



# CPI Antitrust Chronicle

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### Perspectives on the In-House Practice of Antitrust Law

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### I. INTRODUCTION

After 30 years practicing antitrust law, 18 as in-house counsel, I think I can say that I have a fairly decent grasp of antitrust law—or at least what is known about antitrust law (more on that later). But in no way do I believe that my growth as an antitrust lawyer has ended or will end soon. I am continuously challenged and excited to apply the things I have learned in order to provide the legal services my clients expect and deserve. By this I mean providing antitrust advice that is not only correct from a legal perspective, but also understandable and useful to clients. After all, “correct” antitrust advice does no one any good if it is incomprehensible and/or impractical.

I am also referring to employing in my antitrust counseling practice the knowledge and experience I gain through management and involvement in antitrust litigation, and vice-versa. I may not be impartial, but in my experience there is no better way to get an understanding of the dimensions, scope, and intensity of competition than by advising clients on real transactions on a daily basis. This kind of knowledge is difficult as outside counsel to acquire in the same depth and within the same period of time. It improves not only the quality and usefulness of the day-to-day antitrust advice I provide, but also the arguments I help to formulate and make in antitrust litigation.

I will in the remainder of this article discuss some of the things that have worked for me in practicing antitrust law in-house, and why I have found this practice so fulfilling.

### II. TEAMING WITH OTHER LAWYERS AND ADVISORS

All of the companies for whom I’ve worked in-house have had tens of thousands of employees, multiple lines of business, and a hundred or more in-house lawyers organized into different groups. Some of the lawyers are dedicated to particular business units for whom they handle the unit’s legal work on a day-to-day basis. Depending on the company, these lawyers may report directly to the senior management of the business unit or to the General Counsel, sometimes on a “dotted-line” basis. Other lawyers, like me, do work for the entire company, including for individual business units, requiring expertise in one or more specialized areas of the law.

Such a structure for providing in-house legal services has many important advantages. These can best be realized if, and only if, the specialists and business unit lawyers collaborate closely in providing legal advice. Business unit lawyers do not need to ask or prod me to involve

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them in the antitrust counseling I do for other business unit personnel. I would not want it any other way. While my involvement in a particular transaction, etc. often begins with a call from a business unit lawyer, I sometimes am contacted directly by the business unit's product management, sales, or finance organization. In that event, I make it a point to follow-up with one of the lawyers dedicated to that business unit, and include her in future communications and deliberations about the matter at issue.

Quite simply, partnering with the lawyers dedicated to the business unit I am advising is a classic "win-win" for the company, the business unit, the lawyer for the business unit, and me. The overwhelming majority of my business (i.e., non-lawyer) clients have been highly knowledgeable, personable, and honest, and I enjoy and benefit greatly from interacting directly with them. But no matter how long I have been with a company or how hard I work, I am unlikely to understand as well as the lawyers dedicated to the business unit its markets, products, goals, processes, and personnel.

In many cases, the business unit lawyers will already have established a relationship of trust with our mutual client. The lawyers dedicated to the business unit are thus able to provide me invaluable assistance in eliciting information I need to render advice, understanding particular facts, and placing those facts in the right perspective. The business unit lawyers also help in framing the advice in a manner that is most readily comprehensible and thus useful to our mutual clients. And, of course, business unit lawyers are instrumental in assisting with compliance. For all of these reasons, I am vastly more confident in the quality and effectiveness of the advice I give when I am partnering with a business unit lawyer.

### **III. THE REASONING UNDERLYING THE ADVICE IS NO LESS IMPORTANT THAN THE ADVICE ITSELF**

Business moves very quickly in competitive markets like those in which my clients participate or have participated. Often, the time to deliberate over and resolve legal issues is constrained by the need to be responsive to customers. Thus, the more people in the company able to "issue spot," the more success the company will have in tailoring its conduct to achieve its business objective without running afoul of antitrust law. Issue spotting is the first step on the road to obtaining legal advice. Understanding an issue also expedites the process of identifying and communicating the relevant facts. Finally, an understanding of the *basis* of particular antitrust advice can expedite and enhance compliance on the part of the client.

For all of these reasons, I always make the effort to explain the antitrust issues to my business unit colleagues, including non-legal personnel, and the reasoning underlying my advice. Doing so improves the quality of the advice, enables the client to be more involved in selecting among its options, and enhances the ability of business unit personnel to spot similar or related issues that may be raised by other matters in the future.

Many of the antitrust issues that arise during the ordinary course of a client's business will recur. If a client understands the basis for legal advice on a particular issue under particular facts, he will be better able to spot the issue and assist in devising ways to address it under different facts that are satisfactory from both a business and legal perspective. In effect, explaining the basis for antitrust advice in the context of a particular business issue is a form of

antitrust training, and one that can be more effective than more formal training in the abstract, where focus may be lacking.

#### IV. AVOIDING PARALYSIS

Among the most important attributes of an in-house antitrust lawyer are confidence and a sense of the practical. While understanding most antitrust issues is not that difficult, predicting the resolution thereof under a given set of facts remains a serious challenge. Antitrust has always been somewhat of a “gray” area, and its obscurity has, if anything, been increasing. That is so for three reasons.

First, antitrust courts and scholars are increasingly questioning the soundness of “*per se*” rules. Existing *per se* rules are being eliminated or narrowed, though not necessarily expressly. As a result, agencies and courts scrutinize conduct for antitrust violations by weighing various factors, each of which may be subject to vigorous dispute in particular cases.

Second, there is an increasing tendency of antitrust agencies, including such agencies outside the United States, to apply subjective, open-ended, and exception-laden rules and standards in antitrust investigations and cases, presumably to allow the agency to reach the best result under a given set of facts. The price paid for this increased flexibility is that the assessment of antitrust risk and projection of outcomes in an antitrust investigation or case based on the stated factors or considerations is increasingly difficult and uncertain. That uncertainty is magnified by the possibility that the subjective approach to antitrust law currently in vogue in many, if not all, jurisdictions will result in unstated factors, including industrial policy, driving outcomes.

Third, markets are increasingly global, and there are now in excess of 100 nations with some form of antitrust or competition law enforced by its agencies and/or courts. There remain highly material differences in the application of antitrust law and policy worldwide, especially as applied to unilateral conduct. The agencies and/or courts of multiple nations or regions may investigate and sanction the same conduct, applying these different standards. The most meaningful limitation in this regard is agency resources. It is increasingly apparent that the so-called “direct effects” test to determine whether a particular nation has jurisdiction to investigate and, if appropriate, sanction conduct under its antitrust law is not a particularly meaningful limit in a global economy. Some agencies at least appear to believe that the requisite effects in their jurisdiction exist whenever the conduct at issue impacts a local customer or competitor. Notwithstanding talk about and expressions of desire for convergence in antitrust law, convergence is unlikely to occur in the foreseeable future.

An antitrust lawyer does not provide value if she responds to requests for legal advice by stating “I don’t know,” or by simply reciting the various factors, whether stated or unstated, that will be considered by even one—much less multiple—courts and agencies. Against this background, it is not difficult for an antitrust lawyer expected by clients to give them decisive advice to feel lost.

The key to avoiding paralysis in these circumstances is self-confidence. By this, I mean confidence that uncertainty is attributable to the state of the law today rather than to some failing on the lawyer’s part. Unfortunately, this kind of confidence can only be gained through extensive

experience; stated differently, it takes time to differentiate between what you don't know, on the one hand, and what is unknown by anyone, on the other.

It is also important to understand that most clients will not expect their antitrust lawyer to guarantee an outcome in the event of an investigation or litigation, but reasonably expect their lawyer to use her expertise to contribute to the process of assessing options that will best achieve the business objective while minimizing antitrust risk.