Kluwer Competition Law Blog

Antitrust risk re-assessment in newly concentrated markets: Practical ways to preserve freedom from investigation

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While higher concentration/oligopoly should not lead in itself to greater problems, the reality is that agencies may be more suspicious; extra laws may apply; and complaints might be more likely.

This blog post sets out the things that companies can do to preserve their commercial freedom and freedom from investigation:

Contacts with competitors

One area for extra vigilance and perhaps additional housekeeping rules is trade association activity – not least where an enlarged company may expect (and be expected) to play a bigger role.

The Legal Department could require notification before the company becomes a member of a new association. Approvals could be required before individuals join or attend formal/informal subgroups where the case law suggests that people might sometimes become desensitised to the risks.

Social activities connected with trade associations have also been shown to be fertile ground for collusion. If this is a risk, an enhanced compliance programme could require a brief report on every social contact (with details of who was there; when; and why).

Contacts with ex-colleagues are a common source of problems. If this is a risk, then the company could impose a short 'quarantine period' during which contact with any ex-colleague would requires pre-approval – and perhaps also special training, e.g. if they were spouses/golf partners etc. This may be a particular risk where a transaction has required divestments as a condition of merger control clearance. In those circumstances, employees might find themselves in the same room with a former colleague who now works for an important competitor.

Joint ventures with competitors are another area to consider. In highly concentrated markets, it makes sense to conduct a review of all joint ventures with competitors. That would consider where they are located; what they do; how they actually operate in practice. In the event of a complaint, competition authorities will look closely at whether the parent companies have taken steps to manage the flow of any competitively sensitive information. Rules/guidance on this topic should be in place for nominated directors and any secondees.

In markets characterised by bids/tenders, it will be important to involve Legal in the discussion (and vetting) of possible sub-contracting arrangements and consortia bidding scenarios whenever competitors are involved. It may also make sense to think laterally about any other 'joint' industry activity. Government lobbying for example may be common in an industry but treated differently according to applicable competition laws.

Indirect contacts with competitors should also be considered. A number of competition authorities are looking at price signalling. To head this off, companies may wish to enhance pre-approval processes for management speeches, analyst briefings and any other public presentation which could touch on commercial matters, especially pricing.

Steps should be taken to avoid giving an incorrect impression to the market and authorities that collusion underpins business decisions which were in fact taken unilaterally. The not insurmountable challenge is to develop a process which enables Legal to trace how pricing decisions are made both generally and on specific bids so that the independence of the process can be demonstrated if challenged. This could initially focus on the countries which tend to be most sceptical about parallel conduct.

New concentration = new rules.

Additional competition rules may start to apply to a company (and its competitors) because of an altered market structure. For example, a number of countries have presumptions/deeming provisions relating to collective dominance (which might be met because of a merger between third parties). In addition, some countries may have a low presumption for single-firm dominance. There is no international consensus on how a position of collective dominance can be abused (individually or collectively) but what is clear is that conduct which can be taken to target new entrants is very risky.

Companies with material positions in countries with deeming-provisions should consider whether their sector is likely to be an enforcement priority, including because of a realistic prospect of customer complaints. Companies should consider the impact of these laws on their compliance programme: guidance on pricing, refusal to deal, exclusivity, discrimination etc. may need to be included.

Companies also need to be alert to the bigger picture. Many countries around the world have 'market study' powers, allowing their competition authorities to investigate a sector thoroughly – despite there being no allegation of any individual wrongdoing. These investigations always prove to be time consuming and expensive for companies. They can also lead to outcomes (e.g. divestment) which may not even be possible under generally applying competition enforcement competition powers. Companies need to be on guard for suggestions by the competition agency/government or by third parties (customers, suppliers) that the sector is displaying 'market failure' symptoms e.g. public restrictions of competition; customer inertia; information asymmetry between customers and suppliers etc.

Freedom from investigation

High(er) concentration gives rise to a greater vulnerability to complaints and investigation. This is not a reason to be over-cautious. But additional legal checks and balances may preserve a company's commercial freedom and freedom from investigation.

Arranging a brainstorm with the company's antitrust team on where enhanced risks may lie and what mitigation steps can be put in place is a sensible move. Some of the outcomes may be simple and yet avoid unnecessary pain in the future. For example, companies need to get the terminology straight: how should internal documentation (a major part of every investigation these days) describe the company's market position in a way that is accurate but will not need justification explanation in another context? Deeper thinking will need to take place about how compliance efforts should change to address some of the areas outlined above.

Internal procedures are also crucial. Companies in newly concentrated markets should enhance internal processes so that any escalated complaints are reviewed by Legal early. Complaints which should raise serious red flags are, for example, failures to bid and discrimination to prevent market entry.

The Legal department may also want to consider whether to carry out a post-merger 'health check'. It is notoriously difficult to spot the most serious antitrust violations as part of due diligence but an intensive audit after a deal has closed can help identify areas for follow up (whether with the seller or a competition authority).

Looking ahead, another consideration for a company in a highly concentrated market is that there may be more consolidation to come. From a merger control perspective, there may be an advantage in being the first to move – before the agencies decide that enough concentration is enough.

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