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Expert advice on carrying out internal antitrust audits

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Companies need to be prepared for ever closer scrutiny. The trend will continue. Companies need to plan ahead and put their plans into action. We have now reached the stage where companies need to learn a complete spectrum of skills that have been so far put in the “*don't need to know*” box. One of these things is carrying out an informal antitrust audit.

In particular, internal audits are increasingly being conducted:

- ▶ in advance of a deal
- ▶ where a company wants to test the effectiveness of its compliance measures
- ▶ in response to the potential charges

Antitrust internal audits conducted outside the deal and without the pressure from the regulator can be an extremely effective way of uncovering and managing antitrust risk across a business.

Audits generally have a common objective: to establish whether the company has been in compliance with antitrust rules, and if not, to remedy the situation in order to mitigate liability and risk before the regulator learns about irregularities.

Internal audits can be conducted by qualified employees or by external law firms. Personally, I am a strong advocate of the latter.

First, antitrust audits need to be carried out in line with local laws on data protection, privacy and employment. It is important to understand all relevant restrictions and obligations and obtain all necessary contents in advance of an audit.

Second, it must be avoided to produce non-privileged documents during the audit. It is important to understand that all information which will be disclosed to lawyers during the audit must be kept confidential.

Third, witness evidence may play an important role in the future investigation by the regulator, therefore employees should be protected and taken care of. On one hand, it is essential for companies to secure employees' cooperation during the audit to find out any undesirable behaviours but on the other hand, the company must be able to take sanctions against those who breach the rules.

The outcome of the internal audit should be a report giving the management a full picture of the company and conclusions about what needs to be done.

Even if audits do not reveal any wrong-doing or misconduct, the overall outcome should be positive and advantageous for the company, because it shows that the company is determined to respect the antitrust regulations and that it will not tolerate unlawful conduct.

If the conduct in question or the intended merger has a cross-border impact it should be reviewed, analysed and coordinated by lawyers in various jurisdictions. This cross-border aspect is particularly important and normally it requires a well-thought-out strategy involving lawyers in all jurisdictions.

Antitrust authorities are cooperating more and more when reviewing deals therefore cross-border parties also have to cooperate closely. The most important factor of the global strategy is to prepare a coherent substantive antitrust story which will be presented to domestic antitrust agencies in each country, as well as consistent arguments to which all companies will adhere. Good coordination among lawyers in each country is vital to obtaining a clearance.

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4