CHAPTER 10
ANTITRUST

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U.S. antitrust law applies to conduct anywhere in the world that affects U.S. markets or U.S. customers. For example, several Japanese companies were seriously punished for agreeing about the price of fax paper sold to U.S. customers, even though the agreement occurred at a meeting in Japan. Companies from abroad inadvertently take actions that violate antitrust laws, often not realizing that their conduct outside the U.S. borders is subject to U.S. law. The consequences of such violations can be severe. Individuals responsible for the conduct, or the company involved, can be subject to criminal prosecution. In addition, customers, competitors, and others harmed by the conduct may recover damages against the offending party for triple their actual damages, plus their attorneys' fees.

Preventing antitrust violations is far more cost effective than addressing antitrust violations after they occur. Once a foreign enterprise begins to conduct business in the United States, even through others such as independent distributors, it should make sure it understands U.S. antitrust laws, and institutes policies to avoid such violations.

Federal laws governing antitrust matters are stated simply, but they have become quite complex to understand and apply through regulation, government policy, and case law. The following description provides a basic, practical outline of key points, but seeking legal counsel before adopting policies is strongly advised.

1. ANTI-COMPETITION AGREEMENTS

The most important U.S. antitrust law prohibits agreements that unreasonably restrain competition. Agreements among competitors are particularly dangerous. The key word is "agreement." Independent, unilateral conduct by a business does not violate the U.S. antitrust laws. Independent, unilateral conduct means that a business acts alone and without consultation or coordination with its competitors, without reaching any mutual understanding with its competitors, and without any gentlemen's agreement, quid pro quo, or reciprocal obligation with a competitor.

An illegal antitrust "agreement" includes implied or tacit understandings even though they are never written down or expressly agreed to, and even though the understanding would not be a legally enforceable contract. U.S. courts have defined an "agreement" under the antitrust laws as a "conscious commitment to a common scheme to achieve an unlawful objective," and as "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Under U.S. antitrust law, a court or jury is often allowed to infer that there was an agreement based upon "little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove

desirable, or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision."

Not all agreements among competitors violate the antitrust laws. However the following types of agreements among competitors are called "per se violations," which means that they automatically violate the antitrust laws and the defendant is not allowed to explain the reasons or benefits of the agreement:

- to fix the prices they charge their customers;
- to allocate customers or divide markets;
- not to compete for particular customers or types of cargo or not to compete for business from a competitor's established customers;
- not to compete in certain geographic areas or in certain lines of business;
- to limit the capacity they offer in the trade; and
- not to do business with a particular customer or type of customer or with a particular supplier or type of supplier (sometimes called a "boycott").

2. ANTI-MONOPOLY LAWS

Another important U.S. antitrust law prohibits using improper practices to obtain a monopoly or to attempt to obtain a monopoly. It is not illegal to be a monopolist; it is only illegal to obtain or keep a monopoly through unlawful conduct. In general, conduct that has no legitimate business justification is unlawful conduct, which can be a basis for a monopoly claim under the antitrust laws. Unlike agreements in restraint of trade, where an agreement with another person is required before it violates the law, unilateral action that does not have a legitimate business justification can constitute illegal monopolizing or attempting to monopolize.

What constitutes a legitimate justification is often unclear. But conduct that improves service to customers or increases efficiency will likely be found lawful, even if it also has the effect of making it difficult for other businesses to compete. If, however, the only reason for the conduct is to harm a competitor, a court will likely conclude that the conduct could be the basis for a charge of illegal monopolizing.

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