Changing Competition Regimes:

Organizational Best Practices for Navigating Cross-Border Legal and Political Risks

Lex Mundi
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About This Report

The contribution of in-house legal departments to corporate strategy continues to evolve in response to market pressures, growing regulatory complexity and increased political interventionism. As national and supranational competition authorities become more active, corporate decision makers face unprecedented layers of uncertainty, delayed plans and unforeseen risks.

These trends give rise to a broad range of board level considerations about the rulings and behavior of competition authorities:

1. How are risks of merger delays and post-merger challenges changing as institutions evolve?
2. How can general counsel mitigate competition compliance risks in the face of an increasingly dense web of rules and regulations?
3. How can corporate decision makers respond to the public interest motives of political and regulatory authorities to influence foreign investment activity?

This report summarizes the discussions during the 2014 Lex Mundi Summit in Amsterdam. The purpose of the Summit was to shed light on how competition regimes in critical markets are applied, what motivates the decisions of authorities and what general counsel can do to circumvent the pitfalls through better detection, prevention and mitigation of risks.

During the Summit participants identified and reflected on distinct trends in competition law that are impacting the strategy and performance of multinational companies, including the globalization of competition law, fragmentation of enforcement action, diversification of enforcement mandates by agencies, cooperation among competition agencies and increasing litigation. These global trends are covered in the first part of the report.

In particular, three broad challenges facing corporate counsel came to light:

1. How to react to the changing political and economic conditions that are driving the decisions and behavior of national and supranational competition authorities;
2. How to coordinate competition law matters in order to avoid delays and unnecessary spillovers across jurisdictions; and
3. How to ensure involvement of in-house competition experts at an early stage of corporate planning.

In response to these challenges, corporate counsel shared experience and tactics for enhancing the role of the legal department and overall corporate performance. These tactics can be grouped into four categories of management best practices which are outlined in separate sections in this report covering: upstream regulatory advocacy and corporate diplomacy; program management; involvement of the legal department; and engagement of external counsel.

We extend our thanks and appreciation to corporate counsel participants, member firms and guest speakers for their contributions and are delighted to share with you this analysis of the proceedings.

We look forward to seeing you at the 2015 Lex Mundi Summit in Amsterdam (May 28 – 29), where we will continue our best-practices program focusing on the subject of managing cross-border M&A.

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Global Trends in Competition Law

Effective competition enforcement across the world has great benefits. However, at the same time today's rapidly proliferating requirements, enforcement practices, poorly motivated decisions by authorities and a number of other factors pose serious obstacles for the conduct of international business. The challenge for law firms and in-house departments is to navigate those obstacles and to protect the company's legitimate business interests.

The following remarks are structured around five main trends in international competition law, including a discussion of what these trends mean for us in roughly three areas: general compliance, cartels and mergers. The five key trends can be summarized under the following headings:

1. Globalization of competition law
2. Fragmentation of enforcement action
3. Diversification of enforcement mandates by enforcement agencies
4. Cooperation between competition agencies
5. Increasing litigation

The purpose of the Summit and report is to assist corporate counsel to identify ways in which they can improve their response to these challenges, each of which is further outlined below.

1. Globalization of competition law

In the last two decades the number of jurisdictions with antitrust enforcement regimes has grown to some 115. The International Competition Network (ICN) currently includes 138 member agencies, including Armenia, Kazakhstan, Kenya, Uruguay, Colombia and, since 2013, Algeria, Hong Kong and Saudi Arabia; some 20 African countries have developed competition law regimes in 2014. These increasing numbers add a layer of complexity and create significant challenges for companies doing business in these jurisdictions.

For example, how does a company effectively train personnel in a large number of jurisdictions with different legal regimes, and how should that company develop a robust compliance vision? Quite often, this exercise necessitates some sacrifice of nuance and adherence to more developed competition law regimes.

In the cartel field specifically, it is no longer safe to apply a "laissez-faire" approach in emerging markets with a lesser developed competition regime or to "follow the competition." The need to prevent cartel conduct has become an integrated component of business ethics. This raises an increasing number of business dilemmas and requires, among others things:

1. managerial attention;
2. standardized and well-organized business processes;
3. integrated compliance programs and training; and
4. the early involvement of experienced in-house and outside legal counsel.

In the merger field, conducting a solid multi-jurisdictional analysis involving newer jurisdictions is key. Companies expect quick and adequate analyses from their legal counsel, in addition to insights into current enforcement practices coupled with a risk analysis (something that the Global Competition Review or Getting The Deal Through guides won't necessarily provide). In the new merger control world, no international firm is currently able to generate this knowledge independently. Overall, the cost of merger filings may have decreased, but the proliferation of merger control regimes has also made the process much more complex.

2. Fragmentation of enforcement action

Paradoxically, the immense increase of enforcement regimes and agencies has led to a significant fragmentation in enforcement policies, priority setting, substantive rules and due process standards.

The ICN has not been able to bring about uniformity in requirements across a large number or areas, despite the availability of a significant number of best practices. For example, Cyprus, Ireland and India still apply strict merger filing deadlines, despite the ICN *Best Practices on Merger Review* stating that such requirements are inappropriate. Kenya appears to apply merger control law to intra-group transactions. In China, industrial and political considerations are important and – as is shown by the Seagate / Samsung transaction – remedies may be imposed to meet those objectives. In South Africa, employment is a relevant factor (as demonstrated by

the Walmart / Massmart merger) and there is reason to believe that in Kazakhstan the antitrust agency applies dubious ethical rules.

Moreover, in many cases the analytical framework underlying the application of the law is sometimes flawed – in the UAE extensive price control rules apply and in Saudi Arabia the Council for Competition Protection condemns legitimate price leadership and exclusive distributorships. In many parts of the world essential due process rights, such as the right to be informed of antitrust charges, the right to be heard and access to file rights, are underdeveloped. And finally, there are areas of divergence even between relatively sophisticated agencies, such as those in Europe. One key example is the treatment of restrictions on online sales.

3. Diversification of enforcement mandates by enforcement agencies

Diversification relates to the expanding portfolio of many competition agencies. Many competition authorities, including the Korea Fair Trade Commission, the Dutch ACM, the UK CMA, the Danish Competition and Consumer Authority, diversify into areas neighboring competition law, such as consumer protection law. This trend appears to be driven by a belief that agencies should have larger portfolios that include more than competition enforcement in order to be able to deal effectively with anti-competitive practices and other market failures. In addition, enforcement agencies tend increasingly to resort to negotiated settlements in an attempt to effectively remedy the identified competitive problems. There is a risk that such settlement procedures erode essential procedural rights, such as the right to be informed in sufficient detail of the agency's competitive concerns and theory of harm.

4. Cooperation among competition agencies

Cooperation between agencies, for instance in the context of the European Competition Network, is not new. While agencies may have legitimate reasons to exchange information in the context of investigations and enforcement of their competition laws – which is often in the interest of the business community – that same cooperation risks raise significant due process issues, such as safeguards applying to confidential business information voluntarily provided to agencies in the context of merger reviews. One important new project in this respect is the revision of the *1995 OECD Recommendation on International Cooperation between Member Countries on Anticompetitive Practices*. A recent draft includes provisions that would facilitate the exchange of confidential business information without the consent of the party that has provided the information or the companies involved. Clearly, this is a main concern to the business community and may also decrease companies' incentives to cooperate with agencies – something that contributes to effective enforcement of competition law.

5. Increasing litigation

Finally, a fifth trend that underlies the growing importance of procedural fairness is the rise of private and public enforcement in terms of higher penalties. Over the past ten years sanctions for competition law violations have increased significantly – in the EU the CRT cartel attracted fines of 1.47 billion Euro – and it seems that more recently established agencies, such as those in Egypt, Lithuania and India, are sometimes tempted to follow the examples set by the European Commission and other leading agencies with proven track records. Obviously, the larger the penalties are, the more critical respect for procedural safeguards becomes. On the civil front, the approval on 17 April 2014 by the European Parliament of the *Directive on Antitrust Damages Actions* merits attention. The directive provides for easier access to evidence, limitation periods and the establishment of liability on the basis of an infringement decision. In general, civil enforcement, particularly in the UK, Germany and the Netherlands, has been on the rise for a number of years.

Concluding observations

Effective competition enforcement across the world has great benefits. However, today there are too many unnecessary requirements, bad enforcement practices, poorly motivated decisions and other obstacles affecting the international business community. The challenge for law firms and in-house departments is to circumvent those obstacles and to protect legitimate business interests.

Compliance in a globalizing antitrust universe has become more difficult to manage effectively. A prime example is found in a recent Atlas-Copco transaction. One of the company's transactions – not involving any overlapping businesses – required merger approval in the US (clearance in 10 days), Germany (16 days), South Korea (1.5 months), Brazil (3 months) and China (4.5 months). Nowadays, it is not uncommon that a medium-sized transaction requires merger filings in

five, ten or even more jurisdictions. Similarly, the need to prevent cartel conduct has become an integrated component of business ethics. This raises an increasing number of business dilemmas and requires managerial attention, standardized and well-organized business processes, and the early involvement of experienced in-house and outside legal counsel.

The above challenges necessitate an increased sophistication of the (project) management process and strategic approach of law firms and in-house legal departments. What does this mean for general counsel in terms of managing, coordinating and organizing cartel investigations and merger filing processes? The Lex Mundi network provides for a tailored alternative and combines in-depth local expertise, seamless cooperation and the ability to sequence merger filings based on that expertise. This strategic component in merger filings includes the identification of lead jurisdictions, an assessment of regimes that apply strict filing deadlines, such as Cyprus, Ireland and India, and specific documentation requirements.

With local market knowledge, access to global resources and full service delivery in every jurisdiction, Lex Mundi member firms are well-positioned and have identified leading practices and trends to guide and assist in-house counsel in managing multi-filing processes and cartel investigations. Clients have access to a range of tailored software tools on merger control regimes, global practice guides and standardized risk assessment tools.

Analysis of Summit Proceedings:

Organizational Challenges and Best Practices

From a management point of view, three broad challenges facing general counsel came to light during the various interactive sessions of the Summit.

First, an overriding challenge is to keep up with the changing political and economic conditions that are driving the decisions and behavior of national competition authorities (NCAs), particularly in emerging markets. Decision making processes, interpretations of thresholds and substantive legal requirements, and the implementation of procedural principles are seldom predictable. While some jurisdictions may have a high degree of cooperation with authorities elsewhere in the world, consistent application of rules and approaches across jurisdictions is usually not the primary focus. Moreover, national-level political interventionism adds a layer of uncertainty in developed and developing countries alike. For instance, 'public interest' considerations are increasingly affecting the filing procedures and outcomes of the merger control process.

A second challenge relates to efficient coordination of competition law matters to avoid delays or unnecessary spillover effects across jurisdictions, which can be triggered by the way filings or responses to investigations are timed, planned or handled. A prerequisite of efficient coordination is carefully executed communication with the universe of company stakeholders, external advisors and relevant authorities.

A third fundamental challenge relates to the positioning of in-house competition lawyers, who must be involved at an early stage of corporate strategic planning rather than after the fact. This involvement presupposes moving away from acting as a legal department stricto sensu: that is, elevating the legal team to a business advisory position in order to be able to engage with internal stakeholders.

In response to the above interrelated challenges Summit participants shared experience in four categories of organizational best practice:

1. Upstream regulatory advocacy and corporate diplomacy
2. Program management to coordinate strategy, process and stakeholders
3. Early stage involvement of the legal department
4. Management and use of external counsel

These best practices and the examples outlined below are mutually reinforcing in that effective implementation of each category can help advance the others. For example, successful upstream regulatory advocacy and corporate diplomacy can also raise the profile of the legal department within the company, and effective program management can improve the effectiveness of advocacy and use of external counsel.

1. Upstream regulatory advocacy and corporate diplomacy

Whereas in-depth knowledge of the procedural and substantive actions of national competition authorities can help companies to anticipate challenges, "upstream regulatory advocacy" and "corporate diplomacy" are the means by which companies endeavor to preempt such challenges and even shape positive outcomes.

Upstream advocacy can include media campaigns, public speaking, commissioning and publishing of research, filings with courts and regulatory bodies, and direct lobbying of legislators or civil servants. Part of the process of upstream regulatory advocacy is the evaluation of the extent to which political institutions, government agencies or market participants may also attempt to influence competition authorities. Such influence becomes particularly important in highly-regulated sectors such as banking, telecom, natural resources, health care and life sciences, and national defense.

Beyond engaging with political and bureaucratic decision makers, companies may also attempt to improve the conditions for a positive outcome through a process of corporate diplomacy: the collective of interventions directed at other stakeholders, including market participants, investors and political decision-makers. An example of corporate diplomacy would include coalition building among disparate interest groups (chambers of commerce, investor groups, industry associations, consumer advocates, non-profits etc.) to influence decision makers. This type of stakeholder engagement reinforces the way authorities

and entities like trade unions approach and respond to new situations in a given sector or market segment.

When successful, upstream regulatory advocacy and corporate diplomacy allow for a more effective approach to relevant decision makers, ensuring the use of appropriate language in important communications (meetings, pre-notifications, filings etc.). At their most sophisticated, strong advocacy and diplomacy initiatives are based on a deep understanding of cultural sensitivities, political and administrative agendas, the language spoken by local officials and the interest of other parties.

Participants agreed that in situations of cross-border mergers, in-house counsel bring to the table unique awareness of socio-economic and political frameworks, leading to an ability "to pick up and act upon informal signals" of authorities and other stakeholders through diligent upstream regulatory advocacy and corporate diplomacy. Over time, this level of understanding may be developed within the company at the level of different business divisions, markets and industry segments.

Specific Examples

Participants reported that involvement of the in-house team in the above strategic processes is a critical factor for success. Yet many companies and, in particular, those actors within companies focusing on the transaction/deal, may overlook the importance of such initiatives or fail to adequately involve the in-house legal team, either outsourcing completely the management of public affairs or maintaining a separate corporate affairs or government relations division outside legal.

On the other hand, participants attributed positive results to the best practices below:

1. in the case of one natural resources company, setting up a centralized function for "Group Impact," consisting of an ad-hoc team (not full-time) used in complex, multi-filing situations to monitor "difficult" jurisdictions;
2. dedicating legal department staff to follow political hearings, parliamentary processes and other venues where public officials speak and interact with market participants;
3. using third party data to validate the company's determination of economic impact and market share analysis;
4. drawing upon knowledge of individuals familiar with the officials handling merger review at the NCA;
5. designating a single main contact to coordinate and handle the relationships to the NCA and limiting uncoordinated contacts by other representatives;
6. providing NCA officials access to senior business decision makers in addition to legal counsel or those handling government relations; and
7. sending briefing notes to merger control authorities prior to meetings, while ensuring consistent messaging in all press releases and communications across jurisdictions to keep pace with the increasing level of information exchange among authorities.

2. Program management to coordinate strategy, process and stakeholders

Participants were unanimous that effective coordination and strong project management discipline are paramount when dealing with multijurisdictional competition law matters, especially to orchestrate relationships to the range of agencies and stakeholders involved. The more regulated the industry, the more crucial this level of oversight becomes.

Both in-house and outside counsel expressed confidence in their project management skills when it comes to coordinating competition law compliance across multiple jurisdictions. In-house counsel regularly undertake cost-benefit analyses and risk assessments, management of timelines and budgets, and prioritization of tasks such as sequential filings.

However, the frequency with which unforeseen hurdles, delays and regulatory actions arise in connection with mergers and competition compliance suggests more can be done. The purpose of sound project management is to avoid and prepare for uncertainty based on detailed plans and contingencies. An important challenge is to distinguish between project management and what in reality might be crisis management by default. Project management capabilities allow legal teams to identify critical paths, mitigate risks and prepare for the unexpected – all while achieving goals closer in line with budgetary

estimates, important deadlines and board level (c-suite) expectations.

Specific Examples

Among participating companies there appeared to be no analog to other professional services industries (accountancy or strategy consulting) which attach dedicated program managers to project teams in comparable situations characterized by complexity, risk and uncertainty.

We use the term 'program management' to denote this level of resource allocation as distinct from the particular skill set of project management, which all members of the team are expected to have.

Some ways to implement program management with which participants have had success included:

1. maintaining a dedicated internal resource with responsibility for coordinating and project managing merger filings and dealings with NCAs, which is seen as particularly advantageous in companies with a more centralized legal function and frequent merger activity;

2. using the dedicated team to build in-house expertise, experience, confidence and know how, i.e. "institutional knowledge and memory," irrespective of the extent to which external counsel is used;

3. giving the dedicated team overall responsibility for cost and resource management, project and contingency plans, and communication with internal stakeholders – all of which reinforces the contribution of the legal function;

4. outsourcing advice and coordination of complex, multijurisdictional situations to law firms that not only have in-depth local knowledge and a proven track record, but the ability to coordinate with other external advisors in relevant jurisdictions (see below); and

5. tactical sequencing of filings according to whether certain jurisdictions tend to follow the decisions of others.

3. Early stage involvement of the legal department

A direct consequence of new and increasingly active competition authorities in many jurisdictions is the need for companies to engage in-house or external experts early in their plans for business expansion or acquisitions. If competition assessments could be treated as an afterthought of mergers in the past, now they must be anticipated.

Yet, participants tended to agree that the appropriate shift in thinking and behavior to involve competition lawyers early on in the process has still to take place in many large companies or even among transaction lawyers in some law firms. The business case is clear. By getting competition lawyers involved early, internal stakeholders and the c-suite benefit from a firmer grasp of procedural aspects, required timelines and risk calculations. Failure to involve competition lawyers early, however, poses significant risks to reaching deadlines and to overall compliance.

Some key underlying causes of this challenge that were identified at the Summit included:

1. company M&A deal teams having outdated and even "fatalistic" views toward competition hurdles, not regarding them as mission critical in comparison to other financing or negotiating deadlines;

2. company Boards and other senior decision makers being driven by the need to protect confidentiality of acquisition or divestment plans, preventing in-house counsel from getting access to information in time;

3. companies running into difficulties to identify 'clean teams' when colleagues with sufficient know-how are already involved in the deal, leading to a dependency on external counsel when it is too late; and

4. crowding out of in-house legal from decisions by other stakeholders such as separate corporate development or government affairs functions.

To address these challenges participants explored ways to strengthen both the overall relationship between competition law experts and internal stakeholders, and the way in which competition lawyers get involved in cross-border M&A.

Specific Examples

During discussions a range of tactics came to light for the legal department to add value and build bridges to corporate deal teams, creating a virtuous cycle in which competition lawyers are consulted at an earlier stage

of merger considerations. Some of these tactics have the additional benefit of improving overall competition compliance across the organization:

1. determining approach to merger notification prior to finalizing share purchase agreements (SPAs);

2. ensuring competition lawyers review SPAs to spot issues and terms that might unnecessarily trigger adverse NCA reactions;

3. making competition risk a part of overall risk assessment, including estimates of NCA attitudes regarding the impact on employment, consumers and local suppliers;

4. providing competition law training to deal teams to deepen relationships between in-house legal and functions handling M&A (e.g. corporate strategy, business development or finance departments) on aspects including:
   - How SPA negotiations impact competition clearance
   - Appropriate timing of information exchange
   - Change of control triggers;

5. having senior executives set the tone and example regarding the importance of training by undergoing training themselves either at a pilot stage or alongside other staff;

6. working with outside experts to deliver training in order to make participants more aware of risks by sharing knowledge of what other companies operating under similar market conditions are facing; and

7. keeping in-house lawyers involved in training, in order to emphasize the applicability to the company's unique business circumstances and to build rapport with business professionals.

Additionally, there was a note of caution that not all NCAs look favorably upon competition compliance training. In certain jurisdictions, NCAs may view training suspiciously as guidance for circumnavigating the law. It was also pointed out that training can drive violators to develop more sophisticated tactics, making it harder to apply for leniency in future instances.

4. Management and use of external counsel

Finally, most corporate counsel participants agreed on the value of advice from external counsel. However, depending on in-house capability, opinions varied as to the role of law firms in coordinating multijurisdictional advice.

Traditionally, in merger situations, in-house counsel instructed outside competition counsel from the law firm handling the transactional aspects, but most participants felt the appointment of competition lawyers must now be taken more carefully in keeping with a more complex regulatory environment.

Participants did not hold strong views about the relative advantage of instructing international law firms versus local law firms per se. Individual competencies and working relationships outweighed considerations of law firm reputation or brand. Generally, participants preferred firms thought to have deeper working relationships with authorities and decision makers, and a solid grasp of the broader policy implications.

An alternative approach that was explored was to instruct a group of independent firms not only having a track-record of coordinating advice on competition law matters, but with a defined set of processes for project and matter management similar to the Lex Mundi *Seamless Service Protocols*.

Specific Examples

The strength of working relationships among law firms is especially important because it typically falls on the shoulders of the in-house legal department to facilitate coordination among external counsel in cases where no single firm offers the required skills or coverage. Strong coordination among outside counsel can reduce this burden on the in-house team.

Beyond the obvious considerations of cost, expertise and local capability, participants noted a range of important attributes upon which the success of working with outside counsel on cross-border competition matters depends, including:

1. relationship-building and negotiating skills for dealing with NCAs, government institutions and other local stakeholders;

2. ability to communicate with and manage expectations of the board, c-suite and in-house

legal team based on an understanding of the risk attitude of the company with respect to potential non-compliance;

3. coordination arrangements and project management skills to work with external advisors in other jurisdictions; and

4. familiarity among the firms involved across jurisdictions through previous experience working together, joint training programs and ongoing know-how sharing in structured practice or working groups.

Conclusions

The practical reality of navigating risks in connection with changing competition regimes around the world is placing strong demands on corporate in-house counsel. Those corporate counsel who report progress in coming to grips with this multifaceted challenge have done so through contributing to the company's upstream regulatory advocacy and corporate diplomacy initiatives, becoming more sophisticated in their program management of multijurisdictional competition law matters, getting involved in company strategic plans at an early stage and raising the bar for outside counsel performance.

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About Venturis Consulting Group

Lex Mundi wishes to thank Gerard Tanja and Bernadette van Leeuwen of Venturis Consulting Group. Venturis Consulting Group is a leading management and strategy consulting firm for the legal sector. With offices in London and Amsterdam, Venturis advises sophisticated law firms and in-house legal departments worldwide in solving their most important, difficult challenges, establishing powerful market positions and achieving sustained, superior economic performance.

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Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Lex Mundi member firms offer clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth. Each member firm is selected on the basis of its leadership in – and continued commitment to – its local market. The Lex Mundi principle is one independent firm for each jurisdiction. Firms must maintain their level of excellence to retain membership within Lex Mundi.

Through close collaboration, information-sharing, training and inter-firm initiatives, the Lex Mundi network is an assurance of connected, on-the-ground expertise in every market in which a client needs to operate. Working together, Lex Mundi member firms are able to seamlessly handle their clients' most challenging cross-border transactions and disputes.

Lex Mundi member firms are located throughout Europe, the Middle East, Africa, Asia and the Pacific, Latin America and the Caribbean, and North America. Through our nonprofit affiliate, the Lex Mundi Pro Bono Foundation, members also provide pro bono legal assistance to social entrepreneurs around the globe.

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About Lex Mundi Antitrust, Competition and Trade Group

Member firm lawyers in Lex Mundi's Antitrust, Competition and Trade Group specialize in providing coordinated, multijurisdictional advice for organizations confronting an ever more complex set of national and supranational rules and regulations.

Through regular knowledge sharing and based on collaboration in relation to client matters, members of the practice group are well-informed of global developments and uniquely positioned to provided tailored services across jurisdictions.

With broad experience and deep expertise, member firm lawyers work together to deliver high-quality, cost-effective representation wherever antitrust and competition issues arise.

Group leadership rotates among member firm partners, each serving multi-year terms. The current leadership committee consists of:

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Additional Resources

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Competition Law Compliance Risk Overview

What Risk Do You Run?

Many companies think that they are in perfect compliance with competition law. The below examples - all based on actual cases from the practice of Lex Mundi member firms - show that you may run a bigger risk than you think.

Trade Association Activity

A pan-India manufacturing Group attends trade association meetings. The Group is raided by the Competition Commission of India at various sites in relation to alleged competition law infringements. In the aftermath of the inspection, the manufacturer instructs a full competition law audit and immediate implementation of a robust competition compliance program including a policy and extensive training for staff.

During the implementation of the compliance program it is disclosed that meetings of the industry trade association allow the major Indian manufacturers to exchange detailed sales volume information in relation to a different product at meetings on the fringes of the official ones. Following the discovery of this infringement, the manufacturer submits a leniency application. The Competition Commission grants the Group leniency resulting in a nil fine.

Pre-Merger Information Exchange

Two manufacturers begin discussions in relation to a proposed merger and begin the due diligence process. The proposed merger triggers merger filings in various jurisdictions, including Singapore. Before clearance is received from the relevant competition authorities, the parties are raided by the Competition Commission of Singapore on suspicion that the parties are improperly exchanging information prior to clearance of the merger. Instead of disclosing the information to a 'clean team' which is not involved in pricing decisions, the undertakings use the exchange of this sensitive commercial information to coordinate their prices pre-merger. Until the undertakings are under common control, they must be treated as competitors and information exchange should be strictly controlled. Failure to comply with these restrictions results in significant fines.

Retail Price Maintenance

A US company that produces a high quality product wants to preserve its brand image. As it has a small market share it imposes a minimum retail price in most of the US, benefitting from the Leegin case law. Well aware that the European Commission does not allow minimum prices, the company enters the European market with recommended retail prices only. Its sales representatives stress the benefits of the recommended price for the brand image when some dealers give very high discounts. A high fine is imposed in Germany, where the Federal Cartel Office considers that such contacts between the supplier and the dealers amount to the maintenance of a minimum retail price.

Public Procurement

A pan-European building group is aware of the risks of bid rigging in the context of public procurement. It has instructed its employees to stay far away from agreements on prices or on the allocation of tenders between competitors. Some employees see no harm in advising a competitor of the bidding price of the group - 'borrow a price' - in case such competitor only wants to submit a bid to remain in the picture of the procuring agency. When this is found out, the group gets away with a symbolic fine in the UK, but the Netherlands competition authority imposes a hefty fine.

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Distribution Agreement Turns into Market Sharing

The Spanish business unit of a manufacturer of agricultural machinery enters into an agreement with another manufacturer for the distribution of a piece of machinery that it did not yet have in its portfolio. The market shares in Spain are below 30% and a five year non-compete is agreed in line with the relevant European Block Exemption.

During a global competition compliance audit, it is found out that there are other business units in the group that manufacture the relevant piece of machinery themselves. This leads to the conclusion that the Spanish business unit and the third party manufacturer are in fact (potential) competitors, that the European Block Exemption is not applicable and that the five year non-compete amounts to a very serious market sharing cartel. The agreement is quickly terminated.

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Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Lex Mundi member firms offer clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth. Each member firm is selected on the basis of its leadership in – and continued commitment to – its local market. The Lex Mundi principle is one independent firm for each jurisdiction. Firms must maintain their level of excellence to retain membership within Lex Mundi.

Through close collaboration, information-sharing, training and inter-firm initiatives, the Lex Mundi network is an assurance of connected, on-the ground expertise in every market in which a client needs to operate. Working together, Lex Mundi members are able to seamlessly handle their clients' most challenging cross-border transactions and disputes.

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About the Lex Mundi Antitrust, Competition and Trade Group

Member firm lawyers in Lex Mundi's Antitrust, Competition and Trade Group offer specialized, tailored services and solutions for companies and organizations with a commercial presence and interests in various jurisdictions. They understand that the globalized and interrelated economic activity of today demands global solutions, and have the local market knowledge and on-the-ground expertise you need to manage issues and problems that may arise locally, nationally or internationally. Their broad experience and deep expertise assures high-quality, cost-effective representation and legal compliance wherever antitrust and competition issues arise.

Please contact a lawyer at your local Lex Mundi member firm or a member of the Lex Mundi Antitrust, Competition and Trade Group to learn more about how Lex Mundi can help you ensure that your company is in compliance with competition law around the world.

To request a copy of the Competition Law Compliance Toolkit, contact:

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Additional Resources Available to You

Lex Mundi Competition Law Compliance Toolkit

The following resources for corporate counsel have been prepared by the Lex Mundi Antitrust, Competition and Trade Group and are available upon request:

Code of Practice

The code of practice is designed to assist companies with establishing an internal policy and employee guidelines for competition law compliance. The code outlines the expectations of management, reasons to comply, competition rules, prohibitions, anti-competitive agreements, restriction on trade association participation and meetings with competitors, and checklists for basic advice on competition law and how to handle dawn raids.

Competition Risk Assessment Worksheet

The risk assessment worksheet is designed to assist in-house counsel in evaluating the key internal and external competition risks facing their business. This interactive worksheet is divided into seventeen sections that pose questions designed to point out potential areas of concern. Once identified, the risks should be kept under regular review to ensure internal compliance and lower the possibility of competition law infringement.

To request copies of the Lex Mundi Competition Law Compliance Toolkit, please contact Kim Bradell at kbradell@lexmundi.com.