



BUSINESS LIFE: Alliances heed antitrust traps

By: By Sarah Murray, Financial Times
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Companies that want to foster responsible business practices might be surprised to learn that they must also be careful not to breach the law.

Certainly, when it comes to one recent trend - for companies in an industry to group together to address labour and environmental conditions - they must pay attention to how such collaborations might be viewed by antitrust regulators.

Joint initiatives to tackle environmental and social risks are emerging in a widening range of industries, from tea and coffee to jewellery and clothing. In the electronics sector, for example, leading companies such as Hewlett-Packard, Dell and IBM are together launching an industry code of conduct for suppliers. Big brands such as Mattel and Hasbro have also said their suppliers must now meet jointly agreed standards set out by the International Council of Toy Industries.

The idea is to pool valuable experience and to reduce the inefficiencies created when swarms of auditors are sent out by different companies to monitor conditions in the same factories.

Many companies have also recognised that their ability to change suppliers' practices is limited when acting alone.

However, while the ultimate objective of industry-wide programmes is to improve conditions in the places from which companies source their goods, their collaborative nature means they and their advisers must pay attention to competition legislation.

"Whenever companies get into a room to talk about their business, there is always an antitrust issue," says Scott Greathead, chief executive of World Monitors, a consultancy that spearheaded the Fair Factories Clearinghouse, a joint industry effort to create a system for managing and sharing audit information.

"The bigger the companies and the more market share they have, the bigger the antitrust issues," he adds.

Although the motivation behind these new industry collaborations has nothing to do with price fixing or market manipulation, technically there is the potential for the law to interpret otherwise, particularly as some of the sustainability programmes encourage the purchase of sustainably produced commodities.

"Any collective purchasing by competitors is something you would need to look at," says David Marks, partner in the competition team at CMS Cameron Mc-Kenna, a UK-based law firm.

Corporate lawyers and other advisers also stress the need for alliances to establish themselves in such a way that prevents any market movements being interpreted as resulting from their collaborative activity.

Supposing, for example, a group of competitors agrees on a code of conduct for their sector and, a day later, prices change for their products. Antitrust alarm bells might well start to ring, even though those price shifts were unrelated to the agreement.

"Even if the participants in these ventures are pure as the driven snow and have every intention of behaving correctly, any time a group of competitors gets together for any reason, there is a danger their activities will

be construed as being unlawful," says Phillip Rudolph, vice-president and general counsel of the Ethical Leadership Group and an antitrust lawyer for more than 20 years.

"That's why these initiatives - which are important and are not in fact anti-competitive - need to be extremely carefully designed."

The Common Code for the Coffee Community, also known as the 4Cs, is one industry grouping that has looked carefully at its design. Through the 4Cs, coffee buyers have been working on a set of standards for the farmers whose crops they buy. Participants have also agreed to increase the amount of coffee they buy from sustainable sources.

Annemieke Wijn, senior director of the commodity sustainability programmes at Kraft Foods, says that antitrust legislation has been closely scrutinised by Kraft and its partners in the 4Cs initiative. "We have been very careful from the beginning to have the competition authorities involved with this," she says.

To avoid the risk of being seen to be restricting the market, it is crucial for the initiative to be voluntary, Ms Wijn says. "We can draw up a code but we need to be sure it is entirely voluntary and that there are no agreements as to how much coffee might be bought according to this code."

She adds: "It is up to the individual companies to decide how much they want to buy, who they want to buy from and so on - so the voluntary part is a very important aspect of this."

Another key element of antitrust legislation is prevention of boycotts.

This becomes relevant when groups of companies take a more hands-on approach to improving standards in their suppliers' operations. The more closely programmes focus on remediation and, crucially, on decisions as to what to do when remediation fails, the greater the danger of breaching competition laws.

The key is for companies to make decisions individually as to whether to continue to do business with suppliers that consistently breach their codes - and not as a group.

As well as designing collaborative programmes carefully, companies can put another safeguard in place - confirmation of approval from the competition authorities themselves.

In the US, this means securing a business review letter (BRL) from the justice department. After scrutinising the group's objectives, it will declare that, on the basis of the information given, it does not intend to challenge the activities of the alliance concerned.

"It is not a guarantee that they won't," says Mr Rudolph. "But I'm not aware of any circumstance in which a business review letter has been received from the justice department and [that group's activities] have subsequently been challenged - so BRLs are very useful things."

Similar "comfort letters" can be sought from the UK's Office of Fair Trading and the European Trade Commission.

For alliances that are trying to expand their membership, these letters and other forms of evidence that they have addressed competition issues also provide reassurance to risk-averse potential members - particularly those in industries that have been subject to antitrust scrutiny in the past.

If competition issues have been addressed early on, however, antitrust legislation should not provide barriers to collaborative ventures in corporate responsibility, says Mr Rudolph.

"These initiatives are all extremely pro-consumer and pro-efficiency," he says. "They just need to be thorough in their approach to demonstrating that they are not creating competitive concerns and be aware of the traditional risks that are associated with competitors getting together."

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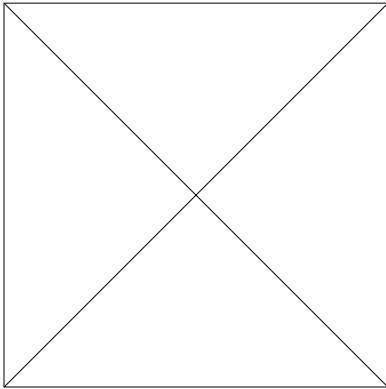
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