Women & Antitrust

Voices from the Field

Vol. II Curation & Foreword by Kristina Nordlander

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Anne Riley

Independent Antitrust Compliance Consultant

Mariana Tavares de Araujo

Anne Riley retired in March 2019 as head of Royal Dutch Shell's global antitrust group, which she had led since September 1992 (having practiced as an antitrust lawyer since 1985) and was a member of Shell's Group Ethics and Compliance Office leadership team until her retirement. She is currently chair of the International Chamber of Commerce Task Force on Antitrust Compliance and Advocacy and a non-governmental adviser to the European Union (DG COMP) for the International Competition Network. She has been awarded a number of legal and compliance awards, including "Women in Compliance, Innovator of the Year".

Mariana Tavares de Araujo is a partner with Levy & Salomão Advogados. Prior to joining the firm, Ms Araujo worked with the Brazilian government, where she served as head of the government agency in charge of antitrust enforcement and consumer protection policy. She provides counsel for the World Bank and serves as an adviser to the ICN and to CADE. She currently is officer of the IBA Antitrust Committee and is a member of the ABA International Developments and Comments Task Force. Ms Araujo holds an LLM from the Georgetown University Law Center.

You have been an antitrust lawyer since 1985, working in industry and private practice, and for nearly 27 years, until your recent retirement you were in-house as the global head of antitrust for a large multinational. What trends have you observed over this time?

An obvious development has been the increased use of electronic and social media. When I started my training contract in a law firm in 1983, we had no computers in the office – the office did not even have a fax but communicated by telex and landline telephone. As an antitrust lawyer, the reliance on computers, iPhones and social media has a very practical side effect, and that is that antitrust investigations have now changed out of all recognition – with very little reliance by investigators on hard-copy documents. Another thing that has changed out of all recognition is the use of the Internet: with relatively little effort it is now possible to keep up with antitrust developments around the world, and as I am a little bit "geeky" about antitrust law, this has given me a lot of personal pleasure, including in my (semi) retirement.

Antitrust is often accused as being overly theoretical. As the retired leader of global antitrust team of a multinational oil company, are there any competition law theories that in your experience you have found are not accurately supported by market realities?

My concerns really do not so much revolve around new theories of harm but rather in the way that some antitrust agencies have applied those theories. For example, it has been good in Europe to have seen a movement back from the characterisation of virtually any exchange of information between competitors as potentially being a "by-object" infringement (as expressed in the *T-Mobile* judgment) to the rather more sensible position now being developed, in Europe at least, that it is vitally important to assess the context in which conduct occurs to see whether it is a by-object infringement or not.

My concern is that overly zealous enforcers (especially perhaps in "newer" antitrust jurisdictions around the world that tend to follow EU case law but

without factoring in the caveats that the EU courts have articulated) may incorrectly characterise perfectly legitimate and lawful cooperation between competitors as constituting an illegal arrangement because the collaboration involved the sharing of some competitively sensitive information (CSI). From many years of antitrust practice in business, I think it is important to understand that sharing of CSI is not always indicative of an illegal agreement or a concerted practice. There can be perfectly legitimate and lawful reasons why companies need to cooperate – for example in the context of a joint venture (provided that the information-sharing is objectively needed to ensure the proper operation of the venture). Indeed, in many instances, cooperation between competitors may be procompetitive and efficiency-enhancing. This means not all sharing of information between actual or potential competitors is anticompetitive – so the CSI which is objectively needed to achieve a legitimate end should not be viewed as illegal, but as being ancillary to the primary legitimate behaviour. Indeed, if overenthusiastic enforcers find a concerted practice from a mere sharing of CSI without considering the *context* in which the information is shared, it may chill legitimate and procompetitive collaboration.

As vice-chair of the International Chamber of Commerce (ICC) Competition Commission and chair of the ICC Task Force on Antitrust Compliance and Advocacy you were instrumental in the design of the ICC Antitrust Compliance Toolkit and the ICC's shorter Antitrust Toolkit for SMEs, which complement materials produced by antitrust agencies and other sources of guidance by focusing on practical steps that companies of different sizes can take internally to embed a successful compliance culture. How different are the challenges in building an effective compliance programme today from, let's say, 10 years ago?

Before I answer this question, I would like first to raise an issue of terminology here: in-house compliance specialists are moving away from talking about "compliance programmes" to talking about the need for businesses

to act with ethics and integrity. I think less focus on a "programme" to talking about acting with integrity really helps businesses focus on "doing the right thing". It also means that one can "sell" the need for compliance – not by instilling a fear of fines or imprisonment – but rather by encouraging a desire to do business properly. At the end of the day, most people want to do the right thing – they just need to understand what is expected of them. In this way, business people can understand what the benefits of competition are to society, to their own business reputation and to their customers. It also helps shift the discussion, hopefully away from the idea that many antitrust agencies seem to still have that antitrust compliance is merely "window-dressing" or a manual that sits on a shelf somewhere, never to be read. If that is all your antitrust compliance programme is, it can never possibly be effective. If, however, you manage to instil ethical leadership in your organisation, your "programme" will be effective – that is not to say that things will not occasionally go wrong – that is human nature, but you learn from past mistakes and improve by learning. So, I think the challenge is to build ethical leadership, as once you truly have that "Tone at the Top" it will filter through the entire organisation.

In your great article with Daniel Sokol, "Rethinking Compliance", you discuss optimal deterrence and its limits in the context of creating a more effective mechanism for antitrust compliance to take hold in businesses, and propose that antitrust authorities should work with the business community to create a regulatory scheme that rewards good behaviour while punishing bad behaviour. Since you published this article, several antitrust agencies issued compliance guidelines, and some set forth the possibility of giving credit to companies that adopt effective compliance programmes. How have you seen the development of a compliance culture around the world and the role of antitrust authorities in this process?

I think antitrust authorities have a key role in helping spread the compliance/ethical business message, by entering into constructive dialogues

with business on what constitutes credible antitrust compliance efforts. As an aside, I would like to make it clear that it has never been the position of the ICC that we were seeking credit for compliance programmes: what the ICC has been doing is engaging in efforts around the world to engage in compliance advocacy. On a personal level, I do think credit for compliance is likely to further boost compliance efforts, although I do understand the position of some agencies. Having said that, I think you only need to look at the huge success of the anti-bribery and corruption enforcers in boosting compliance efforts because of their creative approach to compliance programmes and their willingness to consider some credit for the programme if compliance efforts are genuine. I would therefore like to encourage not only more dialogue with business, but also more dialogue with other enforcement agencies to see how creative use of enforcement tools can support and promote ethical business conduct.

The oil industry has been in the spotlight of many cross-border investigations. Brazil's Petrobras is involved in what is probably the largest corruption probe worldwide. How do you see the role of compliance officers in the implementation of a compliance programme that actually prevents breaches, after a case like *Car Wash*?

Obviously, I do not wish to comment on the *Car Wash* case specifically, as I only know what has been reported in the compliance and wider press, but going back to two previous answers, I would say that it is in everyone's interests – the agencies, businesses and indeed society at large – to do everything possible to encourage businesses to act with integrity. As I said in the last answer, agencies from different compliance disciplines can usefully learn from each other in how best to encourage and perhaps even reward very genuine compliance efforts. I think it is also important particularly for antitrust agencies to understand that human beings *are* only human, and that mistakes are bound to occur occasionally, but that does not mean that compliance efforts are wholly ineffective. The agencies need to examine

carefully the culture and ethos of the organisation. If that is largely a culture of integrity, then some degree of understanding needs to be shown to the enterprise. I would just like to commend the excellent work of the Canadian Competition Bureau in helping businesses understand what in their view constitutes an effective compliance programme (or as I would like to call it, working credibly to achieve an ethical business culture).

The ICC represents several million companies worldwide with the goal to "make business work for everyone, every day, everywhere". How does that translate into your work within the Task Force on Antitrust Compliance and Advocacy?

As you mentioned in a previous question, I am honoured currently to be the chair of the ICC's Task Force on Antitrust Compliance and Advocacy. The work is very much a collective effort of the entire Task Force, and since the first toolkit was first published in 2013, we have worked tirelessly with antitrust agencies and businesses both large and small to promote the importance of ethical and compliance business practices. We have held dozens of workshops around the world (approaching around 100, I think) to explain the importance of competition law to business and society at large, and thus to encourage ethical competition on the merits. At the same time, we have encouraged agencies to enter a more open dialogue with business about the merits of compliance programmes, and have spoken at a large number of agency-organised events. At the same time, while we absolutely condemn cartels and other egregious violations of antitrust law, we encourage agencies to think carefully about the dangers of condemning all collaboration amongst business, since over-enforcement can chill perfectly legitimate and efficiency-enhancing competition.

Global companies have to deal with regulatory frameworks in different countries that can include complex and multi-layered systems of controls, and antitrust and anti-corruption laws that have extraterritorial jurisdiction

and thus apply to virtually every company trading internationally. Also, on top of ensuring compliance at national and global levels, they need to be vigilant with partners – vendors and providers must undergo the same checks and controls applied internally. In other words, a combination of high risks on the one hand, and "compliance stress disorder" on the other. What are, in your view, the measures to effectively disseminate a culture of compliance on a global level, taking into account the specificities of each jurisdiction?

I think the starting point absolutely has to be the culture of the corporation. If leaders within the organisation are committed to conducting business ethically and with integrity, then – by and large – most people working within the organisation will also want to "do the right thing". However, you do make an excellent point about the danger of what I term "compliance fatigue". There are now a vast range of laws that multinationals (and even small companies) are expected to comply with. The list seems endless and ever-growing: not just antitrust, but anti-bribery and corruption, anti-money laundering, data protection, trade controls and sanctions compliance, insider dealing compliance, and for listed companies also securities law compliance. This can make busy business people feel that they are been bombarded with requirements and legal advice. I think the solution is to try to avoid compliance fatigue by trying to integrate compliance training on various topics so that the businesses understand compliance requirements in a more holistic way.

I also think it is important to make compliance training accessible to busy business folks who may have many pressing business travel commitments and cannot necessarily give up half a day or whatever time it is to sit in compliance lectures: so my advice is to use the many tools now available: while face-to-face training is of course desirable when it can be achieved, online training is better than no training. Also, make compliance learning a fun experience and not an imposition: some

companies use fun tools like gamification and compliance-bots to help avoid compliance fatigue and to instil perhaps a little bit of "competition" into the compliance efforts.

A Court of Appeal decision from September 2018 established that documents, including interview notes and forensic accounting reports generated by mining company ENRC during an internal corruption investigation were protected by privilege and therefore did not have to be disclosed to the Serious Fraud Office. Do you believe the discussion over privilege has been settled after this ruling? Do you see areas where there is still legal uncertainty regarding privilege in the UK?

Of course, privilege laws differ all over the world, so I do not think we can say that the laws on privilege are even close to being settled. Under the *Akzo* doctrine in the EU, for example, in-house counsel (and indeed external counsel who are not qualified to practise in an EU country) have no privilege whatsoever in the context of an EU antitrust investigation, whereas in-house counsel do have legal privilege when it comes to purely UK investigations. I do think this unsettled state of privilege under the *Akzo* doctrine is unfortunate in the extreme, as it is predicated on the (completely erroneous) prejudice that in-house counsel, as "employed" lawyers, cannot give independent antitrust advice. This is clearly an outdated notion and indeed in my experience in-house antitrust counsel can (and do) give very robust antitrust advice. Also, the failure to allow in-house antitrust counsel in EU investigations to benefit from privilege for their advice is seriously counter-productive, as it risks antitrust compliance advice being given in the most effective way which would ensure greater compliance and more ethical business behaviour.

Due process problems have received more attention as fines in competition cases have increased greatly in recent years. The ICN's *Framework for Competition Agency Procedures* seems to be an indication of that, as well

as an important step towards fairness and consistency around the globe. Are there procedural fairness issues where you see there is still room for improvement?

First, I must say that I welcome the ICN's *Framework*, and I am very pleased that at the ICN's annual meeting (in Cartegena in Colombia in 2019) there was a fruitful dialogue on procedural fairness. Of course, the topic is a sensitive one to some agencies, as they feel slightly under attack when due process and procedural fairness are being discussed: but the topic is absolutely vital for the fair and proportionate enforcement of antitrust laws, and this can ultimately not only benefit businesses, but the agencies themselves. Without wishing to name any specific countries, there are a number of jurisdictions where even the most basic rights of defence are compromised: for example, I have heard it said that in some countries, even external counsel are not allowed to represent the company on site during an on-the-spot investigation, which clearly compromises the company's right of defence. So I am glad the ICN is now approaching this topic seriously, and I believe this is probably the best place to do this, as more "soft convergence" can be achieved through ICN than perhaps in any other forum.

In your view, how will Brexit impact public and private enforcement in the UK? What do you see as the key challenges ahead for the government, for companies and practitioners?

Well, my personal views on Brexit are well known to my friends. I am a Europhile and wanted the UK to stay in the EU – not only because it is the right thing for the country, but also because I am honoured to be a non-governmental adviser to DG COMP for the work of the ICN (I am grateful to have this position through my Irish nationality). On a practical level, I think there may be a decline in follow-on claims in the English courts post-Brexit and a corresponding increase in civil litigation for antitrust claims in other EU Member States. I do see a likely increase in UK merger control, as the EU Merger Regulation will not apply in the

UK, so there would have to be more UK filings. But at the end of the day, all this can be sorted out. Antitrust enforcement is the smallest of worries for the UK post-Brexit.

From your professional experience at Shell, which do you see as the most important elements of good leadership?

"Tone from the Top." By which I mean a genuine commitment to undertake business ethically and to "do the right thing". But while the culture of the company comes from the top, it is not just the responsibility of the board. Business integrity involves tone at and from the top, tone in the middle and tone right down the organisation.

What do you think is the most pressing topic competition issue today?

Well, I am not sure it is necessarily the most pressing, but I do think that the debate on artificial intelligence/algorithmic collusion is probably one of the most interesting topics. There are now many very interesting articles on the topic, including a 2017 BIAC (the Business and Industry Advisory Committee to the OECD) paper for the OECD. In summary, BIAC concludes that, although the concept of algorithmic collusion seems novel, the legal tests which will have to be applied to establish a violation (for the moment at least, until and unless the law is changed) will still be whether an "agreement" or a "concerted practice" is in place.

Could you tell us about your experience working with other distinguished women in competition over the course of your career?

There have been so many truly inspirational female antitrust lawyers that I have been honoured and privileged to work with (or even work on the other side from) throughout my career that the list is almost too long to cite, but two women antitrust lawyers I have always admired both happen to be British (although there are a large number of inspirational women

in other countries, including many very dedicated woman in antitrust agencies and universities around the world), but the two I would note as being particularly inspiring for me personally are Lynda Martin Alegi and Rachel Brandenburger.

Do you believe there are still challenges to be overcome and/or myths to be dispelled regarding female professionals' presence in the marketplace?

I have never seen it (speaking for myself) to be a real challenge to work as a female antitrust lawyer, but I guess that is because I was really fortunate that my husband gave up his career to care for our children. I can see that trying to balance a career and a family can be a challenge, but I think if employers are prepared to be flexible, this is entirely possible. Speaking personally, when I led the antitrust team in Shell, I always tried to be very understanding and flexible about balancing work and family commitments, but I did not just apply this principle to women in the team, I applied it to my male colleagues too.

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Leading competition professionals from around the world present reflections and forecasts on topical issues in antitrust and competition law and policy in this second volume of Women & Antitrust. Over a series of candid conversations, enforcers, in-house counsels, lawyers and academics take on questions about an extraordinary year. Nestled among the exchanges are insights into the professional paths of the women interviewed. Through personal anecdotes, they share perspectives on their chosen roles, if and how gender has informed their career choices, and offer advice to young practitioners interested in joining this field.

This volume has been published in cooperation with Women's Competition Network (WCN). Another volume was previously published in cooperation with W@Competition.

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