversity of the compliance resources needed to manage and reduce the risks that each source generates. I conclude with some brief observations regarding the evolution of the worldwide antitrust compliance environment and the likely “end game” visions for antitrust enforcement in the global economy. Specifically, I identify needlessly escalating and excessive compliance costs as a reason to generate and work toward new models for legal control of anticompetitive business conduct.

II. THE THREE GLOBAL ANTITRUST TIDAL WAVES

The surge in antitrust enforcement has taken place in three distinct waves: (1) the spread of new or strengthened antitrust and competition laws to numerous jurisdictions throughout the world; (2) formation of numerous bilateral and multilateral relationships between and among new and old agencies, creating a vast mutual-support network linking the thousands of government antitrust enforcement officials around the world; and (3) a more recent proliferation of new and more powerful enforcement modes, including amnesty programs, increasing fines, private damage remedies (including class actions), and the use of criminal remedies for serious antitrust violations. The continuing introduction of so many enforcement innovations across multiple jurisdictions has re-

sulted in unique and, in many respects, unanticipated enforcement complexities for multinational businesses. Among the more obvious are the sharing of information obtained by agencies or private litigants in one jurisdiction with agencies or parties who use that information to initiate or support antitrust proceedings in other jurisdictions, and the tendency of antitrust challenges in one jurisdiction to spawn “me-too” proceedings in other jurisdictions. This section briefly describes each of these developments.

A. NEW LAWS

For nearly a full century after passage of the Sherman Act in 1890, the United States worked virtually alone in amassing a record of serious antitrust enforcement. While other nations had competition laws, enforcement was desultory or nonexistent prior to the 1980s.⁴ Not only were non-U.S. cases rare, but few other countries had—and no other country made any serious use of—the powerful tools that have long marked U.S. antitrust as a force to be reckoned with: criminal sanctions (including incarceration of individuals) and private treble-damage remedies reinforced through a variety of procedural devices and remedial incentives: minimal civil pleading requirements (“notice pleading”), broad discovery rules (including extensive pre-trial discovery), class action procedures (especially the “opt-out” variety), plaintiff-friendly rules for proof of damages (permitting any estimation methodology short of “mere speculation”), joint and several liability for damages among co-conspirators (without right of contribution or claim reduction), and mandatory award of attorney’s fees against losing defendants but no such award—mandatory or discretionary—against losing plaintiffs.⁵

Other jurisdictions gradually emerged onto the antitrust stage at about the time that the European Communities accelerated their historic push for unification and expansion in the 1980s and 1990s.⁶ The expansion and strengthening of the European Communities and their institutions, as well as the accumulation of additional competencies to create the European Union—including the proliferation and strength-

⁴ The origin of numerous non-U.S. antitrust systems is traced in ABA SECTION OF ANTI-TRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001). See also Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 FLETCHER F. WORLD AFF. 59 (2002) [hereinafter *Global Antitrust Explosion*]; Abbott B. Lipsky, Jr., *To the Edge: Maintaining Incentives for Innovation After the Global Antitrust Explosions*, 35 GEO. J. INT’L L. 521, 530–32 (2004) [hereinafter *Maintaining Incentives for Innovation*].

⁵ COMPETITION LAWS OUTSIDE THE UNITED STATES, *supra* note 4 (identifying and contrasting private remedy provisions of U.S. and non-U.S. antitrust laws).

⁶ *Id.* at 13–16.

ening of its antitrust system—was both enabled and accelerated by the collapse of Communism, and specifically by the 1991 dissolution of the Soviet Union, which was destined to produce nine new EU Member States, representing a massive enlargement and eastward expansion of the European Union. With the disappearance of longstanding political and ideological barriers to expanding and strengthening the Single Market (including, for example, introduction of the Euro, inception of the “Schengen” border-free area, deregulatory efforts in a variety of infrastructure industries like telecommunications, and efforts to limit “state aids” more effectively), rapid strengthening and enlargement of the European Union was accompanied by installation and/or improvement of functioning competition rules and enforcement regimes in the European Union itself and in each of its Member States, numbering twenty-seven as of this writing.⁷

Heavy European Union support for the spread of competition “culture” and competition law enforcement institutions helped lead the first wave of new and strengthened antitrust laws that began in the mid-1980s. This first wave of new law-making reached its peak in rough coincidence with the heyday of the so-called Washington Consensus—the early-to-mid 1990s. Before the Single European Act of 1987, barely a half-dozen jurisdictions in the entire world could claim any significant antitrust enforcement record.⁸ A mere fifteen years later, with the Soviet Union gone, with strong encouragement by the European Union, United States, IMF, and World Bank, and with ideological opposition to market capitalism virtually swept from the global political field (perhaps temporarily), competition rules had become a tangible reality in more than 100 jurisdictions.⁹ There is no precedent for the speed and scope of this global antitrust proliferation. Such proliferation is all the more notable because, unlike sectoral or other forms of business regulation (environmental or phytosanitary regulation, for example), antitrust applies broadly to all private competitive conduct and, in addition, in some jurisdictions, to competitive conduct by entities that are owned, affiliated with, or sponsored by government.

⁷ The European Commission Merger Regulation first came into effect in 1990 and, spurred by the Single European Act, as well as a greater enthusiasm for competition enforcement at the European level as manifested in a wide variety of initiatives, a number of existing and new Member States adopted competition legislation or conformed existing legislation to EU norms. The chronology of these developments can be traced in 1 COMPETITION LAWS OUTSIDE THE UNITED STATES, *supra* note 4, ch. 5.

⁸ See sources cited *supra* note 4.

⁹ 1 COMPETITION LAWS OUTSIDE THE UNITED STATES, *supra* note 4, at 13 (providing the number of jurisdictions with competition laws as 107).

Although the rate at which new nations have been added to the roster of jurisdictions with antitrust laws has slowed notably since the mid-1990s, there remains a steady trickle of newcomers. This is caused in part by the continuing attention given to the issue by the European Union and the United States in their separate negotiations for broad trade agreements with other jurisdictions. The United States regularly bargains for a provision in its free-trade agreements (in NAFTA and in the more recent FTAs for Singapore and Chile, for example) that requires or encourages the creation or strengthening of the non-U.S. party's competition law regime.¹⁰ The European Union seeks similar provisions in its various bilateral "association" and trade agreements.¹¹

Singapore and Egypt recently joined the international antitrust movement by enacting their first competition statutes of general applicability.¹² But more remarkably, most recently the two major jurisdictions launching ambitious antitrust goals are the most populous and the most dynamic economies on Earth: China and India.¹³ Like a classic Fourth of July fireworks show, the global antitrust spectacular—the first or global proliferation phase of it, anyway—may end with a thunderous display. When the last echo of the climactic "silver salutes" in China and India have faded, every major economy on Earth will have an antitrust statute of general applicability to business conduct and transactions. When that occurs, jurisdictions with antitrust laws will account for over 95 percent of world GDP. Take the OPEC nations out of the calculation and the figure is closer to 99 percent.¹⁴

¹⁰ North American Free Trade Agreement ch. 15, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78; Chile–United States Free Trade Agreement ch. 16, *available at* http://www.sice.oas.org/TPCStudies/USCAFTACHl_e/Matrix16.htm, US–Singapore Free Trade Agreement ch. 12, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

¹¹ *See, e.g.*, Agreement Between the European Economic Community and the Swiss Confederation art. 23, *available at* <http://ec.europa.eu/comm/competition/international/3a15en.html>; Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part art. 172, *available at* <http://ec.europa.eu/comm/competition/international/legislation/chile.pdf>.

¹² Competition Act 2004 (Singapore), The Law on the Protection of Competition and the Prohibition of Monopolistic Practices (Law 3 of 2005) (Egypt).

¹³ India has had an antitrust law since 1970, the Monopolies and Restrictive Trade Practices Act (based on early UK models), but it recently enacted a comprehensive new statute and is in the process of empowering a new agency, the Competition Commission, to enforce the law.

¹⁴ Based on 2007 data for nominal GDP found in International Monetary Fund, World Economic Outlook Database, Apr. 2008, *available at* <http://www.imf.org/external/pubs/ft/weo/2008/02/weodata/index.aspx>.

Recent landmark cases demonstrate beyond doubt how this new global antitrust coverage requires multinational businesses to satisfy multiple competition authorities in executing structural transactions and multinational business strategies: IBM Corp.'s early confrontations with the European Union and the United States, the acquisition of McDonnell-Douglas by Boeing, the proposed merger of General Electric and Honeywell International, and, of course, the numerous monopolization/abuse of dominance proceedings involving Microsoft and Intel, and the many cases challenging the core structural arrangements of the major credit card systems. These cases illustrate dramatically on the global stage how today, major transactions or modes of conducting business cannot go forward except with the approval or acquiescence of antitrust agencies in Washington and Brussels as a matter of routine, and by the agencies in Brasilia, Canberra, London, Mexico City, Pretoria, Seoul, Toronto, and Tokyo on many other occasions. Will we soon be watching for penalty flags thrown by the competition umpires of Beijing and Delhi whenever a major transaction or new global business strategy is proposed or rolled out? The answer to this profound question is about to be revealed.

B. NEW RELATIONSHIPS—EMERGENCE OF THE GLOBAL SUPPORT NETWORK FOR COMPETITION ENFORCEMENT

As scores of new competition agencies have been created, and as literally thousands of new enforcement officials have received their commissions, the proliferating nodes of antitrust enforcement activity have evolved a wide variety of methods for cooperation and interaction—all in the name of more effective enforcement. As has been documented elsewhere, there are no less than 100 bilateral and multilateral antitrust cooperation agreements now in effect between and among the antitrust enforcement agencies of the world.¹⁵ These range from bilateral agreements with relatively informal or “aspirational” provisions, to full Mutual Legal Assistance Treaties that contemplate intimate cooperation in the pursuit of criminal investigations and prosecutions including antitrust offenses. These arrangements provide for consultation in cases involving nationals of the other signatories, for mutual assistance in obtaining information relevant to pending investigations and, in many cases, a “positive comity” provision that allocates responsibility for pursuing antitrust infringements to the jurisdiction that can achieve the enforcement ob-

¹⁵ See ABA SECTION OF ANTITRUST LAW, INTERNATIONAL ANTITRUST COOPERATION HANDBOOK § 8 (2004).

jective most efficiently (considering the international complications of obtaining evidence, attaching jurisdiction, and securing relief).¹⁶

Perhaps chastened by the high-level public clashes between the United States and European Commission that threatened the Boeing/McDonnell-Douglas transaction¹⁷ (ultimately cleared by each reviewing authority and then consummated, but not without a public confrontation reaching all the way up to head-of-state level) and that scuttled the GE/Honeywell transaction¹⁸ (approved in the United States but prohibited in the European Union), the United States and European Union now go out of their way to share information and to coordinate both analytical and remedial approaches to transaction review.¹⁹ Similarly, it is now commonplace for cartel investigations to be revealed to the world when as many as a half-dozen jurisdictions simultaneously conduct “dawn raids” or other unannounced information-gathering efforts, executed in careful coordination by agencies spanning the globe. In the plastics heat stabilizers case first publicized in 2003, simultaneous “raids” were conducted in Canada, the European Union, Japan, and the United States.²⁰ Similarly broad global cooperation was evident in the air freight case in 2006.²¹

A new alphabet soup of international organizations has also stepped forward to provide a multilateral framework for interaction and cooperation among the scores of new agencies charged with antitrust enforcement responsibility. The Competition Committee of the Organization

¹⁶ See, e.g., Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (June 4, 1998), available at <http://www.usdoj.gov/atr/public/international/docs/1781.htm>.

¹⁷ See Salil Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191 (1999).

¹⁸ See Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST, Fall 2001, at 18.

¹⁹ In addition to their broad bilateral antitrust cooperation agreement, the United States and the European Union have a specific protocol for cooperation in cases involving review of structural transactions. See US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, available at http://ec.europa.eu/comm/competition/mergers/others/eu_us.pdf.

²⁰ See Makan Delrahim, Deputy Assistant Att'y Gen., Antitrust Div'n, U.S. Dep't of Justice, Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies in the U.S. and E.U., Speech Before the ABA Administrative Law Section Fall Meeting (Oct. 22, 2004), available at <http://www.usdoj.gov/atr/public/speeches/206429.htm>.

²¹ Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div'n, U.S. Dep't of Justice, Oversight of the U.S. Dept of Justice, Antitrust Division, Hearing before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights, 110th Cong., 1st Sess. 22 (2007).

for Economic Cooperation and Development²² has been active in promoting multilateral cooperation among the numerous competition authorities of the developed world and, through a targeted outreach program, those in the developing world as well. The United Nations Committee on Trade and Development, including its Intergovernmental Group of Experts on Competition Law and Policy, sponsors numerous programs offering technical assistance to developing jurisdictions, conducts peer review of competition agencies and provides other competition policy related activities open to competition officials from around the world. A number of regional organizations—APEC, ASEAN, COMESA, Mercosur—have also elevated competition as an agenda item and provide platforms for coordination, technical assistance, and exchanges of views on a wide variety of questions of competition law and policy.

Most prominently, in 2001 thirteen of the leading competition agencies of the world formed the International Competition Network, a “virtual” organization comprising a membership forum for competition agencies that since has grown to include every active competition agency in the world—102 at this writing.²³ Aside from a few bedrock principles of extraterritorial jurisdiction and comity found in public international law, the Recommended Practices of the ICN have emerged as the closest available proxy for international competition law standards. Founded only upon a consensus of the ICN membership and operating without any other official sanction, ICN Recommended Practices have no force other than their own quality and allure. They cover a limited range of the broad policy, substantive, and procedural questions falling within the scope of international antitrust enforcement, and leave aside, at least for now, many subjects that comprise the most profound points of controversy and divergence. Nevertheless, the Recommended Practices on Merger Notification and Procedures have registered some noteworthy real-world impact, inspiring a number of statutory and regulatory reforms of inefficient agency practices in the field of transaction review requirements and procedures.

While the bilateral and multilateral agreements, fora, organizations, and relationships that comprise modern international antitrust are al-

²² Showing adaptation skills matching those of the post-Soviet NATO alliance, OECD originated from a committee appointed to disburse Marshall Plan funds to post-World War II Europe, then evolved into a broad economic policy coordination forum for the developed nations.

²³ International Competition Network Members List (Jan. 2008), *available at* http://www.internationalcompetitionnetwork.org/pdf/ICN_Contact_List.pdf. One can anticipate that the Chinese antitrust agencies will also join ICN.

most too numerous and diverse even to catalogue meaningfully, in many respects these are not the real story. Multilateral contacts among competition agency personnel are now so common and continuous that there is in fact a global competition law enforcement mutual support network or community. Like the faculty and administration of a vast multi-campus university, this community is formed by a dense and complex web of interpersonal and interagency relationships. Communications are so frequent and intimate that the workings of this community cannot really be fully monitored (were that considered to be desirable), although many of the links that form this community are clearly evident and can be followed to some extent by anyone with Internet access. It is inevitable that at least some elements of this network will always remain non-public, as agency contacts often involve confidential communications essential to the formulation and execution of tactics for investigation and legal challenges to anticompetitive activity. This includes such mechanisms as the Interpol “Red Notice” system for the apprehension of individuals accused of criminal antitrust offenses, and other mechanisms for the seizure of documents relevant to pending investigations. In the latter case, secrecy may prevent intended investigation targets from despoiling evidence.

Within this global competition enforcement community, ideas suggested in one jurisdiction often take hold around the world with blinding speed. Such ideas circulate not only through written papers, set speeches, and formal face-to-face meetings, but also through unquantifiably vast numbers of untraceable emails, telephone calls, and anonymous but undeniably strong—even if unofficial—relationships and communication channels. There is truly an international global antitrust enforcement mutual-support community, in which officials in any jurisdiction in the world can draw on the thoughts and energies, as well as some of the specific enforcement modalities, of virtually any other enforcement agency in the world. Jurisdictions don’t always agree, and they sometimes work at cross-purposes, but in the vast majority of situations agencies are working together for the common objective of vindicating competition law objectives.

C. PROLIFERATION OF ENFORCEMENT MODES—CRIMINAL PENALTIES,
AMNESTY PROGRAMS, PRIVATE DAMAGES, AND CLASS
ACTION PROCEDURES

I described above how the first wave of new and strengthened competition laws covered most of the world with antitrust rules, and how the second wave of new international bilateral and multilateral agreements, institutions, and person-to-person enforcement agency relationships

have extended the reach of individual jurisdictions by creating a vast and intimately connected mutual-support platform for antitrust enforcement. Now there is a third global antitrust wave emerging—the proliferation of more powerful antitrust enforcement modalities, which is further strengthening antitrust enforcement on national and international levels. Some years ago I referred to the first wave expansion of antitrust as a phase of “luxuriant growth,” leading to overlapping assertions of jurisdiction by agencies applying often-inconsistent standards and procedures to business conduct and transactions.²⁴ This type of overlapping jurisdiction has led to conflicting standards of conduct, poorly coordinated procedures, and rapidly escalating compliance costs for multinational business, with the clear potential for producing adverse effects on the international economy.²⁵ At that time I envisioned a period of “trimming and pruning,” in which inconsistencies would be resolved and multiple assertions of jurisdiction would be reduced, ultimately limiting the burdens on businesses and agencies alike.

The “trimming and pruning” that has occurred, however, has been limited predominantly to merger notification and procedure, and has had limited practical impact on the more profound difficulties faced by businesses in organizing and executing competitive strategies in the international economy without the need to consider a separate accommodation for the distinct competition environment that exists in each jurisdiction that such a strategy might affect.²⁶ If anything, the luxuriant growth phase of international antitrust has intensified, and “trimming and pruning” is far too slow to overtake the continuing expansion of more aggressive enforcement methods.

The proliferation of specific antitrust enforcement modes to other agencies around the globe is a pattern that first emerged when many jurisdictions of the “old” antitrust world adopted merger notification rules. The first such premerger notification requirement was enacted in the United States in 1976 (the Hart-Scott-Rodino Antitrust Improve-

²⁴ Lipsky, *Global Antitrust Explosion*, *supra* note 4, at 64.

²⁵ *Id.* at 62–68 (discussing overlapping and conflicting standards and cases involving merger control and monopolization/abuse of dominance).

²⁶ In 2005 the International Competition Network issued a report describing, *inter alia*, the results of a survey of changes in merger notification laws and regulations that tended to conform with ICN Recommended Practices for Merger Notification and Review Procedures and in which such Recommended Practices played a role. International Competition Network, Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures (Apr. 2005), available at http://www.internationalcompetitionnetwork.org/media/archive0611/050505Merger_NP_ImplementationRpt.pdf.

ments Act).²⁷ The European Union followed when its Merger Control Regulation came into effect in 1990.²⁸ As antitrust statutes proliferated during the Washington Consensus phase, so did merger notification requirements. At this writing as many as eighty jurisdictions have some form of premerger notification approval or review.²⁹ Even China, whose first broad-based antitrust statute did not take effect until August 1, 2008, has required since 2003 certain significant foreign acquisitions involving Chinese-located entities to undergo an approval process.³⁰ At this writing the Indian Competition Commission is in the process of finalizing rules to implement the premerger notification provisions of its new antitrust statute.³¹

In similar fashion, as the United States and other developed jurisdictions refine and strengthen the tools of antitrust enforcement, other jurisdictions tend to follow suit, adopting these innovations and tailoring them to their own individual enforcement regime and legal culture. Thus, for example, U.S. innovations in the system of encouraging self-identification of cartel members through corporate and individual amnesty have spread to the European Union and to numerous other jurisdictions.³² By one recent count, at least thirty-four jurisdictions have amnesty programs to encourage self-reporting by antitrust violators.³³ Numerous other examples can be cited: whereas class actions seeking private damages resulting from competition law violations were once confined to America, it is now typical for class actions to follow quickly in Australia and several Canadian Provinces whenever news first breaks that antitrust authorities in Canada, the European Union, the United States, or other jurisdictions have conducted “dawn raids” or have otherwise initiated investigations involving an industry sector not previously subject to any active antitrust inquiry.³⁴

²⁷ 15 U.S.C. § 18a.

²⁸ Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *repealed and superseded by* Regulation No. 139/2004, 2004 O.J. (L 24) 19.

²⁹ 1 COMPETITION LAWS OUTSIDE THE UNITED STATES *supra* note 4, at ch. 14 (China).

³⁰ Interim Provisions for Foreign Investors to Merge Domestic Enterprises, *available at* <http://www.helpline.com/law/china/merger-acquisition/index.php> (promulgated by the Ministry of Foreign Trade and Economic Cooperation, March 7, 2003, effective April 12, 2003).

³¹ Competition Commission of India (Combination) Regulations, *available at* http://www.cci.gov.in/images/media/Regulations/combination_0107008.pdf.

³² *See* LENIENCY REGIMES (Kevin Arquit et al. eds., 2d ed. 2007).

³³ *Id.*

³⁴ For example, the announcement of dawn raids in the international air freight investigation has led to the filing of purported class actions in the United States, several Canadian Provinces, and Australia. The recent announcement of a Canadian investigation into

The list goes on: the European Commission has set a clear course to encourage private rights of action to recover damages for competition-law infringements—rights that have existed in a number of EU Member States for some time, albeit without the kind of frequent and high-impact consequences typical of private treble-damage litigation in the United States. The European Commission’s White Paper on Damages Actions for Breach of the EC Antitrust Rules³⁵ suggests a variety of modalities (including “collective actions”) to encourage private actions under EU competition rules; there is a parallel exercise pending before the United Kingdom’s main antitrust agency, the Office of Fair Trading.³⁶ One may question whether European or other jurisdictions would ever accept the idea of appreciably enhanced litigation opportunities in the field of antitrust (or otherwise) based on the powerful U.S. models (viz., treble damages, class actions). There is no doubt, however, of the seriousness of the European Union’s current interest in exploring whether various legal and cultural obstacles to successful private recovery for harm caused by competition rule infringements can be overcome without producing a system having the perceived weaknesses of American litigation methods.

Another area of widening interest involves criminal remedies for antitrust violations. Only the United States has applied criminal remedies seriously in the field of antitrust. Such remedies have been available *de jure* in a number of jurisdictions for many years, but their application outside the United States has been exceedingly rare.³⁷ The evolution of American criminal remedies is nothing short of breathtaking: from their lowly status as misdemeanors prior to 1974, with minimal permissible fines and terms of incarceration, Sherman Act violations are now felonies, capable of attracting sentences for guilty individuals of up to ten years’ incarceration.³⁸ Individual and corporate fines have increased dramatically, with fines for price fixers and other serious offenders now routinely reaching into the hundreds of millions of dollars.³⁹ There can be

alleged price fixing among chocolate product suppliers led to the filing of numerous purported class actions in Canada and the United States.

³⁵ European Comm’n, White Paper on Damages Actions for Breach of the EC Antitrust Rules (Apr. 2, 2008), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

³⁶ Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business* (Discussion Paper #OFT916, Apr. 2007), available at http://www.of.gov.uk/shared_of/reports/comp_policy/oft916.pdf.

³⁷ So far as public source research reveals, only Canada, Ireland, Japan, and the United Kingdom have attempted criminal prosecution of antitrust offenses.

³⁸ 15 U.S.C. § 1.

³⁹ Recent examples are discussed in Scott Hammond, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Recent Developments, Trends, and Milestones in the

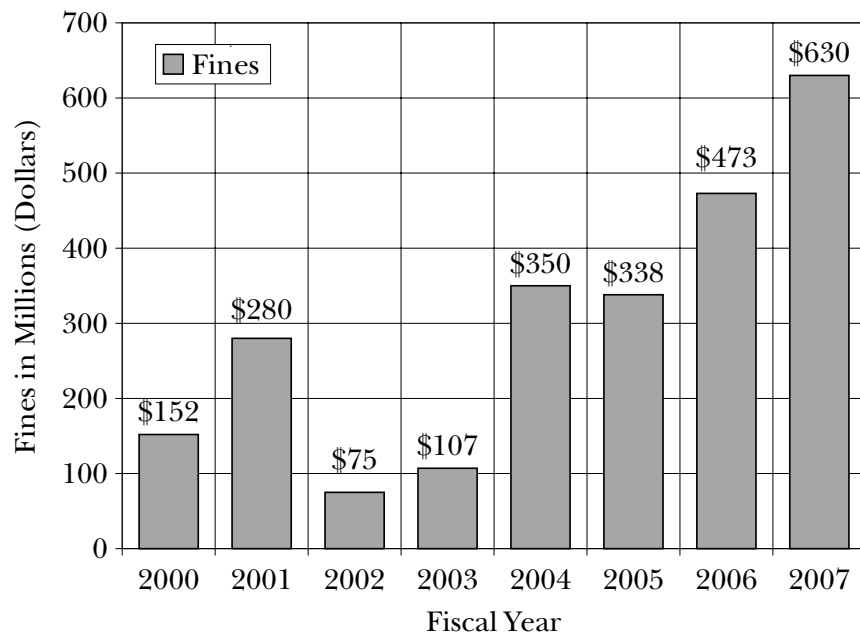


FIGURE 1. CRIMINAL ANTITRUST FINES (2000–2007)

Source: Hammond, *supra* note 39.

no doubt that under U.S. criminal provisions, the stakes for serious offenders have risen dramatically since the 1990s. Twinned with the remarkably successful implementation of the retooled U.S. amnesty program, the United States has reaped extraordinary bounty from its criminal antitrust enforcement efforts. Criminal antitrust fines obtained by the Antitrust Division are set to exceed \$3 billion for the period 2000 through 2008.⁴⁰

Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law (Mar. 26, 2008), available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>. The current statutory maximum \$100 million is now routinely exceeded in plea agreements because the U.S. Justice Department can apply leverage derived from the "alternative fines" statute, which allows penalties of twice the harm (to the victims) or twice the gain (to the violator) attributable to the offense. 18 U.S.C. § 3571(d).

⁴⁰ The total 2000–2007 is about \$2.4 billion, but already announced criminal fines in various air cargo and passenger investigations will bring the 2000–2008 total to over \$3 billion. Kevin O'Connor, Associate Att'y Gen., U.S. Dep't of Justice, Remarks Prepared for Delivery at Press Conference Regarding Air Cargo (June 26, 2008), available at <http://www.usdoj.gov/aag/speeches/2008/aag-speech-0806267.html> (itemizing previous fines contained in plea agreements in international air cargo investigation).

This may help to explain why Ireland and the United Kingdom have criminalized antitrust offenses, and why other jurisdictions—Australia, Canada, Japan, Mexico, and South Africa—have shown interest in enacting or increasing the use of criminal remedies to combat cartels. It is possible that other jurisdictions ultimately will adopt the U.S. perspective—that incarceration of individuals responsible for cartel activity is the most effective method of deterrence.

The global proliferation of new and enhanced laws, more severe remedies, and more powerful investigative tools has given rise to novel interactions between the laws of different jurisdictions. An obvious form of interaction is the use of evidence-gathering devices in one jurisdiction to obtain information that can be used for competition proceedings in a different jurisdiction.⁴¹ These interacting discovery mechanisms can lead to profound dilemmas for businesses subject to antitrust investigation in multiple jurisdictions. A typical concern of amnesty applicants in the increasingly numerous non-U.S. jurisdictions that have amnesty programs involves the discoverability of the amnesty submissions for use in private treble-damage actions in the United States. Obviously a significant disincentive to any firm considering a request for amnesty in a non-U.S. jurisdiction is the possibility that the confessional material supplied abroad—which must persuade the foreign authority that there is indeed a violation afoot—will become the basis for claims made in U.S. civil antitrust. In U.S. proceedings the combination of notice pleading, liberal pre-trial discovery, mandatory treble damages, the availability of opt-out class actions, and joint and several liability, and state remedies (including liability to indirect purchasers) can magnify the potential remedial consequences dramatically.

In sum, the combination of worldwide antitrust coverage, closely knit bilateral and multilateral enforcement agency agreements and relationships, and the proliferation of criminal remedies, amnesty programs, private damage modalities, and other more powerful enforcement tools

⁴¹ A classic example is the U.S. statute that permits parties to seek discovery in the United States to obtain information for competition proceedings in other jurisdictions. 28 U.S.C. § 1782; *see Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–50 (2004) (district court has statutory authority to authorize discovery in aid of European Commission antitrust investigation). U.S. civil discovery rules also permit plaintiffs to seek (through document requests, deposition questions, interrogatories, requests to admit, or other discovery devices) information submitted to foreign antitrust authorities, provided such requests meet applicable requirements (e.g., discovery must be “reasonably calculated to lead to the discovery of admissible evidence” and seek information not privileged or otherwise exempt from discovery). Fed. R. Civ. P. 26(b)(1). A major branch of U.S. procedural law concerns the ability of U.S. litigants to obtain information located abroad for use in the United States. *See generally* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS ch. 13 F.1. (6th ed. 2007).

is producing a compliance environment of extraordinary complexity and enormous potential impact. The result is an order-of-magnitude increase in the costs and burdens of compliance for businesses seeking to function in the global economy. In the next section I point out some of the most difficult aspects of complying with the substantial and often overlapping demands of the present international antitrust environment.

III. COMPLIANCE CHALLENGES OF THE NEW ANTITRUST REALITY

Managing compliance with so many vigilant enforcement agencies, competitors eager to inculcate each other at the first opportunity, and determined plaintiffs' lawyers powerfully motivated by huge financial rewards and the lure of publicity and enhanced professional stature is a daunting challenge. The multifaceted issues that confront enterprises in attempting to deal with these challenges are discussed here in three parts: (1) recognition and acceptance; (2) identifying and procuring the resources necessary to meet the challenge; and (3) managing and coordinating those resources.

A. CORPORATE RECOGNITION AND ACCEPTANCE

1. *Prevention vs. Cure*

Business firms responding to the new compliance challenges of a global antitrust enforcement network that is rapidly expanding, strengthening, and assuming new and more potent forms must confront the same institutional barriers characteristic of any effort to bring about a significant change in the conduct and thinking of people and institutions: old patterns die hard because they are valued for whatever past success and present comfort they represent, and they are difficult to change for any reason. There is tremendous inertia that can lead firms to deny the increasing possibility of alarming new consequences and to take on new, more burdensome, and more costly safeguards, especially when the new threat appears so complex and not even the improved defenses can be certified as foolproof. Like other forms of real-world navigation and problem solving, constant vigilance and well-planned action are the best—indeed the only—true protections.

For all participants in the process of managing compliance—outside antitrust counsel, in-house counsel, enterprise management, and the employees performing functions that may create exposure—it may be instructive to pause and appreciate the transformative character of the changes that have occurred in the global business environment. The transformation of antitrust might be compared with that of classical

physics which occurred as the bizarre truths of relativity and quantum mechanics came to be recognized as undeniable. That was not a situation in which new certainties replaced old certainties; rather, old absolutes and certainties turned out to be mistaken. Deterministic and intuitively plausible rules ultimately gave way to profound uncertainties and more complex understandings of reality. Although compliance with antitrust standards has always been challenging, the internationalization of antitrust (the three waves described above in Part I) has led to order-of-magnitude increases in complexity and in the size of the stakes.

Where antitrust compliance is concerned, prevention is much preferable to cure: it is both far cheaper and more effective in the long run. But it is difficult to bring focused attention upon and cause action to be taken based on new possibilities that may seem speculative, remote, unfamiliar, illogical and perhaps too awful to contemplate. Here's a simple but very common example: in Europe, competition authorities conducting "dawn raids" often specifically seek out written legal advice rendered by in-house antitrust counsel, and this legal advice ultimately may be treated as evidence, without regard to any assertion of legal privilege. This is because the European Union does not recognize attorney-client privilege with respect to communications by or with in-house counsel.⁴² Requests for advice of counsel and responses to these requests provide a roadmap to the most sensitive antitrust issues found within an enterprise, therefore the Commission raiders tend to pursue such documentation aggressively. This reality is difficult to explain to clients used to dealing with U.S. antitrust, where companies using in-house counsel are accorded the same benefits and protections of the attorney-client privilege as are available with regard to communications with outside counsel.⁴³

There are many similar surprises for those used to dealing with the American system of antitrust when they go abroad and confront systems of antitrust and competition law in other jurisdictions. This is particularly true in jurisdictions with enforcement institutions based on civil law and/or administrative law traditions, as is typical in Continental Europe and throughout most of the world.⁴⁴ Totally aside from differences in the substantive standards for conduct between U.S. and non-U.S. anti-

⁴² Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chem. Ltd. & Akros Chems. Ltd. v. Comm'n*, 2003 E.C.R. II-4771.

⁴³ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁴⁴ Limitations on discovery and opportunities for confrontation and cross-examination of witnesses in civil law jurisdictions may also seem novel to attorneys whose experience is derived primarily from U.S. practice.

trust systems, the contrasts between such systems and the common law and judicial enforcement models of the United States can be striking.

Similar challenges await foreign firms encountering U.S. antitrust for the first time; they may be stunned to see that even isolated and unconfirmed media reports of a competition investigation by U.S., European, or Canadian authorities can give rise within days to the filing of scores of purported class actions across the United States, alleging serious antitrust violations and seeking massive damage awards in U.S. courts under both federal and state antitrust law.⁴⁵ Foreign firms and their executives are often dumbfounded to learn that U.S. investigators are empowered to wiretap telephone lines or tap into computer systems to intercept communications that may involve suspected anticompetitive activity—the same techniques long used to combat organized crime, in which none of the participants in the communication is aware of government eavesdropping.⁴⁶ In the recent marine hose investigation, foreign executives were actually apprehended and taken into custody—apparently a first-ever achievement for the Antitrust Division—allegedly while on travel to the United States to hold a meeting pursuant to the alleged conspiracy.⁴⁷

Another important characteristic unique to the new international network of antitrust enforcers is the tendency of many authorities to go on alert for the same issues and targets at the same time. Once the global network described in Part I above takes hold of an issue, resolution may take decades. An early example of this type of concurrent involvement by multiple agencies resulted from various challenges to IBM's competitive conduct by private parties as well as U.S. and EU authorities in the 1960s, '70s and '80s. The U.S. monopolization case against IBM was filed in 1969.⁴⁸ The competition directorate of the European Commission also began an investigation of IBM's conduct under abuse of dominance

⁴⁵ In the international air freight investigation, for example, purported class actions were filed under federal and state antitrust law in the United States within days of the public disclosure of "dawn raids" on the carriers.

⁴⁶ 18 U.S.C. § 2518. The well-publicized "ADM Tapes"—videotaped price-fixing sessions obtained during the investigation of the lysine cartel, which ultimately yielded a rich harvest of pleas and convictions—required the consent of one of the participants. U.S. government investigators are no longer limited to such "consensual" surveillance, but can obtain authority to conduct the "surreptitious surveillance" described in the example in the text.

⁴⁷ Press Release, U.S. Dep't of Justice, Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose (May 2, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/223037.htm.

⁴⁸ *United States v. IBM Corp.*, No. 69 Civ. 200 (DNE) (S.D.N.Y. 1969).

standards, eventually commencing its own formal proceeding in 1980.⁴⁹ The U.S. lawsuit was dismissed without prejudice in 1982, but the EU proceeding continued. In 1984 IBM bought peace by means of an “undertaking” or commitment to mollify its conduct in certain respects (primarily involving early disclosure of interoperability requirements to competing producers of peripheral devices—printers, disc drives, plotters, etc.—usable with new modular IBM mainframe computer systems and competitive with IBM’s own peripheral devices).⁵⁰ The behavioral commitments undertaken by IBM to DG Competition continued well beyond the end of the U.S. monopolization case. Start to finish, the entire process lasted over twenty years.

Obvious similarities occur with regard to numerous antitrust issues and specific investigations now ongoing: the antitrust proceedings surrounding Microsoft have not been limited to the United States and European Union, but have included antitrust agencies in Japan, South Korea, and other jurisdictions.⁵¹ The same can be said about recent proceedings involving Intel Corp.,⁵² and earlier proceedings involving A.C.

⁴⁹ Commission of the European Communities, *IBM to Continue with European Commission Undertaking* (Dec. 15, 1988) (describing renewal of August 1984 undertaking “suspending four-year long proceedings against IBM”).

⁵⁰ Bulletin of the European Communities 101984.

⁵¹ See, e.g., Korea Fair Trade Commission, *The Findings of the Microsoft Case* (Dec. 7, 2005), available at http://ftc.go.kr/data/hwp/microsoft_case.pdf; Japan Fair Trade Commission, *Hearing Decision Against Microsoft* (Sept. 18, 2008), available at <http://www.jftc.go.jp/e-page/pressreleases/2008/September/080918.pdf> (tentative English translation). Taiwan’s antitrust agency settled an earlier investigation of Microsoft, Taiwan Fair Trade Commission, *The Fair Trade Commission Approved an Administrative Settlement Proposed by Microsoft Taiwan and Its Affiliates* (Feb. 27, 2003), available at <http://www.ftc.gov.tw/EnglishWeb/20000101299901011397.htm>, and apparently another investigation is pending. Time Cuplan, *Microsoft Under Antitrust Probe in Taiwan over Vista*, Bloomberg.com, Aug. 18, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601080&sid=aboHMfWWU3Y&refer=asia> (quoting telephone interview with Taiwan FTC spokesperson).

⁵² Intel faced an antitrust investigation by the U.S. Federal Trade Commission, Intel Corp., FTC Docket No. 9288 (filed June 8, 1998), as well as private litigation in the United States, *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001), and investigations in Europe, Press Release, European Comm’n, *Intel: Reaction to a Press Report on an Antitrust Investigation* (Apr. 6, 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/129&format=HTML&aged=0&language=EN&guiLanguage=en>, Japan, and elsewhere. Japan Fair Trade Comm’n, *The JFTC Rendered a Recommendation to Intel K.K.* (Mar. 8, 2005), available at <http://www.jftc.go.jp/e-page/pressreleases/2005/March/050308intel.pdf>; Korea Fair Trade Comm’n, *Corrective Measures Against Intel’s Abuse of Market Dominance* (July 4, 2008).

Nielsen⁵³ and the VISA and MasterCard payment-system networks.⁵⁴ Of course, cases involving mergers or other structural transactions between global companies by their nature will trigger simultaneous or near-simultaneous investigations in those jurisdictions where notification thresholds are met. Cartel cases can spread from jurisdiction to jurisdiction by a variety of means: characteristically cartel activity has an international aspect nowadays. The U.S. Justice Department has been saying for some time now that roughly half of its pending grand jury proceedings have an international dimension.⁵⁵ It has become common for different jurisdictions to cooperate in conducting “dawn raids” or unannounced inspections in order to preserve the element of surprise and thereby maximize the evidentiary output of common investigative efforts. When dawn raids were conducted on Valentine’s Day 2003 in connection with the so-called plastics modifiers case, for example, Canada, the European Union (acting in conjunction with local authorities in its Member States including Belgium, the Netherlands, France, Germany, Italy, and the United Kingdom), Japan, and the United States all coordinated their activities and launched raids all over the world within a narrow time window.⁵⁶ This pattern has become increasingly common in other cartel cases.⁵⁷

As the consequences of ignoring these trends become more horrific, it gets easier to persuade multinational companies to formulate and implement antitrust compliance programs and to adapt their business strategies accordingly. Antitrust penalties continue to head skyward—cartel fines frequently reach into the hundreds of millions of dollars (or euros),⁵⁸ civil treble-damage penalties often reach the same scale,⁵⁹ and in the United States convicted price fixers are sentenced to increasingly

⁵³ *Information Res., Inc. v. Dun & Bradstreet Corp.*, 260 F. Supp. 2d 659 (S.D.N.Y. 2003); Press Release, European Comm’n, *Following an Undertaking by AC Nielsen to Change Its Contractual Practices, the European Commission Suspends Its Action for Breach of the Competition Rules* (Dec. 4, 1996); Director of Investigation and Research v. *D&B Companies of Canada Ltd.* (A.C. Nielsen), CT-94/1 (Consolidated Order, Aug. 30, 1995).

⁵⁴ U.S. Gov’t Accountability Office, *Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, But Additional Revenue Collection Cost Savings May Exist*, GAO-08-558 at 30–34 (May 15, 2008), available at <http://www.gao.gov/new.items/d08558.pdf>.

⁵⁵ Hammond, *supra* note 39 (stating that of the 135 open grand jury investigations, “over 50” involved suspected international cartel activity).

⁵⁶ Delrahim, *supra* note 20.

⁵⁷ The international air cargo investigation provides another example of the internationally coordinated launch of a cartel investigation. Barnett, *supra* note 21, at 19.

⁵⁸ Hammond, *supra* note 39.

⁵⁹ See, e.g., *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (affirming antitrust treble damage award of US \$1.05 billion).

lengthy periods of incarceration,⁶⁰ even for employees of foreign firms who remained abroad in jurisdictions that do not provide extradition to the United States for antitrust offenses. The pressures exerted on multinational businesses by the threat of U.S. criminal liability on the one side, and the prospect of staggering civil liabilities on the other, often produce quick compromises involving enormous fines and lead to career-ending sentences of culpable individuals from all over the world. It is sometimes claimed that senior corporate executives find it easy to authorize their firm to pay even the nine-figure antitrust fines and penalties that have become more typical now, because those fines are paid with “other people’s money.” But where individual criminal liability and the possibility of incarceration in a U.S. penitentiary becomes a realistic prospect, the compliance mentality becomes an easier sell.

It also bears mention that according to the U.S. Antitrust Division, the number of pending grand juries is at a record level.⁶¹ Despite the unbroken decade-plus string of huge criminal fines and numerous jail sentences made possible by the use of amnesty, immunity for cooperating witnesses, surreptitious and consensual surveillance, international cooperation in obtaining evidence, and the other tools of modern criminal enforcement, the frequent announcements of new indictments and plea agreements demonstrate that substantial cartel activity remains afoot. This is a fertile subject for experts in criminal behavior, and one can speculate as to the explanation and the appropriate enforcement response (capital punishment for price fixing?—as was once semi-seriously proposed).⁶² But for present purposes the significance is that the long menu of current investigations guarantees continued and intense worldwide antitrust enforcement into the foreseeable future. For any substantial business, playing the antitrust game is unavoidable, and it can no longer be played for small stakes.

2. *Nature of the Responsibility*

Once an international business recognizes and accepts the task of confronting and addressing these intensifying legal challenges, what must be done? Some of the items are obvious and would be a natural part of any traditional legal compliance program. Competent counsel must be identified and briefed, and management must take steps to assure that an effective compliance program is developed, implemented,

⁶⁰ See *supra* note 39.

⁶¹ *Id.*

⁶² Michael K. Block & J. Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980).

and kept in fine tune. But the global penetration of the enforcement network makes this a far more complex and difficult task than was required for compliance efforts of the past. One must have access to counsel across the globe, in legal and cultural environments of great diversity, and each part of the overall picture must be woven together to form a functional whole.

Global antitrust compliance is different than making sure real estate taxes or truck licenses are up to date around the world. Assuring adequate counseling and defining the right behavioral standards is daunting enough—but since business transactions and competitive strategies are global, while enforcement agencies are still confined to national jurisdictions, there must be an integrated approach. If a distribution strategy requires protection of dealer investments through the use of exclusive territories, how does the global system deal with jurisdictions that do not permit territorial limitations? One leak deflates a balloon, even if it's only one leak, and it doesn't matter where that leak occurs.

Acquiring in-house legal staff sufficient to be highly experienced and skilled (let alone qualified at bar) in the practice of all the competition laws of the world would require resources far beyond the capacities of even the largest multinational corporations. With scores of jurisdictions wielding serious antitrust remedies, no single counsel could possibly provide fully qualified advice and representation with regard to more than a handful of the key jurisdictions. Mastering all the substantive and procedural details of 100 distinct antitrust systems around the world is flat-out impossible. Generally it will be a challenge for in-house counsel to coordinate, manage, and monitor execution of the compliance process, delegating the detailed planning, counseling, implementation, and dispute resolution tasks either to local in-house counsel or to retained outside counsel in the jurisdictions of interest. Maintaining adequate compliance programs and ensuring vigilance for new developments—to say nothing of the heavy day-to-day burden of managing specific matters and disputes—requires major efforts to retain and coordinate a wide variety of in-house and outside resources in jurisdictions scattered around the world.

Among the more important obligations of a responsible compliance effort is the need for a constant watch on the leading edge of enforcement developments. Although few of the major global antitrust enforcement developments of the past twenty-five years were specifically foreseen, nearly all were foreshadowed in time to give sufficient early

warning to well-counseled multinational businesses.⁶³ By monitoring developments occurring in diverse parts of the international enforcement community, a global business can see the approach of a leading-edge development: the increasing frequency of coordinated dawn raids, the rising numbers of jurisdictions with amnesty programs, the spread of class-action damages litigation from the United States to other jurisdictions, such as Australia and Canada, or the use of a new theory of anticompetitive effect (e.g., “portfolio effects,” “unilateral effects”) in recent speeches, cases, or other agency or judicial output. There is usually enough time for a watchful enterprise to anticipate and prepare against the day when novel enforcement tools are applied to it, if it is conscious of the need to do so and willing to invest the needed resources.

Another justification for close monitoring of international legal developments is to enhance awareness of how different jurisdictions play an increasingly important role in obtaining information to support investigations of similar conduct and parties in other jurisdictions. A classic example is the U.S. statute codified at 28 U.S.C. § 1782, which permits discovery in the United States of information relevant to proceedings in foreign jurisdictions. The availability of this provision in cases aiming to supply information to the European Commission in a competition proceeding was confirmed by the Supreme Court decision in *Intel Corp. v. Advanced Micro Devices, Inc.*⁶⁴

The increasing trend toward international cooperation in obtaining evidence is supported by a multitude of bilateral antitrust cooperation agreements, as well as by the direct interactions of numerous enforcement agencies informally, or within the International Competition Network, the Competition Committee of the OECD, or other similar organizations. Formal systems aside, information available to one jurisdiction tends to be found in the hands of other jurisdictions with remarkable speed. There is no sense in asking why in the new antitrust environment, because information once dispersed cannot be collected

⁶³ For example, the European Commission asserted competence over corporate acquisitions under the competition rules as early as 1972—an effort ultimately thwarted by the Court of Justice. Case 6/72, *Europemballage Corp. & Continental Can Co. v. European Comm’n*, [1973] E.C.R. 215. See also Cases 142 and 156/84, *British Am. Tobacco & R.J. Reynolds Indus. Inc. v. Comm’n*, [1988] 4 C.M.L.R. 24 (Commission’s later attempt to assert jurisdiction over a merger). Similarly, efforts to improve international coordination in pursuit of cartel offenses was long telegraphed by various enforcement agencies. Diane P. Wood, *Cooperation Among Competition Authorities in the Global Market*, Speech Before International Company Lawyers’ Conference (Feb. 24, 1995), available at <http://www.usdoj.gov/atr/public/speeches/0134.htm>.

⁶⁴ 542 U.S. 241 (2004).

and confined again, and there is no effective remedy for unauthorized disclosure.

Monitoring international developments can also be of great value in predicting how particular jurisdictions will react to a substantive issue. While significant substantive differences remain between jurisdictions, similarities are also evident, and ideas spread very quickly. An enforcement concern identified by one jurisdiction rapidly migrates to become a focus of concern in other jurisdictions. The mandatory licensing of intellectual property as a remedy for monopolization or abuse of dominance is one obvious example of a substantive issue that has come under simultaneous review in a number of antitrust agencies around the world—from the United States and European Union, to South Africa, to South Korea and other jurisdictions.⁶⁵ The same has occurred with regard to the issue of bundled discounting,⁶⁶ patent disclosures within standard-setting organizations,⁶⁷ standards applicable to interchange fees for payments systems,⁶⁸ and a variety of other major antitrust issues.

3. *Finding Compliance Resources*

Designing, implementing, and maintaining a global antitrust compliance program—and keeping it updated in the face of rapid and profound developments scattered around the world—require a diverse set of resources, not all of them familiar to the multinational business.

⁶⁵ The issue was implicated in the FTC investigation of Intel, Intel Corp., FTC Docket No. 9288 (filed June 8, 1998), proceedings against Microsoft in the United States, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), and European Union, Case T-201/04 R, Microsoft Corp. v. Comm'n, 2004 E.C.R. II-4463 (Ct. First Instance Sept. 17, 2007), and South Korea, Korea Fair Trade Commission, The Findings of the Microsoft Case (Dec. 7, 2005), available at http://ftc.go.kr/data/hwp/microsoft_case.pdf, as well as in proceedings before the Competition Commission of South Africa in an investigation of the conduct of suppliers of antiretroviral pharmaceutical products, Hazel Tau v. GlaxoSmithKline SA (Pty) Ltd.; description of settlement of case available at <http://www.compcom.co.za/resources/Comp%20Comm%20March%20HTML/Frameset%20March.html>.

⁶⁶ The legality of bundled discounts was the key issue in a recent leading EU case involving international passenger air transportation, Case Comp/34.780, Virgin/British Airways, 2000 O.J. (L 30) 1 (1999); Case T-219/99, British Airways v. Comm'n, 2003 E.C.R. II-5917, appeal denied, Case C-95/04, 2007 E.C.R. I-2331 (2007), and U.S. cases LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), and Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008).

⁶⁷ In the United States, the issue was central to *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), and in the EU. See Press Release, European Comm'n, Competition: Commission Welcomes Changes in ETSI IPR Rules to Prevent 'Patent Ambush' (Dec. 12, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1565&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶⁸ Brian W. Smith et al., *Why the Market Should Set Credit Card Interchange Fees: An Update and Comment on Legislation Pending in Congress, the Credit Card Fair Fee Act*, 21 BANK ACCT. & FIN. 35 (2008).

Even an enterprise that regards itself as having a high degree of legal sophistication can discover that its antitrust early-warning systems are primitive and inadequate in the face of the instantaneous and enthusiastic global cooperation within the enforcement community. Playing defense demands an understanding of just how sophisticated the “offense”—that is, the enforcement community (including both agency prosecutors and their private damages-seeking counterparts)—has become.

The first requirement is for the services of one or more antitrust practitioners—whether in-house or retained—with broad experience, familiar with and capable of anticipating the unexpected from the increasingly aggressive and diverse enforcement weapons that are widely available to antitrust agencies and private plaintiffs. Because of the strength and longevity of its antitrust enforcement system, the United States remains the most plentiful source of counsel. Europe, which is now going on a quarter-century of strong enforcement within its own unique traditions, is becoming competitive. The ideal is to combine U.S. and European talent within the same top-level team. This helps to ensure sensitivity to the characteristics and foibles of each system, and prevents “monoculture” from inhibiting understanding of enforcement patterns in jurisdictions that would otherwise remain totally, or at least partially unfamiliar to the senior antitrust counsel managing the overall effort.

Whether in the role of in-house or outside counsel, even the most sophisticated and experienced individual antitrust advisors cannot by themselves provide all the expertise and master all the disciplines that must be relied upon to assure an adequate compliance program. While we like to believe that the more established enforcement systems of the major developed countries—primarily Canada, the United States, and the European Union—provide the first and last word on the most important issues and problems of antitrust enforcement, it is undeniable that even the newest and least sophisticated jurisdiction is capable of significant original contributions to antitrust thinking, as well as to its practice and procedure, and every jurisdiction typically develops its own unique practices, procedures, and traditions. Failing to appreciate that fact and failing to mine the full range of local resources and to maintain constant contact with the situation “on the ground” in various jurisdictions around the world is dangerous.

On the other hand, there is a trap for the unwary in relying exclusively on local antitrust practitioners in jurisdictions very new to antitrust. Such practitioners are sometimes guilty of rookie mistakes: ask an antitrust practitioner in a jurisdiction whose first antitrust law is only a

few years old how it is possible to sell shoes and shoelaces without engaging in a prohibited “tie-in,” or how a homeowner can fix the selling price for his property without engaging in illegal “price fixing” with the real estate agent. Sometimes the response is a “deer-in-headlights” look (albeit far less frequently these days as the supply of “antitrust sense” is increasing worldwide as many jurisdictions adopt antitrust rules and seek information on proper administration of such rules). This is no cause for alarm, nor is it evidence of a local deficit in legal talent: it’s usually a normal byproduct of the novelty of the local antitrust system. Moreover, those same local practitioners have something that is just as valuable—and possibly more valuable—than the overwhelming antitrust erudition of a life-long antitrust practitioner from the United States or Europe. Specifically, they have the wealth of in-depth information on and hands-on experience with local language and customs, local business patterns, local government and competition-agency enforcement traditions, and the legal and cultural constraints and understandings that guide enforcement throughout the local antitrust system. They may also have invaluable (and, in the short run, irreproducible) personal credibility with those who populate the local enforcement institutions. No compliance program can function without an effective combination of both sophisticated antitrust understandings and deep local understandings of the law and legal culture.

Also counseling in favor of integrating local practitioners into the compliance network is the simple fact that in many jurisdictions around the world, understanding the law and/or interacting with the enforcement agency *requires* individuals with local legal qualification and/or local language skill. While the European Union and many EU Member State agencies seem content to accept documents and presentations in English and welcome appearances by U.S or UK practitioners, for example, there are many other jurisdictions where neither is possible, or where presentation of a case in English by non-local practitioners, even if possible, would be unwise, or at least inconvenient or otherwise disadvantageous.

The organization of global antitrust compliance resources is also complicated by the need to find professional antitrust economists who can be clear and persuasive in supporting the work of a compliance effort—whether that means transaction planning, advocacy, or preparation and support for contested proceedings and dispute resolution. Jurisdictions vary widely in terms of understanding and receptivity to economic arguments and to economists. They also vary widely according to the availability of economists who are rooted in the local jurisdiction (at a university or consulting firm, for example) and who have good under-

standings of antitrust economics, local business patterns, and industrial structure. Few countries have the level, scope, and diversity of antitrust practice that produces consistent demand for the evolution of a local antitrust economics profession. As yet, there is no general solution to this problem. Sometimes a U.S.- or EU-based economist with the appropriate skills can be found for assignments in other jurisdictions, but it is frequently the case that no individual with the triple threat—antitrust sophistication, thorough knowledge and experience in the local jurisdiction, and credibility with local authorities—can be found. As antitrust expands, one can hope that economics will be integrated into local practice in more jurisdictions around the world and the economics profession within more jurisdictions will develop in response.

B. COORDINATING AND MANAGING COMPLIANCE RESOURCES

In recognition of these realities, one can think of the entire project of developing a robust antitrust approach in any specific jurisdiction as a four-step learning process that must be performed before a company is in a position to determine its best response to an antitrust investigation or proceeding, or to formulate an antitrust compliance policy. First, counsel responsible for coordinating the company's overall antitrust strategy must learn the local antitrust law (from the local practitioners, and from their own absorption of the local legal materials, read in light of similar provisions encountered previously in other jurisdictions that might be looked to as local models or precedents). Second, the local practitioners must be informed of antitrust approaches encountered in other jurisdictions that are likely to influence the local perspective on any issues likely to arise in the matter assigned to them (recognizing that various jurisdictions characteristically inform themselves about precedents and the views of enforcement agencies in a number of other jurisdictions with regard to the same or similar issues). Third, the company's antitrust experts must learn from the local practitioners a wealth of detail about the local legal culture and enforcement environment, including any procedural, administrative, judicial, or even political or cultural aspects that are likely to influence decision making in the local antitrust proceedings. In this phase the U.S. or other non-local antitrust lawyers have everything to learn from the local practitioners, however limited the antitrust experience of the latter. Finally, all the counselors involved must formulate and mutually support a strategy for dealing with the issue at hand that seems most likely to be successful in protecting the client's business and legal interests. Such a strategy must weave together both the accumulated knowledge of the international antitrust community (whatever the substantive issue happens to be) with the best advice

on how the client's business strategy is likely to be "processed" in the context of a real-world matter in the jurisdiction in question.

The task of organizing these steps is often far more complex than at first appears. Maintaining an adequate focus on the fundamental business issue that gives rise to the need for consideration of antitrust compliance (the business issue could involve execution of a marketing or licensing strategy, contemplation or consummation of an acquisition, etc.) requires the involvement of those with detailed business knowledge. Such knowledgeable client representatives may be in the local jurisdiction or at headquarters in the United States or elsewhere, or perhaps it will be necessary to involve multiple client representatives from different locations and/or business units. There may be local legal counsel (either in-house or outside) in the jurisdiction(s) in question with longstanding relationships within and deep knowledge of the client's business in the particular areas of interest. An essential ingredient for success is recognition of the diversity of the set of skills and knowledge required to overcome the challenges of global antitrust compliance.

The complexity and fluidity of these sorts of questions strongly suggest a "network" rather than a "hierarchy" approach to the organization of problem-solving teams. Experience tends to validate the recognition that no single individual or corporate resource can supply all the necessary inputs for the formulation and execution of a compliance strategy. Each of the resources identified above—inside and outside counsel, local and headquarters business people, legal specialists with sophisticated antitrust knowledge, and other specialists from the specific jurisdictions involved—all have important roles. Consulting antitrust economists or other experts may be required, and these may be either local or from other jurisdictions. The salience and utility of one or the other skill set may ebb and flow. Roles must shift accordingly.

In today's antitrust world, the team needed to deal with a typical compliance issue feels much less like a well-run courtroom litigation machine—with a senior litigator at the top, junior partners and associates and paralegals and document specialists, etc., at lower levels down to the "engine room" of a trial team—and more like a flexible network of collaborators, each with a particular specialized skill (or set of skills) to contribute. Although it is essential that such a broad and diverse team be managed carefully to prevent loss of focus and maintain accountability, it must style its organization with flexibility, discretion, and the capacity to change as needs evolve, so that those with the most relevant skills for any part of the task are brought forward as appropriate. Command and control only goes so far in dealing with the huge complexity

and diversity that pervades the management of a multinational antitrust project.

IV. CONCLUSION

I have tried to describe the three waves of the continuing global antitrust surge in a way that conveys their power, scope, and potential for enterprise-threatening impact. I have also pointed out why it should be an easy decision for any business enterprise contemplating cross-border operations—and that category includes a large and increasing number of enterprises within the continuing evolution of the global economy—to adopt a global perspective on antitrust compliance. I conclude here with a few thoughts on the future of antitrust, given the reality of this massive and still-expanding global antitrust enforcement network.

This network is characterized by great diversity, extreme complexity, and by the potential for heavy legal consequences in many different jurisdictions around the world. Taking it as assumed that strong antitrust laws are desirable, the huge range of diversity in the approaches of different jurisdictions is not necessarily beneficial. The themes of convergence (“soft” and “hard”—meaning “somewhat aligned” versus “identical” or nearly so), harmonization, and the like have been much discussed in the extensive literature on international antitrust enforcement.⁶⁹ There are pros and cons and the considerations are shifting and complex.

There are real questions about the viability of an antitrust enforcement environment in which (1) over 100 national (and supranational) jurisdictions enforce their own laws through their own procedures, (2) many of these jurisdictions allow private remedies in some form—perhaps in very powerful forms, such as treble-damage opt-out class actions, (3) many of these jurisdictions allow independent antitrust enforcement efforts to be undertaken by *subordinate* jurisdictions, such as the states of the United States, the EU Member States, the Spanish autonomous communities, and the Canadian provinces, (4) none of these jurisdictions will defer fully or even substantially to any other, except in relatively rare and limited circumstances, (5) there is no international body—and within national jurisdictions there is often no *national* body—with the capacity or authority to reconcile and coordinate these additive and sometimes conflicting demands. (Consider the United States—with the longest and strongest antitrust tradition—where federal antitrust law does not generally preempt the antitrust laws of the fifty states, and even

⁶⁹ See, e.g., Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, ANTI-TRUST, Summer 2005, at 25.

at the federal level we have two agencies that waste time squabbling over their jurisdiction in some particular matters.)

The costs and complexities of this network system are enormous. We are just beginning to adopt the most rudimentary mechanisms for reducing them. The ICN has made some progress in the area of merger notification and procedures. The United States and the European Union work hard to anticipate overlaps and conflicts in the merger review process, with apparent success. But coordinating EU-U.S. approaches to the conduct of globally significant firms—viz., IBM and Microsoft—is visibly unsuccessful. The right blend of uniformity and diversity is still not clear and may never become clear as circumstances change. (What will happen—and what *should* happen—to U.S.-EU cooperation in merger review when notification regimes come on line in China and India?) Are the agencies in the smaller jurisdictions destined to become bystanders in the global antitrust game? That makes no sense if an important resource or industry or class of consumers is concentrated in that jurisdiction. There seems to be no general formula by which compliance overlaps and conflicts can be reconciled.

The implication seems clear: there must be a new model—a model not based on such a huge diversity of supranational, national, and subnational enforcement structures.⁷⁰ The new model might involve a clearing out of this multiplicity of enforcement structures, but even the outlines of such a model have yet to emerge. Certainly, a higher degree of unity within specific jurisdictions (e.g., state-federal in the United States; national-provincial in Canada, EU-Member State-Member State subjurisdictions, etc.) might be a logical starting point. In the meantime, as I have argued previously, the costs and complexities of antitrust enforcement cannot be permitted to climb higher at their present rate forever. At some point—we may be well past that point—costs outweigh benefits. Global economic health depends on innovation and flexibility, which are stifled by a heavy regulatory hand. Are we already past the point where the “trimming and pruning” phase should have begun? Some like ICN are toiling to bring some degree of order and harmony to this antitrust garden—but this and similar efforts are still no match for the kudzu-like growth of the global antitrust network.

As former Council of Economic Advisers Chair Herb Stein used to say, “Unsustainable trends tend not to be sustained.” Can antitrust reform itself from “within,” building on the ICN and other cooperative organizations and relationships to rein in the complexities and overlaps of in-

⁷⁰ See Lipsky, *Maintaining Incentives for Innovation*, *supra* note 4, at 532.

ternational antitrust? Or will the global antitrust enforcement network ultimately lead the world economy into an era of stagnation, inviting the type of sudden and profound reform characteristic of epochal shifts in norms and standards (comparable to U.S. antitrust reforms of the early Reagan years)—an “antitrust revolution”? This seems a close question to me. If the reform is to be internal, the existing institutions need to shake a leg—in seven years the ICN has roared to life as a government-agency forum but the reforms achieved have been limited in comparison to the complexities to be overcome. ICN had a promising start, but performance tests need to continue ratcheting up.

What would external reform look like, perhaps following a global economic collapse or other major upheaval? A takeover of the international antitrust system by the WTO or absorption of antitrust into broader economic institutions like the IMF? A broad political movement in favor of a drastically different approach to antitrust—perhaps a broad rejection of antitrust or a sudden and profound cutback in its scope and power? It is difficult to picture the specifics.

Comedian Steven Wright—a bit of a surrealist, as comedians go—tells the joke about the photographer who drove himself crazy trying to get a close-up of the horizon. At its current rate of expansion, global antitrust will reach a point of crisis or collapse if the costs, burdens, and complexities cannot be reduced by at least one order of magnitude. With the overwhelming majority of world economic activity now subject to antitrust rules, with thousands of enforcers in hundreds of regional, national, and subnational jurisdictions, we can begin to glimpse the point on the horizon where that collapse occurs. Antitrust enforcers, economic policy makers, and leaders of government need to start planning how to avoid that crisis. To plan, we need to see more clearly what is happening out there on the horizon, where we are destined to reach the crisis point. We need to move in and get that close-up.

