NADINE JONES

CORPORATE ANTITRUST COMPLIANCE

Disrupting and Dismantling Environments That Encourage Illegal Competitor Agreements

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About the Author

Nadine Jones is a seasoned executive who brings a wealth of diverse, legal, commercial, and compliance corporate experience. She has experience developing compliance programs to address risks in a variety of areas, such as antibribery/anticorruption, trade compliance, third-party vetting, conflicts of interest, and, of course, antitrust. Nadine has extensive experience in antitrust from her days in private practice from her days in private practice in Washington, D.C., when she served as Counsel to the Antitrust Modernization Commission; and, most recently, as VP for a multinational corporation.

Preamble

On July 11, 2019, the Department of Justice Antitrust Division ("Antitrust Division" or "the Division") announced a shift in policy as it pertains to evaluating corporate compliance. The Division announced that it would begin to give credit to corporate defendants for having an "effective" antitrust compliance program.[1] This was a complete reversal of the Division's decades-long approach to discounting, in its entirety, the effectiveness of a corporate compliance program should a criminal antitrust violation have occurred. The July 2019 policy change meant that the Division would now consider a corporate defendant's compliance program when deciding whether to charge, or whether to recommend a lesser sentence, under the U.S. Sentencing Guidelines ("USSG").[2]

What does this all mean? It means that federal prosecutors can now consider the efficacy of an organization's antitrust compliance program when deciding "whether and to what extent to bring criminal charges against a corporation,"[3] as well as whether to recommend a downward departure from corporate fines under the USSG at the sentencing stage. This could translate into *millions of dollars* in savings for corporations, and the avoidance of a criminal record that could adversely affect the company's ability to compete for certain types of business.

As a compliance professional, these developments should excite you. This means that prosecutors now have the latitude to consider *your* antitrust compliance program when deciding to defer prosecution (i.e., deferred prosecution agreement or "DPA"). Or failing a DPA, because of *your* antitrust compliance program, your organization could receive a downward departure under the USSG. In this way, an effective antitrust compliance program can generate a very tangible return on investment.

These changes, however, also place a lot of pressure on compliance professionals to "get it right." Whereas before you might have devoted limited corporate resources toward bolstering those areas of your company's compliance program that could produce a tangible return on investment (e.g., in the area of antibribery and anticorruption with the Department of Justice Fraud Division) at the expense of developing your antitrust compliance program. Now, antitrust compliance is back on the table. There is no longer any excuse for *not* developing a corporate antitrust compliance program.

Chapter 1

New Focus on Antitrust Compliance

In light of the Antitrust Division's policy changes, there should be a revived interest in antitrust compliance. The Division's shift in policy creates the possibility of a direct rate of return on any investments made in developing a strong antitrust compliance program.

Depending on the nature of your organization, including its size, its position in the industry (e.g., new entrant or dominant player), the frequency with which it enters into mergers and acquisitions, and the type of goods or services it produces, your antitrust compliance program might need to be varied and complex. Any one of these factors will dictate what areas of antitrust compliance need to be developed in your organization.

However, there is one area of antitrust risk that is universal to all firms that produce goods or services: *illegal competitor agreements*. Once you are in the market, whether you own one little gas station at the corner of Main Street in Midwest America, or whether you own the billion-dollar refineries that produce the gas, unlawful competitor agreements are a risk.

Illegal competitor agreements will be the focus of this book. Specifically, we will examine what might be happening in competitors' environments that would cause them to seek to collude with each other rather than to compete. Once we have examined these environments, we will consider ways in which an effective antitrust compliance program can disrupt or dismantle them.

Chapter 2

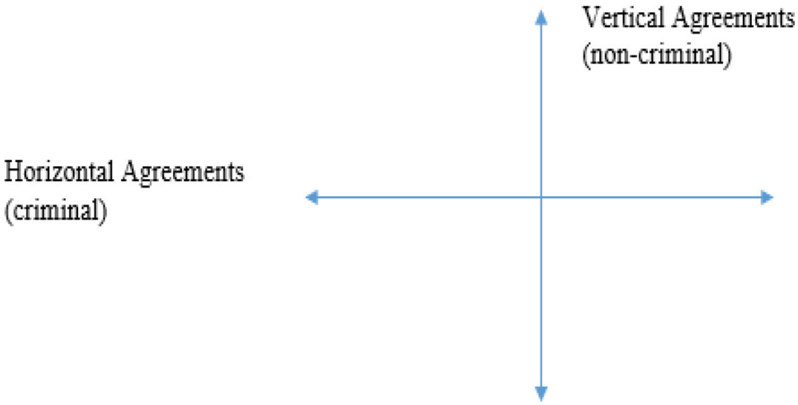
Brief Primer on U.S. Antitrust Law

Before we get to the main purpose of this book, let's *briefly* examine U.S. antitrust law. As a general matter, it can be broken down into two buckets:

- bucket #1—agreements between two or more firms (Section 1 under the Sherman Act[4]), and
- bucket #2—a single firm that is big enough to control prices or output in a particular market[5] (otherwise known as "unilateral conduct" or monopolization—analyzed under Section 2 of the Sherman Act[6]).

Only agreements in bucket #1 can lead to criminal prosecution,[7] and even then not all bucket #1 agreements carry that risk—just a small subset.

To distinguish between the bucket #1 agreements that raise criminal antitrust concerns and the ones that do not, you will need to analyze the agreement along horizontal and vertical axes:



Vertical agreements typically are *not* subject to criminal prosecution, largely because they are not presumed to be harmful to consumers. These types of agreements may or may not be anticompetitive, and include agreements between an upstream entity and its downstream distributors; or retailers in terms of what prices the distributor or retailer should charge consumers, or a manufacturer that designates geographical resale territories to its resellers. These types of agreements *could* be harmful to consumers, but they are not immediately presumed by the antitrust regulators to be harmful. Further analysis would be required to determine whether there is harm to competition.

Alternatively, horizontal agreements typically are *presumed* to be harmful. These agreements would include agreements between firms occupying the same position along a supply chain, that is, competitors, and only on *very* specific topics:

- price,
- volume/output,
- allocation of markets (i.e., competitor agreements to divide customers, geographies, or industries among the coconspirators), or
- bid rigging (e.g., agreements between competing bidders on quotes or on who should win the bid).

Agreements between competitors on these topics are presumed harmful, and, thus, can be prosecuted criminally.[8] No analysis or further determination needs to be made to conclude harm to consumers.[9] In fact, these violations are considered so harmful to society that they rise to the level of criminal felonies in the United States with prison terms of up to 10 years. Corporations, of course, escape incarceration, but they can be charged with criminal fines of up to $100 million, or double the gain to conspirators or double the lost to consumers, whichever is more.[10] Further, never forget that corporations can carry a criminal record, which can wreak havoc in other ways.

Criminal antitrust violations carry the highest stakes. This is the area of antitrust compliance that keeps many compliance professionals up at night. This area of antitrust will be the sole focus of this book.

Chapter 3

There Can Be No Criminal Antitrust Violation Without a Competitor Agreement

Competitor *agreements* lie at the heart of all U.S. criminal antitrust violations. Essentially, two competitors need to agree to collaborate in the marketplace instead of competing. Let's stop and think about that for a minute: two—competitors—agreeing. In just about any scenario where competition is involved, the natural inclination of one competitor is to trounce the other. Be it the Olympics, the World Cup, or any national championship game, the thought that one team member would *collaborate* with someone from the opposing team to determine the outcome of the game staggers the mind. That would shock the public's consciousness, and rarely, if ever, happens.

Yet these competitor agreements happen with some frequency in the marketplace.

The question is, why? To help us answer this question, we will incorporate learnings from books that discuss how successful collaborations are either formed or hindered.

Specific elements need to be present to encourage collaboration between two or more people. From an antitrust compliance perspective, we want to *avoid* creating these environments for competitors and consider how an effective compliance program might be a disruptive agent to the formation of such environments.

One book in particular, J. Ibeh Agbanyim's *The Five Principles of Collaboration*, identified five elements that are *necessary* for successful collaborations:

1. trust,
2. respect,
3. willingness,
4. empowerment, and
5. effective communication.[11]

As such, we will consider how these five elements can impact the formation of unlawful competitor collaborations, and provide a case study to illustrate each point.

At the end of each chapter in this book, you will find practical examples of what you can do as a compliance professional to prevent these conditions from forming vis-à-vis your employees and their competitors.