# Avoiding The Harmonization Trap: Making Sure Your Antitrust Compliance Program Is Truly Global In Scope

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As companies extend their reach into increasingly global markets, they need to avoid the "harmonization trap" – the assumption that meeting U.S. antitrust requirements will protect them from scrutiny under other countries' regulatory standards. In this article, we discuss lessons learned and practical guidance to be taken from a high profile case involving Coca-Cola and the EU and the differing rules around the globe concerning product distribution and marketing.

In September 2004, the European Commission initiated proceedings against Coca-Cola accusing the company of "abusing" its "dominant position" in the carbonated soft drink market by entering into agreements with its retailers that many U.S. antitrust lawyers regarded as perfectly legal. Coca-Cola ultimately settled the case by entering into an agreement with the EC promising not to (1) enter into exclusivity agreements with retailers, (2) offer retailers certain loyalty rebates, (3) require retailers to purchase Coca-Cola's full line of beverages, and (4) prohibit retailers from using free Coca-Cola coolers to display competitors' products. Under the agreement, Coca-Cola must refrain from engaging in any of these practices in the European Union until 2011 or face a fine of 10% of the company's worldwide profits.

The Coca-Cola case illustrates that, despite all of the talk in antitrust circles about the increasing harmonization of U.S. and EU antitrust laws, important differences remain due to fundamentally different philosophies regarding what it means to "harm competition." This is particularly true when it comes to the type of vertical restrictions manufacturers can place on the companies that sell their products. Antitrust compliance policies and training programs must account for these differences or companies that sell globally will find themselves blindsided by scrutiny from foreign antitrust regulators. This article examines the major differences in U.S. and EU law as to how manufacturers can go to market and outlines how companies can best educate and sensitize key employees to those differences so as to avoid problems and results like Coca-Cola experienced.

Although American and European antitrust law both regard horizontal price-fixing as unlawful, there are very few areas of vertical restraint law where U.S. and EU law are in harmony. Under U.S. law, retail price maintenance is now presumptively lawful while in the EU such conduct is regarded as unlawful. Section 2 of the Sherman Act outlaws attempts to monopolize. In practice, however, very few firms' vertical restrictions on their resellers are deemed unlawful in the U.S. because typically there needs to be a showing that the company has in excess of 60% of the relevant market <u>and</u> a reasonable likelihood of excluding rivals from significant portions of the market through its practices. The European corollary to Section 2, Article 82, proscribes "abuses of dominance" which are defined as imposing "unfair" prices or conditions on one's trading partners. In contrast to the U.S., a company is presumed under EU law to possess a "dominant position" if it possesses a share of 30% or more of the relevant market. Moreover, because the European standard for proving an actionable abuse is "fairness," there is no requirement in the EU that the European Commission show the dominant firm's practices adversely impacted competition. Thus, companies like Coca-Cola that would not be deemed monopolists in the U.S. or that might be able to show their vertical restraints promote rather than inhibit competition may find their practices labeled as abuses in the EU with the result that they are forced to abandon contract provisions or programs that they take for granted as lawful in the U.S.

The Coca-Cola case highlights those areas where EU and U.S. differ most dramatically in terms of vertical restraints. Agreements that expressly require resellers to carry a company's product to the exclusion of its competitors' products are going to be problematic in the EU if the company has significant market share. Full line forcing agreements by companies with "dominant" market shares also generally will be frowned upon in the EU, as will fidelity rebate programs where the rebates are paid to the company's resellers rather than directly to consumers. Finally, slotting agreements that have the effect of relegating competitors' products to less prominent areas in stores in the EU may be deemed unlawful if the company in question has sufficient market share there. In contrast, barring dramatic evidence showing an adverse impact on competition, none of these types of vertical restraints are likely to be held to be a violation of U.S. antitrust laws.

Beyond these substantive differences between U.S. and EU antitrust law, there are important procedural differences that may impact companies that sell globally. In the U.S., a dominant firm has no obligation to seek advance regulatory approval of vertical restraints imposed on its resellers and generally need only competitively justify its practices if, and only when, the government or a private litigant challenges one of the practices. The European Commission, in contrast, now requires companies with market shares over 30% to perform a self-assessment of the vertical restraints they impose on the resellers of their products. This self-assessment must show that the restraints benefit consumers, do not eliminate competition, are indispensable to some other sought-after benefit or are otherwise needed in order to usher in some demonstrable improvement in production, distribution or technology. More importantly, companies with large market shares in the EU must perform this self-assessment while they are implementing restraints on their resellers and document the self-assessment so that it can be made available should regulators come calling.

Based on our review of enforcement activities over the past several years, vertical restrictions by "dominant firms" remains an area of focus for European regulators while U.S. regulators have largely ignored this area except in a few high profile cases like the Microsoft matter. As a result, there may be complacency among U.S. employees and counsel who advise solely on U.S. antitrust matters about the antitrust risks associated with vertical restraints. To the extent that a company with large market share outside the U.S. entrusts its global antitrust compliance efforts to such employees or lawyers, care must be taken to ensure the distinctions between U.S. and European antitrust law are highlighted and the increased risks associated with vertical restraints in the EU are emphasized during compliance training.

The following are our recommendations for American companies with large market shares in the EU:

➢ Involve European antitrust counsel in antitrust training seminars along with American counsel.

➢ Establish internal procedures so that counsel must review any changes in the key conditions of sale, the exclusivity of territories or of products, or customer rebate and discount programs prior to implementation.

➢ Regularly evaluate your company's market share and other indicia of market power to see whether they might trigger increased scrutiny from antitrust regulators at home and abroad.

➢ Sensitize key sales and business leaders within the company to the importance of using language emphasizing that the company is interested in competing "vigorously but fairly" and not in "dominating" the market or "eliminating competition."

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