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Prager Dreifuss is an independent medium-size full service law firm with offices in Berne and Zurich and a foreign representation in Brussels. With more than 30 lawyers, many of them qualified in foreign jurisdictions, Prager Dreifuss acts for both local and international clients ranging from small and medium-sized businesses to multinationals from all business sectors, as well as private individuals. With profound knowledge of Swiss and EU competition law, the team regularly advises clients before the Swiss competition authorities and frequently collaborates with foreign law firms in multi-jurisdictional cartel and merger proceedings.

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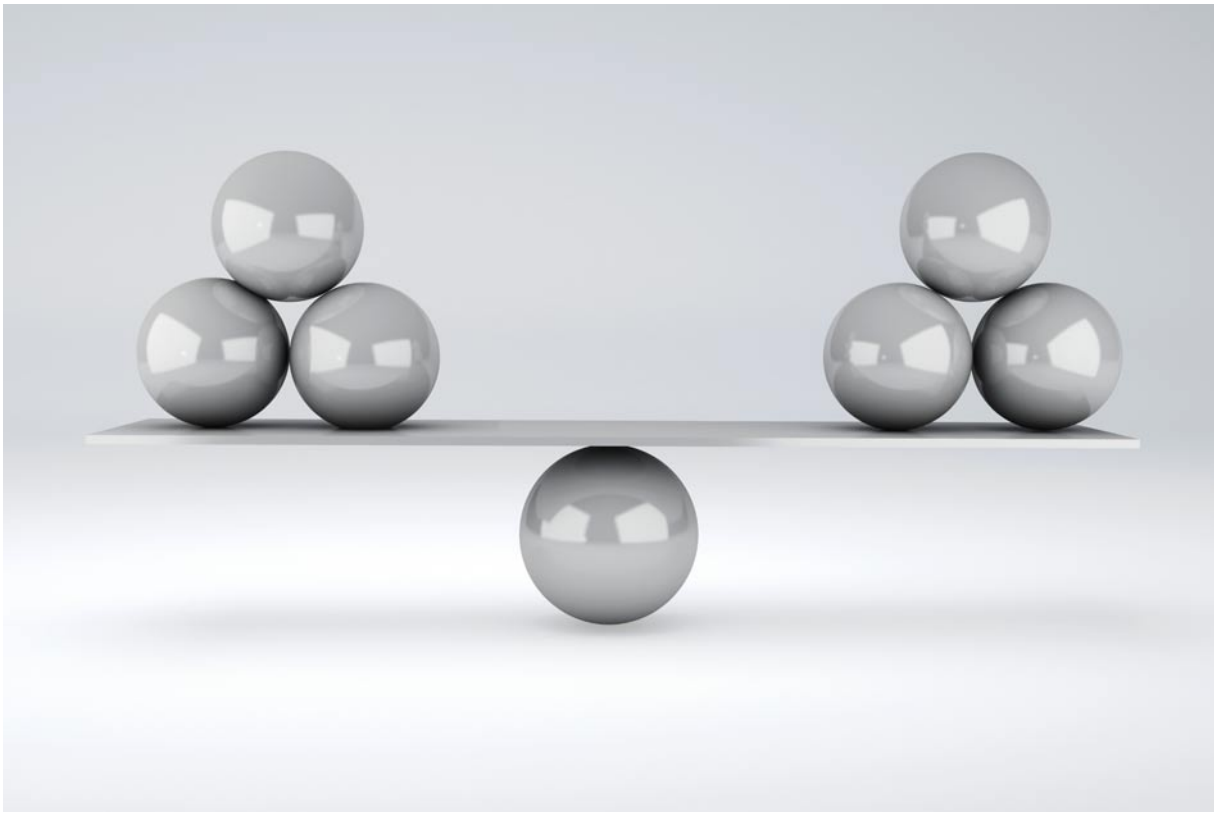
MINI-ROUNDTABLE

COMPETITION AND ANTITRUST



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Peter Broadhurst is a partner in Simmons & Simmons' EU, Competition & Regulatory group. He advises a wide range of energy and infrastructure, finance, technology, industrial and consumer clients on the competition law issues arising from mergers, acquisitions and structural joint ventures, and also has considerable experience dealing with non-structural joint ventures and cooperation agreements. His practice also covers behavioural competition law, including abuse of dominance, and he has been involved in assisting clients in cartel investigations, as well as advising them on how to avoid cartel activity and ensure compliance with competition law.

RC: To what extent have authorities in your region intensified their enforcement of antitrust regulations?

Broadhurst: The Competition and Markets Authority (CMA), the new UK competition authority created by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), became fully operational on 1 April 2014. ERRA 2013 included various amendments to the UK regime, two of which are particularly significant for antitrust enforcement. The first is a new – potentially very wide – power for the CMA to interview individuals having a 'connection with' a business being investigated on any matter relevant to the investigation; this interview can potentially take place without the business' lawyers being present. The second is the removal of the dishonesty requirement from the criminal cartel offence – intended to increase the rate of successful prosecution, this has caused unhelpful uncertainty. Finally, sectoral regulators have been put on notice to make more use of their competition law powers or risk losing them; and this will include the Financial Conduct Authority (FCA) which will obtain wide-reaching competition law enforcement powers in April 2015.

Zurkinden: Given that the protection of competition is one the most important regulatory tasks in a market economy, the competition authorities in Switzerland are very active in uncovering and investigating potential restrictions on competition. While statistics show that the authorities' activities in enforcing antitrust regulation are comparable with those of previous years, some industry sectors like construction and financial services were particularly in the authorities' focus. In 2013, the authorities' work continued to focus particularly on hard cartels, some involving bid rigging and market foreclosure. It concluded several investigations into price-fixing agreements in the field of aviation, bid rigging in the road-construction industry in the Canton of Zurich and into restraints on parallel imports of French-language books. Currently in the spotlight are several investigations in the financial sector. Since 2012, the competition authorities have carried out a full scale investigation into alleged agreements to influence the reference interest rates Libor, Tibor and Euribor, as well as derivatives based on these rates, and in 2014, following a preliminary investigation, the competition authorities opened an investigation against four Swiss and four foreign banks in relation to alleged price fixing agreements in the foreign exchange sector. Finally, the authorities have also examined credit card interchange fees.

Zarzur: After the change in the Brazilian competition legislation in 2012, which introduced a pre-merger approval system, the Brazilian antitrust authority CADE (*Conselho Administrativo de Defesa*

Econômica) had to carry out an institutional and management reform to achieve faster merger analysis. As the antitrust agency gained efficiency, ruling cases on a more expeditious manner, human and financial resources were released to be used to intensify the fight against anticompetitive conduct, especially cartels. According to CADE's website, among the 22 convictions in 2013, 13 were in collusion cases. In 2013, CADE opened 14 new administrative proceedings to investigate infractions to the economic order and carried out two dawn raids. In the two years following the new Competition Law entering into effect, CADE concluded analysis of 271 conduct cases, submitting them to the Tribunal for evaluation, and, afterwards, for the final decision, or shelving them, when applicable. It should be noted that CADE has publicly disclosed its intention to keep strengthening the repression of anticompetitive conduct.

del Pino: The Argentine Antitrust Commission has been very active in the commencement of antitrust investigations, primarily regarding dominance issues. Up until last year, it had mainly focused on price discrimination and refusal to deal cases, but the beginning of 2014 marked the commencement of four major market-wide investigations: first, the pharmaceutical market and vertical relations in the industry, second, the sale of consumer goods in supermarket and hypermarkets and vertical relations in the industry, third, raw materials for industry, and finally, raw materials for construction. Under these investigations, the Antitrust Commission has issued several requests of information to over 250 companies on a wide range of markets in order to determine the costs and margins of companies and their influence in the vertical structural pricing of these markets. The type of information being requested includes, among others: trade names and trademarks by product line; price lists of the past five years; main customers; market shares; main competitors; if the products are imported or are locally manufactured; distribution channels; cost structures; profit margins; installed capacity; expected plans to increase the installed capacity; exports, for which products and in which conditions; and financial statements for the last five years.

Taylor: The level of enforcement activity by the Australian Competition and Consumer Commission (ACCC) is affected by its annual budget, strategic priorities and management direction. Notwithstanding increased budgetary pressures, the current chairperson of the ACCC, Rod Sims, has given priority to "strong enforcement". The ACCC has focused on the worst types of anti-competitive conduct and the most problematic industry sectors. Under Rod Sims, the ACCC has also been prepared to litigate more frequently, even where success is not assured. As a result, enforcement activity has trended upward over his tenure in the ACCC's areas of strategic priority.

RC: What advice can you offer to companies that find themselves subject to an antitrust dawn raid?

Zurkinden: Generally, an undertaking should have available internal processes that define responsibilities and reachability of key personnel – management, in-house or external counsel – in case of an unexpected search. Normally the authorities grant an undertaking that is subject to a search of its premises a short time to convene key personnel before the search is carried out. Instructions not to use certain devices, such as cell phones and computers, must in any case be respected. If in the view of the authorities the length of preparatory time distorts the search, the undertaking should propose that searches that appear less problematic be carried out first and that searches that appear more delicate be deferred until an attorney is present. Note, however, that the authorities are free to organise the search and need not consider the undertaking's proposal. An undertaking subject to a search of their premises must fully cooperate and must avoid any action aimed at concealing or destroying potentially incriminating evidence. Obstruction of justice entails severe penalties and arrogance towards the investigators will likely result in a less cooperative attitude by the investigators with respect to the undertaking's sensitivities. Companies must make sure that they keep record of the documents seized by the authorities and of the interviews made.

> **"An undertaking subject to a search of their premises must fully cooperate and must avoid any action aimed at concealing or destroying potentially incriminating evidence."**
>
> *Philipp Zurkinden, Prager Dreifuss*

del Pino: The key issue is to be able to interact with the authority in order to allow it to carry out its duty, yet duly supervised by the investigated company's legal counsel. As such, it is of the utmost importance to verify the scope of the dawn raid and whether there has been a judicial order allowing its performance. It is also very important to ensure that the investigated company's employees do not carry out any action that could be construed as obstructing the investigation.

Taylor: Dawn raids in Australia are historically very rare and normally reserved for 'cartel busting'. Unless consent is given, the ACCC requires a search warrant to enter a premises. A first step is to check and copy the warrant and ensure lawyers are notified and, if possible, in attendance. In practice, the ACCC may be prepared to wait for up to an hour for a lawyer to arrive. If a valid warrant is presented, the search cannot be impeded and reasonable assistance must be provided. Those in attendance should obtain receipts for, and arrange to copy, any material taken. Legally privileged documents do not need to be handed over. If legally privileged documents cannot be identified at the time, the company should expressly reserve its right to continue to claim privilege.

Zarzur: CADE has been intensifying the fight against illegal conducts and, within this trend, antitrust dawn raids tend to be more common, given its power as an investigative tool. For instance, among the two dawn raids conducted in 2013, one of them was related to the trains and subways cartel and was performed in 14 companies. During the current year, CADE has already carried out two dawn raids, one related to bid rigging in civil engineering bids, also conducted in 14 venues, and the other to investigate an alleged cartel in the resins market, carried out at the head office of 10 companies. Given the variety of instruments available to CADE and considering the surprise element inherent to such procedures, it is important for companies to have specific document generation policies and dawn raid guidelines, together with training and compliance programs offered to employees on a regular basis. The main rule to be followed in these situations is that all employees should remain calm throughout the procedure. The investigation in itself does not mean that the company is being considered guilty of any infraction, and this should be made known to all.

> **"It is important for companies to have specific document generation policies and dawn raid guidelines, together with training and compliance programs offered to employees on a regular basis."**
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> *Cristianne Saccab Zarzur, Pinheiro Neto Advogados*

Broadhurst: Firstly, it is important not to panic. Call external lawyers immediately, unless you have a sizeable in-house antitrust team. Check the officials' documents carefully: is the raid under EU or UK

competition law? Are FCA or SFO officials present? What is the scope of the inspection? Cooperate fully with officials, but protect the company's rights. In particular, ensure that officials stay within the scope of the inspection. Shadow officials diligently, identify search terms used in digital searches, and what digital material is searched or imaged. Make or obtain copies of anything copied, taken, scanned or imaged. Ensure that a lawyer is present if officials ask any questions. Note that under EU law, legal professional privilege will not extend to documents created by in-house legal counsel, unless these simply reproduce advice from external lawyers. In parallel, other workstreams within the company must be mobilised, including to consider the merits or otherwise of a leniency application.

RC: What developments in merger control law or application of the law have you seen in your region? Do dealmakers generally find it difficult to obtain the necessary clearance?

Taylor: Unlike other jurisdictions, Australia operates a voluntary pre-notification regime for mergers. The Australian approach is flexible and allows significant scope for parties to negotiate court-enforceable undertakings with the ACCC to address competition concerns. As a consequence, it is normally not difficult to obtain merger clearances in Australia by international standards. Some 75 percent of mergers that attract the ACCC's interest are cleared in a 'pre-assessment stage' in the space of a couple of weeks. Only 3 percent of such mergers tend to raise material concerns for the ACCC and most of these concerns are resolved by negotiation. In this manner, only a small handful of mergers each year are formally opposed and litigation is very rare. In recent years, the ACCC has focused on improving the quality and commerciality of its merger decisions with encouraging results.

Broadhurst: The CMA fused the Office of Fair Trading and the Competition Commission. Previously, separate Phase I and Phase II bodies ensured that substantive concerns were reconsidered by an independent set of eyes. The cost was potential duplication and inefficiency, but while efficiency may now be greater, so too is the risk of confirmation bias. Other significant ERRA 2013 changes are: a mandatory 40 working days Phase I timetable; CMA powers, backed by fines, to demand production of documents and attendance of witnesses; lowering of the threshold for imposing hold-separate obligations. The latter change increases the likelihood of hold-separate undertakings – also applicable to anticipated deals – becoming the norm for completed transactions. Already reflected in the CMA's practice, this raises the question of whether the UK system remains truly voluntary. UK competition lawyers familiar with the CMA regime

should be able to advise accurately on the prospects for and timing of clearance.

Zarzur: With the enactment of the new Competition Law, Brazil has changed from a post-merger to a pre-merger control system, whereby transactions that are subject to antitrust approval may not be consummated prior to the authorities' clearance. The initial concerns that pre-merger control would be more of a burden to dealmakers, delaying the effective closing of certain transactions, were overcome by the fast reviews conducted by the competition authority, made possible by the institutional reforms introduced by CADE. For instance, simple cases are being cleared in less than 30 days and due time is being dedicated to more complex cases. In more complex cases, the scrutiny tends to last longer, which is natural, but the authorities are being very efficient in conducting the review and negotiating remedies, when applicable.

Zurkinden: Obtaining merger clearance in Switzerland is rather easier than elsewhere as the blocking criteria are stricter than, for example, in the EU. What is important, however, is to coordinate merger filings in Switzerland and elsewhere. With regard to the EU, we find it useful to time a Swiss decision a few days after the EU decision and to allow the Swiss authorities to exchange with the EU Commission. Differing delays – including delay extension possibilities in case of remedies – in particular with regard to the EU, have to be carefully taken into consideration.

del Pino: There has never been as much merger control activity in Argentina as there is today. The reason for this can be traced to the fact that the notification threshold has been set in Argentine Pesos and due to the devaluation, what used to be a US$200m threshold is now equal to threshold of approximately US$25m. As such, the Antitrust

Commission has become overburdened with cases and unfortunately there are no short form notifications in Argentina. Current average review times range between 18 to 24 months even in non-material transactions. However, it must also be taken into account that there is a very low historical rejection rate, at less than 1 percent. As regards remedies, the Antitrust Commission usually negotiates these with the parties, but in some cases it has taken an adamant position regarding certain issues, such as ancillary restrictions which have been the reason for an important share of the remedies being imposed in the country.

RC: What considerations do companies need to make to avoid abuse of dominance? Are regulators in your region increasingly interventionist in this area?

Zarzur: During the two years since the new Competition Act has been in force, the main challenge for CADE has been to conciliate the implementation of the pre-merger control system in Brazil with the investigation of anticompetitive practices. After CADE initially concentrated its resources on merger analysis, the Brazilian antitrust authority is now focusing its efforts on investigating and punishing infractions against the economic order. Therefore, investigations of abuse of dominance may increase in the near future. The Brazilian competition system adopted a general rule of reason principal when dealing with anticompetitive violations. In this sense, with the exception of cartels, there are no per se violations and each conduct is analysed on a case-by-case basis in order to establish whether a violation has occurred.

del Pino: Abuse of dominance is the key area being probed right now by the Antitrust Commission. The regulator is especially interested in determining how value is created across the production chain in order to determine whether there are any areas in which there may be a market position that would allow companies to carry out excessive pricing schemes or similar abuse of dominance conducts. It must also be taken into account that the Antitrust Commission is dependent on the Secretary of Trade and said regulator has recently issued a price reporting scheme by means of which certain types of companies which surpass a volume business threshold must report on a monthly basis certain information on prices and discounts. As such, there is a very strict probing of these issues. It remains to be seen what actions the Antitrust Commission will take once it processes the information gathered by means of its four major market investigations currently underway.

Zurkinden: Switzerland has not seen many precedents in relation to dominance and abuse thereof. Instead, the authorities regularly rely on EU precedent. Determining dominance appears to be a difficult exam, although the rules are similar to those in the EU. A company complying with Article 102 TFEU is not likely to infringe Swiss competition law. Caution should be employed in particular with tying practices and denials of supply. We have observed in recent years that some cases where an undertaking has been subject to an abuse of dominance claim are tried to be solved in the course of an informal preliminary investigation with commitments offered by the undertaking concerned. As the parties subject to a preliminary investigation do not enjoy party rights, the result can however be highly problematic, in particular when new concepts of law are employed or the Secretariat arrives at findings the company concerned cannot rebut and which may be prejudicial. The Secretariat's findings in an informal settlement cannot be appealed and will be published in a report.

> **"Relatively few new abuse of dominance cases have been brought in the UK, although a significant proportion of those have been brought by the sectoral regulators."**
>
> *Peter Broadhurst, Simmons & Simmons*

Taylor: The Australian approach to abuse of dominance focuses heavily on the causal nexus

between a firm's substantial market power and the abuse of that power. The most fundamental consideration for any firm with substantial market power is to ensure that its conduct has a legitimate justification and is consistent with the conduct of a firm in the same position in a competitive market. The ACCC has experienced historic difficulties succeeding in the enforcement of such cases in Australia, resulting in legislative amendments to Australian law to facilitate enforcement. As a result, some of the legal thresholds are not yet fully tested and may be subject to further legislative reform. The ACCC is currently investigating a number of instances of misuse of market power in Australia and will continue to give enforcement high priority.

Broadhurst: The key question for any company is whether it is potentially dominant in any market. Only if the answer to this question is, or might be, "yes" – or if the company may become dominant in the not too distant future as a result of a change in the markets in which it is active – does it need to be concerned about the prohibition against abuse of dominance. Dominant companies should seek specialist advice before considering , for example, sales promotions and rebate schemes, entering exclusive agreements, refusing to supply an existing customer, drafting conditions of sale or purchase, and so on. Relatively few new abuse of dominance cases have been brought in the UK, although a significant proportion of those have been brought by the sectoral regulators. The FCA's new powers from 2015 will bear watching. The UK authorities do, however, remain vigilant in respect of potentially serious exclusionary conduct.

RC: Have you seen a rise in antitrust-related disputes, including complex class actions and private ligation? Do companies need to be mindful of this risk?

del Pino: There has been an increase in antitrust claims filed between companies before the Antitrust Commission and they should be taken into account when planning a legal strategy. There are no legal fees to be levied for filing a claim before the Antitrust Commission and, as such, certain companies have resorted to antitrust claims in order to seek objectives that may not strictly be antitrust related. While the Antitrust Commission has been actively working on these claims and rejecting those that would not fall under its provisions, the fact that there would be no costs involved allows for a very active participation. In addition to this, there has been an increase in antitrust damages cases, mainly driven by the judicial upholding of certain major cartel investigations, which has triggered a newfound interest in these issues.

Broadhurst: The number of antitrust related disputes in the UK courts has been steadily

increasing. The UK remains a popular jurisdiction for bringing follow-on actions for damages on the back of UK or EU enforcement decisions, either in the High Court or in the Competition Appeal Tribunal (CAT). Standalone damages claims can currently be launched in the High Court, although the UK Consumer Rights Bill proposes to extend the CAT's jurisdiction to allow it to hear standalone actions and grant fast-track injunctions. The Bill also introduces an 'opt-out' collective action regime, and a collective settlement regime. 'Opt-in' class actions have proved ineffective in the UK to date, being hampered by the difficulty identifying claimants: only one opt-in action was brought between 2003 and 2014. That looks set to change. Companies should also be mindful of the risks of antitrust arguments filtering through into general commercial disputes, as they increasingly are doing.

Taylor: Private litigation is possible in Australia and has historically occurred, yet it can be expensive. Australia's most expensive litigation ever, at some US$200m in legal costs, involved private antitrust 'mega litigation' in the media sector from 2002-07. Moreover, Australia does not have a treble damages regime for private plaintiffs and exemplary damages have not been awarded. As a result, most firms prefer to rely on the ACCC to undertake enforcement action. While class actions are starting to increase in Australia, they are a relatively recent phenomenon and occur at nowhere near the level experienced in the United States. Antitrust class actions are perceived as more difficult that other forms of class action and are normally undertaken with the purpose of negotiating a commercial settlement.

Zarzur: In Brazil, civil claims are brought in the form of civil actions, which can be filed only by the Public Prosecutor's Office, the Public Defender's Office, the federal government, the states, the federal district, the municipalities, public agencies, foundations and companies, as well as by associations. Even though companies in Brazil can be found liable for antitrust practices under the civil sphere, civil actions and private litigation are still incipient in Brazil. There are no relevant cases of final condemnations involving civil actions in Brazil based on anticompetitive conduct. Some civil actions involving the major cartel cases are still under analysis at the judiciary branch, involving discussions on a number of procedural issues. In addition to indemnification for the financial losses suffered by consumers, some civil actions also claim condemnation for moral damages, with some also indicating that financial losses would have to be ascertained upon the award calculation proceeding. However, calculating damages could be a major challenge involving civil actions.

Zurkinden: Civil antitrust claims are still of limited appearance in Switzerland. Nevertheless, decisions of the competition authorities should be carefully

analysed in cross-border matters as prospective claimants may use them to obtain cartel damages abroad. The right to bring legal action against cartelists, under the current Swiss Cartels Act, is limited to those hindered by an unlawful restraint of competition from entering or competing in a market and is therefore not open to end consumers. The short one-year limitation period may lead to the unsatisfying result that a potential civil antitrust claim becomes time-barred during the investigation. Interestingly, a reform package including proposals to expand the right to lodge civil actions to end consumers and to interrupt the one-year-limitation period for the duration of the competition authorities' investigation has been very recently rejected by the Parliament.

"While class actions are starting to increase in Australia, they are a relatively recent phenomenon and occur at nowhere near the level experienced in the United States."

Dr Martyn Taylor, Norton Rose Fulbright Australia

RC: What considerations should a company make if it uncovers a potential antitrust/competition breach and undertakes an internal investigation? Are companies encouraged to self-report any wrongdoing?

Broadhurst: Under the UK leniency program, real advantages accrue to the first applicant to approach the CMA with valuable information or, failing that, from being close to the front of the leniency queue. Only the first applicant may be eligible for 100 percent immunity from fines. In an initial internal investigation, enquiries should be limited to what is necessary for the company to decide whether to apply for leniency. Key considerations are to: avoid tipping off anyone involved in the potential infringement; safeguard evidence to prevent tampering or corruption which would undermine its value; conduct witness interviews so as to maximise the value of evidence obtained. There is no self-reporting obligation under competition law. However, the significant advantages from being first in – or near the front of – the leniency queue create strong incentives to approach the authority promptly, even after a dawn raid has been launched or an information request received.

Zurkinden: In the case of a horizontal or vertical hardcore cartel or an abuse of dominance, the

company concerned may want to consider filing a leniency application with the competition authorities as such types of agreements are subject to direct fines. Other agreements are subject to a sanction if found unlawful for a second time. Whether a leniency application should be considered to be filed depends on a number of aspects. For example, companies filing for leniency should be aware that they are under a duty of continuous cooperation with the authorities – without restriction and delay. Furthermore, companies filing for leniency may obtain substantial reductions on cartel sanctions, if at the time of filing the leniency application they ceased the reported conduct. The first leniency applicant may be granted a 100 percent bonus; for further leniency applicants, the reduction may be up to 50 percent, normally in the range of 20-50 percent. Note that in case of an abuse of dominance, the reduction may be up to 50 percent only.

Taylor: Australia has three key mechanisms for self-reporting. In a cartel context, Australia operates an immunity policy and leniency policy. In a non-cartel context, the ACCC operates a cooperation policy. Immunity may be granted for civil contraventions, by the ACCC, or criminal contraventions, by the Commonwealth Director of Public Prosecutions. The first cartel member through the door – including directors, officers and employees – can place a 'marker' and obtain conditional immunity if they admit the contravention, fully cooperate, are not a ringleader and there is not yet sufficient evidence. Under the leniency and cooperation policies, a concession in penalties may be negotiated, subject to court approval, in consideration for cooperation and evidence. In all circumstances, the firm should immediately take steps to rectify the contravention as soon as it becomes aware of it.

> **"The most important idea to transmit is for employees to understand the sanctions that could befall both the company and themselves should they participate in anticompetitive conduct."**
>
> *Miguel del Pino, Marval, O'Farrell & Mairal*

Zarzur: The first measure to be taken if a company uncovers a potential antitrust breach is to make sure that the potential anticompetitive conduct has stopped. The Leniency Program in Brazil is a viable alternative for companies in this situation, since it can offer immunity from administrative sanctions

and criminal prosecution for those companies which identify and provide strong and sufficient evidence of anticompetitive practices. If the managers involved in the conduct also sign the agreement, they will also be granted immunity. If CADE already has information on the anticompetitive practice in question, CADE may execute a leniency agreement reducing the applicable administrative penalty by one-third or two-thirds.

del Pino: While there are currently no leniency provisions in Argentina, the Antitrust Law does allow a mechanism for the company to approach the Antitrust Commission and enter into an agreement in order to finalise the conduct. In this regard, it is very important that the company would be able to show that it has carried out extensive antitrust training for its employees to show any lack of intent. In addition to this, the internal investigation should be duly documented in order to be able to accurately report its findings as well as the fact that all due diligence steps were taken to eliminate anticompetitive conduct.

RC: What is your advice to companies on rolling out an effective antitrust compliance program throughout their organisation?

Zurkinden: Compliance is not solely training of people – this is only one aspect. Compliance is about culture. Implementing a compliance program, whether in a large MNE or in an SME should be seen as a project – not detached from the organisation where it is to be implemented but involving the people concerned. Simply designing an online tool with some slides saying 'thou shalt not' will not suffice – an employee will likely see it as 'just another tool I have to complete'. Such a tool will likely also fail in a compliance defence, which may be invoked even if there is hitherto no precedent at all. In any case, whether the compliance program was adequate would be subject to determination by the Competition Commission and the courts.

del Pino: The most important idea to transmit is for employees to understand the sanctions that could befall both the company and themselves should they participate in anticompetitive conduct. There are certain times in which employees believe that by carrying out certain forbidden acts like price fixing or arranging market quotas they are ensuring the success of their companies by not 'rocking the boat'. Yet what ultimately happens is that the company's wrongdoing is uncovered and those efforts end up triggering the exact opposite effect and they subject the companies to long-winded litigation as well as major fines and even imprisonment. Those in charge of the antitrust compliance program must ensure that the message is direct and practical as to its day-to-

day enforcement, rather than merely enunciating generalities with no link to the company's business.

Zarzur: Compliance programs are very important instruments to enhance antitrust awareness among companies. A successful implementation of a compliance program involves employee training, including presentations of do's and dont's, guidelines by internal and external counsel and may also include interviews with key employees. Moving forward, after this initial training, it is also recommended that the company prepares reports with guidelines and makes them available to employees, in addition to carrying out regular audits. Compliance programs not only decrease the chances of having a negligent employee breaching the law because he or she had no knowledge of antitrust issues, they are also an instrument that grants a good reputation to the company in the eyes of the market and the authorities.

Taylor: An effective compliance program must be commercially relevant, simple for employees to understand and straightforward to apply. It should involve clear statements of policy, identify their practical application and implementation, and then require continuous monitoring and consistent application. The level of risk of certain conduct should be identified, perhaps via a 'traffic light' system, so that employees can clearly recognise potentially illegal – 'red light' – conduct, including discussion of pricing with competitors. Non-legal staff should have clear direction as to the circumstances in which they should involve lawyers. Practically-focused training, case studies and workshops with relevant staff are normally invaluable and should be an integral part of the implementation of any program.

Broadhurst: The compliance program should be practical. It should be tailored to the risks, issues and situations relevant to the business, enabling staff to understand in concrete terms how it applies to them. Accordingly, the person preparing the compliance program must have an understanding not only of competition law, but also of how it applies in the context of that business. A potential focus in all businesses is likely to be the extremely strict approach in the UK to anti-competitive information exchanges in both horizontal and 'hub and spoke' type situations. The compliance program should be regularly updated and complemented by a series of training programs and refreshers – similarly regularly updated – for all individuals whose role potentially exposes them to competition law risk. Perhaps most importantly, for a compliance program to be effective and credible it should have buy-in and endorsement from the very highest level of senior management. R&C