Brown Bag Program

Spanning the Globe: What Every In-House Counsel at a Multinational Company Needs to Know

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ELISE KIRBAN: I'm Elise Kirban, your moderator today, and I'd like to welcome you all to the Corporate Counseling Committee's latest virtual brown bag, which we've ambitiously entitled, "Spanning the Globe: What Every In-House Counsel at a Multinational Company Needs to Know." I'd like to introduce you to the four distinguished panelists we have with us today. I'll do that in the order in which they're going to speak. Our first panelist is Ken Glazer, who is the senior competition lawyer at Coca-Cola in Atlanta, where he is responsible for handling competition matters around the world. Prior to joining Coke, Ken practiced antitrust law at Patton Boggs in Washington, DC. He is currently serving as Vice-Chair of the Section of Antitrust Law's Section 2 Committee.

Our next panelist is one of our colleagues in private practice, Jonathan Jacobson, a partner at Akin Gump Strauss Hauer Feld LLP in New York, where he is co-chair of the firm's national antitrust practice. Jon has taken a lead role in many significant antitrust cases over the course of his twenty-seven-year career, including *PepsiCo v. Coca-Cola* (where he indeed did work with Ken), *United States v. VISA USA*, *Eastman Kodak v. Image Technical Services*, and a number of others. Jon is also active in the Antitrust Section, and is currently Editorial Chair for the upcoming revision of the *Antitrust Law Developments*, which is moving into its sixth edition. He is also Co-Chair of the Section's Publications Committee. He has also been appointed to serve as a Commissioner on the Antitrust Modernization Commission and frequently publishes articles and books on a variety of antitrust topics.

Our third panelist is Catriona Hatton, who joins us from the Brussels office of Hogan & Hartson LLP, where she is a partner, a member of the firm's antitrust, competition, and consumer protection group, and managing partner of the Brussels office. Catriona has been practicing EU competition law in Brussels for over fifteen years and has extensive experience advising clients on

both EU and national competition law aspects of mergers, government investigations, and compliance with competition rules that apply to a wide range of commercial agreements. She has represented clients in a variety of industries, including chemicals, pharmaceuticals, media and entertainment, automotive, and energy. She also practices in the area of data protection, which is one of the topics she'll talk about today, advising clients regarding EU-wide compliance with data protection laws and issues relating to the transfer of personal data to countries outside of the EU. Catriona is a UK- and Irish-qualified lawyer and speaks English, Dutch, Italian, French, and Irish.

Our final speaker is Aimee Imundo, who is antitrust counsel for General Electric Company. Aimee is based in GE's corporate offices in Washington, where her practice includes responsibility for counseling, transactions, litigation, investigations, training and compliance—all on a global basis. Prior to joining GE, Aimee practiced law at Arnold & Porter in Washington, where she worked primarily on antitrust litigation and transactions. Aimee has also been active in the Antitrust Section and is a frequent speaker at antitrust law conferences on international, transactional, and compliance-related topics.

As you can see, we have a wealth of knowledge and experience on this panel. And with that, let me turn the program over to Ken, who will get us started.

KEN GLAZER: My topic today is how to manage multinational transactions. We really are in a new world today from what it was ten or fifteen years ago. There is now a huge amount of antitrust law around the world to worry about. There has been a veritable explosion in just the last five or ten years of new antitrust laws—countries enforcing their laws in a new and vigorous way that hadn't been the case before. Depending on who's doing the counting, we now have more than one hundred countries with antitrust laws, and that really does include the biggest, most important countries. And most of those countries have some form of premerger provision. So, the first starting point of my remarks is that antitrust law, and specifically merger law, is now a global phenomenon.

We are in a new world, a world where you have to worry about antitrust law everywhere.

—Ken Glazer

The second starting point is that while it's global, it's still jurisdiction by jurisdiction; there is no world antitrust body. If you have to do a merger filing in one country, filing in another country is not a substitute for that. Of the hundred or so countries that have antitrust laws, about seventy-five have some kind of premerger regime—that means on the same international deal you can have different outcomes—where you can have one country clearing a deal, another country rejecting it or imposing conditions. The most famous recent example of this is the *GE-Honeywell* case. Now when I say that merger law is jurisdiction-by-jurisdiction, the one big exception to that is, of course, the European Union, which now covers fifteen countries, but in May of this year will cover twenty-five countries in Europe, and that is a multinational body. But for deals that fall below the very high EU threshold, you still have to take into account the merger laws of all those individual countries. And I believe all of them, or just about all of those twenty-five countries has its own individual merger law.

So, I'm really going to be Johnny-One-Note on this panel, because my point is, we are in a new world, a world where you have to worry about antitrust law everywhere. I'm going to be making that same point over and over again in different ways. I see three implications for this in the area of deals, especially international deals. First, you have to worry about notification almost everywhere now. (I'll be getting into that in some greater depth.) The second point is that all the substantive antitrust issues that you used to have to worry about just in a limited number of jurisdictions, and especially the United States, fifteen years or so ago, you now have to worry about in a whole lot of places. The third point is now you have to have the right antitrust resources in a whole lot of places, and I'll touch on that briefly at the end.

Turning to the first area, I'm going to spend most of my time on this question of notification and reporting. To repeat, this is a widespread problem now. You have to worry about notification almost everywhere. By my latest count, the number of countries that have some kind of premerger regime is around seventy-five. Just to give you a sense of how that's growing, one of the leading treatises on international mergers is a book by Bill Rowley and Don Baker, and the 2000 edition of that said sixty countries have merger regimes. Today, as I say by my count, we're up to seventy-five. By the way, a good source on this is a very good publication by the Antitrust Section on international competition laws generally. But the key point I would make is, while the books are a good starting point, you cannot rely on any of them because the law is changing so rapidly. You always need to re-check. And that's because you have new countries adopting merger laws for the first time, or antitrust laws of which merger may be a part, for the first time. For example, Coca-Cola had to do its first filing in Morocco last year because of a brand new law there, which went into effect I think at the beginning of last year. India has had an antitrust law for a number of years, but they just revised their antitrust law and it now contains a merger provision. And then, of course, you're constantly having changes to the merger laws, and the European Union has just revised its laws quite extensively. So you can never go by a source that's even only one year old. You should always go back and check. Fortunately, you can now get a lot of this information on the Web and a lot of the agencies now have actually very good Web sites.

But there are now deals where literally dozens of separate jurisdictions have to be reported. This really is a new world we're living in. Going back even as recently as 1988, you really only had to worry in a big way about the United States and just a scattering of a few other countries. Then you had the European Union adopt its merger control regulation in 1989, which went into effect in 1990. And then, as I said, over the last twelve to fourteen years, dozens of new countries have come online with antitrust and merger laws. So, in the case of Coca-Cola, for example, a few years ago, we did a deal where we were buying some of the Cadbury-Schweppes beverage brands around the world and I believe the count was, we had to do at least two dozen merger filings around the world. Just to illustrate the geographical breadth now of these laws, about a week after we announced our Cadbury deal, we got a letter from the Zambian Competition Commission reminding us that they now had an antitrust law with a merger provision that requires a premerger filing. The point is, if you're in a world where you have to worry about a filing in Zambia, there really are not too many other places you don't have to worry about. And that was back in 1998, and that's six years ago and there have been a number of new countries added since then.

I keep talking about notification. Why is notification so important? If you're advising your deal people, your deal lawyers, they have to understand that these notification systems determine the whole timing by which they can complete a deal because the merger laws almost invariably have waiting periods. You have to file and then you have to wait a certain period of time before you are allowed to close. That could take six months or even longer. Your deal team has to take into account that time lag as part of the deal planning process. And it's critical for the antitrust lawyers to be part of that process from the very beginning so that it's understood from the very beginning.

In some countries you run into unusual delays. I mentioned Zambia a minute ago. We also had to file in Zimbabwe on our Cadbury deal. They had a new law and it was so new, in fact, that it was clear that we had to file but they didn't have their premerger form ready. And it wasn't ready for about another nine months. Essentially, we had to sit there and wait for them to get their form ready before we could even begin the process and start the clock rolling on that. And your deal people need to understand that it takes a lot of time to fill out these forms. Some of these forms are quite onerous. Some require a lot of substantive analysis and huge quantities of data. Some of them

require translations of deal documents, and so forth. And your deal people also need to know there are filing fees. Fortunately, most of them are not high, but there are some that are quite steep, even relative to the size of some deals.

So the first thing you have to do in a deal is figure out where it's going to need to be reported, and where there will be some level of agency review. For each of those you have to figure out the timetable. It's hard to generalize across seventy-five different laws. Each one is different and has its own peculiarities. But let me try to just make a couple of general points that apply across the board.

Of the approximately seventy-five countries that have some kind of merger regime, most of those seventy-five are mandatory, that is, if you meet the threshold, if your deal or if the parties are of a certain size, you have to notify. It's not voluntary. But even where premerger reporting is voluntary, in some cases it's what I would call voluntary in theory but mandatory in fact because if it's a deal that has serious or some significant antitrust issues, you really want to file in the first place, even if it wasn't technically required because the agencies can come after you anyway, even if you didn't have to file in advance. In other words, it's going back to the pre-Hart-Scott-Rodino situation in the United States. As a practical matter, in virtually all of those countries, you do need to pre-clear the deal if the deal is the least bit controversial from an antitrust point of view. And that's true even if you have a deal that falls below the threshold. There are many cases in which the prudent and the responsible, sensible thing to do is to notify the agency, even if you fall below the threshold.

The second observation about these premerger laws is that the business people need to understand that the scope of these laws is quite broad. They hear about merger law—they might have this idea that it just applies to a full-scale merger. They need to understand that these laws typically apply to a much wider range of transactions than just full-scale, formal mergers. They apply to all manner of acquisitions of stock, acquisitions of assets, changes of control, many different kinds of joint ventures, and even in some cases the grant or acquisition of an exclusive license. They need to understand that the reporting requirement could and very often does apply to the seller as well as the buyer, so the seller can't necessarily just sit back while the buyer does everything. They also need to understand that the laws often require the parties to take into account any other deals that the same parties might have done with each other within a certain space of time. In other words, they need to understand that they can't do a deal by little incremental steps. Incremental, smaller deals that fall below a reporting threshold may still trigger premerger review if they take place within a certain time period.

The third point I want to make about these merger laws is that each one does have a different threshold for filing and there's no way to generalize. But it sometimes takes a fair amount of time just to figure out whether you have to file. So, again, that time element also needs to be built into the planning process.

A fourth point is that a lot of these premerger laws—something like twenty or twenty-five of them—have what I'll call a triggering event or an early filing deadline. In other words, virtually all the laws say you can't close your deal, you can't consummate the transaction, until you have filed. For example, under the Hart-Scott Act, you don't have a deadline for making a filing; you just can't close your deal until you file and the waiting period has expired. But there are about twenty or twenty-five of them where you actually have to file within a certain number of days of a particular event. Typically, it is the signing of a definitive agreement. That is true, for example, of the European Union and a lot of other countries in Europe. In some cases, though, the filing requirement is triggered by something less than a definitive agreement. So those need to be looked out

for. Some companies have actually been fined in the last couple of years by the Brazilian agency for failure to file on time.

The fifth point I want to make about these laws is that some of them have a surprisingly broad geographical reach. Again, this is another counseling point. Your business people need to know that just because a deal doesn't have an immediate impact in a particular country doesn't mean that no filing is necessary in that country. There are a lot of examples of this. The leading example is the European Union because the way the EU merger control regulation is structured, there are some joint ventures that need to be filed even if the joint venture has no impact whatsoever on the European Union. If you have two companies, each of which has a Community dimension within the meaning of that phrase, and they go off and they do a joint venture in, let's say, Latin America, they will still need to notify in the EU. It seems counter-intuitive, but that's the way it is. One should not assume that there is no filing necessary in country A just because the deal has minimal or even zero impact in country A.

Your worries have now been internationalized . . .

—Ken Glazer

One final point on notification: I've been discussing all this as though notification is a burden and, of course, in some respects it is a great burden, especially if you have to notify in multiple countries. But, there is another way of looking at it, which is that in some cases (this is very true, for example in the EU and in the U.S.) notification does give you a tremendous amount of comfort. If you notify and the waiting period has expired and the deal clears—you have a great degree of comfort that you wouldn't otherwise have had.

Let me just turn quickly to the substantive issues—it's really an obvious point. If you have antitrust laws around the world, or merger laws, you now have to worry about these substantive issues in all those countries, whereas in the past you only had to worry about them in the United States and just a smattering of countries. Your worries have now been internationalized, starting, of course, with just the basic question of whether the deal is doable. So you do have to go through your substantive antitrust analysis. Again, this differs from country to country. Every country has its own distinctive standard, although there are some common elements. A lot of countries focus on the dominance-type of test—they are looking to see whether the merger will result in one firm becoming dominant. A lot of countries look at the structure of the market. You have to look at this for every country where there is some impact and where notification is going to be required. Some of the countries have merger guidelines and obviously those are important to get hold of and study if that country is going to be relevant. But many countries don't have merger guidelines and many don't even have precedents. But the number of precedents is now growing around the world.

In the U.S. we've always, in the past, worried about document creation. What are our business people going to say and write in their documents? In many cases those actually have to be turned over to the FTC or DOJ. You now have to worry about that issue of document creation in 75, 80, 90 countries. You should put into place a confidentiality agreement and make sure that it covers all the countries that are at issue to prevent improper uses of information or improper information flows. You have to worry about gun-jumping issues now, not just in the United States but in quite a few countries now, as well.

And I think you also need to think about the kind of deal points, the kind of provisions that we would put in a deal document, when we have the United States in mind, exclusively. Like a provision that says the deal is subject to regulatory approval. That now needs to be internationalized. You have to think about the nature of the approval you're seeking in the number of countries, not just in the U.S. or Europe. And the various other kinds of provisions—best efforts provisions, required spin-offs and divestitures—your concerns now have been internationalized.

And then, the final area to cover is resources. Given this new world we're living in, you now have to think about having the right resources in each of the countries in which you're going to be facing some kind of regulatory scrutiny. And that means antitrust counsel, perhaps for both sides, and local counsel, perhaps even for both sides of the deal, as you would in a sophisticated jurisdiction. You may need to engage an economist, and even local economists, in various countries. You need to engage your local business people, not just people at headquarters, because they're the ones who know the markets and the impact the deal is going to have on the market. You now need to gather market share and other types of data for dozens of countries. I think that Aimee is going to go into greater depth on this resources point later in the program.

That wraps up what I was going to cover. For internal purposes, I've prepared a checklist on competition law issues that people working on transactions ought to have right there in the forefront. I'm happy to share that checklist with anyone who registers an interest. Send me an e-mail at kglazer@na.ko.com.

ELISE KIRBAN: We'll also post that checklist on the Antitrust Section Corporate Counseling committee's Web site (http://www.abanet.org/antitrust/committees/counsel/home.html). Jon, did you have any thoughts or questions or comments for Ken?

JONATHAN JACOBSON: It struck me that one of the particular difficulties might be negotiating risk-shifting provisions. Do you do one for the whole deal? Do you do it country by country? It would seem to me that it requires a really early assessment about the merits. How do you go about that, Ken?

KEN GLAZER: It depends a lot, I think, on the nature of the deal. I think you can distinguish between a very centralized deal, on the one hand, and a decentralized deal. A centralized deal is a merger, for example, or you're buying another company in its entirety. It's harder to break those things down on a country-by-country basis. Contrast it with a decentralized deal. Take, for example, the Coca-Cola/Cadbury deal—it really in a sense was not one deal but multiple deals because we were actually buying the trademarks in each country where those trademarks were registered. And so you had a country-by-country breakdown with respect to those types of provisions.

ELISE KIRBAN: Aimee, as an in-house lawyer, do you have any thoughts, comments, or questions for Ken?

AIMEE IMUNDO: Ken pointed out how long these merger filings can take to put together sometimes. I wonder how you face the tension that I sometimes face, which is: your business people seem to understand when you tell them that this will take a long time and yet they really want to hold back on putting the time and attention into that until the deal is sort of real, which could mean a week before signing. And then how do you manage the fact that the day they sign, they're ready for you to have filed, and want to know what's taking so long? How do you manage that and get people to buy in and actually commit the time to you early on?

KEN GLAZER: The way I deal with that is, you need to let the business people know what you're dealing with and let them know the delays that you might be facing. And warn them that if we don't do x, y, and z, if we don't hire a lawyer in this country now and make a determination or hire a lawyer to start preparing the notification form or whatever it is you need to do, it's going to cause

a delay. I hate to put it this way, but you basically shift that back to the business people. All you can do is let them know what the costs are in terms of time and then, ultimately, it has to be their call as to how they want to handle it. But, clearly, it's critical for the in-house antitrust people to be part of that process from the very earliest stage.

ELISE KIRBAN: And I think it's really an issue of managing expectations, to a large degree. I want to move now to Jon Jacobson, who is going to talk about international coordination in cartel cases.

JONATHAN JACOBSON: I'll be talking, not just about cartel cases, but the inevitable tag-along U.S. class action litigation. We'll find out from the *Empagran* decision exactly how far the international scope of that extends. Many would say that international coordination in this context is an oxymoron, and I'm quite sympathetic to that. But in reality, the need for the best possible coordination really does arise immediately when a potential cartel problem is discovered. Now, typically, inside counsel will learn about a possible cartel problem either from a U.S. grand jury subpoena—that gives you a pretty good clue—or a dawn raid—that gives you a pretty good clue—or with much greater difficulty, internally from sources within the company. Occasionally, you'll also learn of a possible cartel problem when you're dealing with an existing problem in one product line and you then may learn of another problem in a related or different product line. We certainly saw that in the *Lysine* case and in a number of the *Vitamin* cases, as well. In all of these instances, a number of very important decisions must be made very quickly, and counsel must make sure to consider the implications for all major jurisdictions that may be affected.

The key in every case, and it's very difficult, is to get to the real truth and the whole truth quickly and accurately. Outside counsel will certainly be involved, but the role of inside counsel in this process is absolutely critical.

—Jonathan Jacobson

Often the very first question that must be asked is whether the company should apply for an amnesty. The go/no-go amnesty decision has to be made with great care but also with great speed. Time is of the essence because only the first applicant is eligible, both in the U.S. as well as in other jurisdictions that have amnesty programs. If you arrive second or third or worse, you're too late. You can always seek a reduced fine or other concessions in return for your cooperation, but amnesty as such is out. And that can be a big deal. Amnesty, when granted, means no corporate fine and no prosecution of individuals at the company. There is still civil damages liability, but in this country, the Department of Justice is even proposing legislation for de-trebling of damages for companies that have qualified for amnesty.

Even though the Justice Department and international enforcers have done a very good job in making amnesty a race to see who gets in first, the decision to seek amnesty is a monumental and extraordinarily difficult one. Once an amnesty request has been made, as a practical matter there is no going back. A mistaken decision to seek amnesty can be a nightmare if the client, after all, proves really to be innocent, or if the conduct is not really hard core. And in many cases the facts may at least be ambiguous enough that the right decision is not to seek amnesty but to fight. The key in every case, and it's very difficult, is to get to the real truth and the whole truth quickly and accurately. Outside counsel will certainly be involved, but the role of inside counsel in this process is absolutely critical. Inside counsel needs to identify the people involved, provide access to them, and most importantly gain their trust and do so on a very time-sensitive basis.

If a decision is made to seek amnesty, it's not necessary to convey to the DOJ every detail on day one. The DOJ puts a marker down for an amnesty applicant, holding the company's place in line, so to speak, for a reasonably short period of time after which more complete disclosures will have to be made. The EC has a similar process and allows what it calls a hypothetical application in which the company can apply for amnesty by reciting, on a hypothetical basis, a descriptive list of the evidence it believes it will be able to provide later on. The EC also allows a compa-

ny to enquire preliminarily as to the availability of amnesty without identifying who the company is, so long as it provides the broad product sector. And the examples used have been chemicals, construction, transportation—broad descriptive categories—to learn if a prior application in those categories has been made. The EC also allows applications to be made orally, which can be very important in maintaining confidentiality and protecting against U.S. civil discovery, as we'll talk about in a minute.

A key point is that if a decision to seek amnesty is made, an approach to the European Commission, the Canadian authorities, and possibly other enforcers should normally be made very soon after the approach to the DOJ—very soon, as in days, and certainly not weeks. Having made the decision to seek U.S. amnesty, it is quite rare that there would be any reason not to seek the same treatment everywhere else that it may be available.

Whether you seek amnesty or not, when a cartel problem is discovered it's important to start assembling the team quickly. Aimee will talk about this process in detail later on, but let me give you a few highlights focused on cartel-like investigations. For companies operating globally, any response to a cartel investigation must at least include counsel from the EC and counsel from Canada. Depending on the company's operations, you may need counsel in Australia, Japan, and several other countries, as well. Moving quickly is important here too, for slightly different reasons. Depending on the jurisdiction, the number of top lawyers, including those who are close to local regulators, may be quite small and you don't want to be shut out by your competitors having gobbled them up. In many cases, you will also want to retain top-flight economists and econometricians, not just in the U.S., as Ken was indicating in the merger context; you may need them in many other countries, as well.

Another issue that arises almost immediately in the process is the scope of the attorney/client privilege. But that's Catriona's topic and she has an excellent presentation on it. I'll leave that for her discussion in a few minutes.

Once the team is assembled, setting up regular communications is essential. There should be at least one live all-hands meeting early on if it can be done, followed by regular—meaning at least weekly—conference calls. You should determine a secure means of e-mail communication. Be very sensitive to the privilege issues you're about to hear about and consider setting up an e-room or other resource in which rights to particular files can be monitored closely to minimize attorney/client privilege and work product issues as you proceed.

Apart from managing privilege questions, another issue that is going to be faced fairly soon is whether public disclosure is required, either under U.S. securities laws or the public disclosure laws of other countries. Typically, a U.S. company will tend to disclose a grand jury subpoena but almost never an amnesty application. Some companies disclose when there's a grant of conditional amnesty; others do not. There are no hard guidelines on this and it depends on the company and its situation and, candidly, on the lawyer giving the advice. Disclosure issues must be analyzed not only from an SEC perspective, but certainly under the disclosure laws of all jurisdictions in which the company's securities are sold. Recognition also has to be made of the fact that if you disclose in one country, you probably ought to disclose in all of them.

Now, we've heard a lot from the enforcers in the U.S. and in Canada and in Europe about how closely they coordinate their investigations. One of the concerns that arises is that if I provide information to an antitrust enforcer here or one overseas, to what extent will that be shared with other enforcers or wind up some time later on in the hands of civil treble-damage plaintiffs here in the U.S.? In most cases, documents and information provided to government enforcers will remain confidential. But this is not necessarily so, and it's quite important to be careful. In terms of the U.S.

grand jury context, information provided to a U.S. grand jury is protected under Rule 6(e) of the Rules of Criminal Procedure absent a court order based on a showing of particularized need, which is difficult to establish. As a matter of both law and practice, the Antitrust Division will not share grand jury information with enforcers from other countries absent express consent from the disclosing party, which is typically given in the amnesty context but almost never in other contexts. Antitrust Division officials will never share grand jury information with civil plaintiffs absent a court order. But there are important caveats.

First, where conditional amnesty has been granted, the company that has applied will typically consent to the sharing of information by the DOJ with enforcers outside the U.S. Frequently, the result of that will be that a lot of information is exchanged about the companies that have not applied for amnesty but, rather, are resisting the investigation. Whether or not you've applied for amnesty, consent to share documents as opposed to oral information should be granted sparingly. The consequences of voluntary disclosure and later treble damage actions can be severe, and we'll talk about that in a minute.

Second, even without consent and even without an amnesty applicant involved, nothing prevents the DOJ from discussing publicly available information with other enforcers. So if there's a news story about a grand jury subpoena that has been received, or there are names of the employees of a particular company in publicly available information like a Web site, there's absolutely nothing to prevent a call from this side of the pond to the other or vice versa saying, "Gee, you ought to check out this news story. It's very interesting." Or, "Gee, you ought to go to this Web site here. There's some interesting information for you to look at."

There are a number of express written cooperation agreements that the U.S. has entered into with the European Commission, with Canada, and many other jurisdictions. (I'll take a moment here to insert a plug for the ABA Antitrust Section's upcoming book, *International Cooperation Agreements Handbook*, which will be available for sale at the Spring Meeting and which covers this issue accurately and in great detail.)

An important fact to recognize about all international cooperation agreements, however, is that they are trumped by domestic non-disclosure laws. So, if as in the case of Rule 6(e) of the Rules of Criminal Procedure, domestic law bars the sharing of information outside the investigating agency, an international cooperation agreement will not open a loophole and allow the disclosure anyway. There's one narrow exception in the case of antitrust mutual assistance agreements, but there's only one such agreement that the U.S. has today and that's with Australia and I am not aware of the exception ever having been invoked.

In addition to the sharing of documents that may be produced particularly here in the U.S., there's an issue that comes up in every global case about documents that are located overseas. Once a criminal investigation has begun, it's important to begin addressing those issues, again, as with almost everything else, very early on. DOJ grand jury subpoenas do not reach documents located outside the U.S. Typically, a DOJ subpoena will be accompanied by a demand to preserve foreign located documents and a reservation of rights to get them. But unless the DOJ proceeds through an MLAT, which is one of the cooperation agreement types, or some other means under which the process of the other country itself is invoked to procure the documents, the documents will not be subject to production in the United States. The DOJ has been trying to streamline and expedite the process of international evidence gathering, most recently, in a speech that Scott Hammond gave in November in Japan arguing for more legislation and other cooperation in international investigations. But as for right now, in any event, it remains quite difficult for the DOJ to get access to documents that are located abroad.

This difficulty in the criminal context should be contrasted with the process in civil cases under the Federal Rules of Civil Procedure. Those rules, which obviously apply in civil, not criminal cases, and apply only after a case has been filed, allow document requests and subpoenas for documents wherever they may be located. The only limitation is that the documents must be in the custody or control of a company over which the court has jurisdiction. And, or course, the request can't be overly burdensome, and must be reasonably relevant. Strangely, if documents located outside the U.S. are ultimately produced to U.S. located parties, like treble damage plaintiffs, they can then be subpoenaed by a grand jury. But timing issues tend to make this point somewhat academic.

Now, an issue that is quite current and unresolved is what happens in the case of voluntary provisions of materials to overseas enforcers. A particular issue that has come up is whether responses to Article 11(3) requests in the European Commission and similar information requests abroad are discoverable in the U.S., including applications made for amnesty or applications made for leniency or even statements made in a candid way to get more favorable treatment from an enforcer. An Article 11(3) request, like some of these other voluntary requests, is technically just a request. There are no penalties for non-compliance. In the case of Article 11(3), it's really a slap in the face of the EC not to respond and, in any event, non-compliance will be met with a Commission order requiring compliance in short order, in any event. Article 11(3) responses include supporting documents, but the key part of the response, and the thing the U.S. treble damage plaintiffs want most, is the narrative that counsel prepares setting forth in some detail the client's version of the facts and the applicable law, which is expected to be candid. These are submissions that treble damages folks in the U.S. are always anxious to get.

To date, I'm aware of only two decisions on the discoverability in the U.S. of Article 11(3) submissions, and the cases conflict. Both decisions are by special masters, not district judges, but they are both available. One is reported on LEXIS and another is on various Web sites. My paper will be posted, as Elise indicated, and if you need the decisions, feel free to consult the paper or contact me.

The first of the two cases I mentioned was *Vitamins*, a January 2002 decision in the District of Columbia. There, the Special Master rejected all the arguments—attorney work product, self-evaluation privilege, and comity—on the grounds that the submissions were voluntary and therefore ought to be produced. With regard to comity in particular, he said that those considerations were real but they were outweighed by the important U.S. interest in disclosure. More recently, in June 2002, in the *Methionine* case in the Northern District of California, the opposite result was reached. There, the Special Master upheld the self-evaluation privilege and upheld the comity argument. And what may have been particularly important in that case, even decisive, was the filing by the European Commission of an amicus brief opposing disclosure. My feeling is that future cases will follow *Methionine* rather than *Vitamins*. But, in any event, the issue has to be top of mind when responding to requests for information from foreign governments.

ELISE KIRBAN: It makes everybody think really long and hard about the complex web of issues you've got to face when you're dealing with something that has potentially massive ramifications for your company. I wanted to ask Aimee, as an in-house lawyer, what's your response to Jon's presentation?

AIMEE IMUNDO: Of course, the multinational that I counsel is the biggest, and the need for speed is something that Jon mentioned in the face of making these decisions about whether to go for-

ward and seek amnesty or not. The analogy with moving a big organization is turning a battleship around, and it's a constant challenge to get people to focus on important things quickly. And I wonder, Jon, how it is that you can rally your clients to really focus quickly enough on these decisions, especially where it's a little bit gray or you've discovered the conduct internally and you haven't gotten a grand jury subpoena?

JONATHAN JACOBSON: With great difficulty. And the larger the company, the greater the level of difficulty. As a general rule I think if you're convinced that amnesty is a real possibility and at least needs to be considered or recommended, it's essential just to grab the general counsel physically and walk with him or into the CEO's office as soon as possible. That can be complicated if the CEO herself is involved. That can make it even more difficult and, in that event, it may be necessary to go to members of the board of directors. But, in my experience, the critical thing is to go straight to the top as soon as possible and get a decision whether to pursue the amnesty course or to do something else and, at a minimum, get a direction to people within the company to cooperate with you to the maximum extent possible. If you don't do that, and you flail about at lower levels, you're going to fail.

ELISE KIRBAN: Catriona, you're over in Europe. Any thoughts?

CATRIONA HATTON: You mentioned that the U.S. domestic rules on non-disclosure might prevent the DOJ or FTC from sending information over to the EU or to some other third country with which they have a cooperation agreement. Is it useful to use domestic rules to try, if it's in the party's interest, to prevent the transfer of the data between the two agencies?

JONATHAN JACOBSON: It depends on whether you cooperate. If you're cooperating, as a practical matter, you can't prevent it and if you try they will view it as not cooperating. How do they get around the non-disclosure laws? I think it goes back to what I was saying. All of the cartel enforcers around the world are bragging of late about how much cooperation there is, so, clearly, they are talking to one another. They're not spelling out chapter and verse how they're doing that consistent with the international non-disclosure laws, but I have no doubt that the enforcers are going to the line and I certainly have no reason to believe they're ever crossing the line, but I'm sure they're going to the line of what they can disclose in terms of what's publicly available within the limits of the national non-disclosure provisions.

ELISE KIRBAN: We're going to now move to Catriona Hatton who's going to talk about privilege and also data privacy issues and how they interplay with this.

CATRIONA HATTON: These are two distinct issues. Obviously, one concerns EU rules on legal privilege and the other the EU data protection rules. But what they do have in common is that those issues are peculiar to Europe, and the rules in this respect often conflict with the rules in the U.S. and elsewhere. Therefore, it's quite difficult to deal with these issues in the international context in which most of us are operating.

First, I'll speak about the question of legal professional privilege and the position of the European Commission on that—in particular, the fact that the European Commission does not consider in-house counsel advice as privileged, which has obvious ramifications for those of you who are practicing in-house and, indeed, for us external counsel as well. And, the first thing on the EU

rules on legal professional privilege is that there are no written rules. It's not dealt with by any decision or regulation or directive. The European Commission's position is currently based on a 1982 judgment of the European Court, more than twenty years back, which is known to a lot of people as the *AM&S* judgment. The European Court's decision in that case was clear that communications between external counsel who are qualified in an EU member state and its client are privileged. But in-house counsel communications within the company are not, with the consequence that they could be seized by the European Commission in a dawn raid and can be reviewed by them and used in evidence to prove antitrust infringements.

In practice, all of this means that currently, in order to obtain a privileged opinion for EU Commission purposes, you need written advice from an outside counsel admitted to practice in the EU.

—Catriona Hatton

A subsequent court case clarified that in-house counsel communications which were reporting on external counsel's advice would be privileged. So if you had in-house counsel preparing a memorandum for circulation internally, say, that "Y law firm has advised me of this and the bottom line is such and such," that will be a privileged communication for the European Commission.

Another implication of the *AM&S* judgment is that advice from external counsel—U.S. counsel or other counsel—not admitted to practice in the EU is not privileged. I think all of the debates since *AM&S*—and there's been significant debate in the last twenty years on this question—has really focused on the issue of the lack of in-house counsel privilege and not on the fact that the Commission doesn't recognize privilege for external U.S. counsel's advice. I'm not aware of any cases where the Commission has seized advice from U.S. counsel to its client, but nonetheless it still remains the position of the European Commission that they could, if they so decided, review the advice given to companies by their external U.S. counsel. So, in practice, all of this means that currently, in order to obtain a privileged opinion for EU Commission purposes, you need written advice from an outside counsel admitted to practice in the EU. Now, in practice that will often be a collaborative effort between the outside and in-house counsel, who will have had their own ideas on the issue concerned, but ultimately—and particularly for sensitive issues—the final product should be signed by an outside EU counsel in order to benefit from attorney-client privileged communication status.

I think it's safe to say that there have not been numerous cases where the Commission has relied on an in-house counsel opinion to prove an infringement. But there are a few cases where their published decisions have even quoted the in-house counsel advice as helping to prove the infringement. I'll talk about those in a minute. And there's also the pending case of *Akzo Nobel*, which is currently before the Court of First Instance. I think a lot of people are very anxious to hear the final decision of the court in that case and to see whether there might be some scope for change in the rules.

I mentioned there are two published decisions where the Commission has quoted from in-house counsel's advice. One was *John Deere* and the other was the *London European Sabena* case. They're both a few years back, but in the *John Deere* case, the Commission fined the company €2,000,000 for an export ban. The export ban was expressed in a way that the ban would be applicable provided there was no contrary legal regulation which prevents that kind of a ban. The Commission noted that—this is the Commission's quote—"John Deere's own in-house counsel expressed doubts as to the legitimacy of such a device." The Commission also noted that "Deere and Company knew that such conduct and, in particular the export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel. Senior management of Deere and Company in Moline, including a member of the main board, was fully informed."

In *London European Sabena*, back in the late '80s, where the Commission found an abuse of dominant position, again, quoting from the Commission's decision, they said: "The infringement

was committed deliberately and Sabena could not have been unaware that it was infringing the rules of competition: on April 9, 1974, a member of its legal department stated that, in his opinion, its behavior could give rise to penalties imposed by the Commission pursuant to Article 86 (now Article 82)." These are both decisions where the Commission expressly relied on the in-house counsel's opinion. There will have been other cases where the Commission will seize the in-house counsel's opinion and maybe not use it or not refer to it in their decisions.

There is now a case before the European Court of First Instance, and I think a lot of people are anxious to see how that will come out in the end because it concerns a dawn raid on Akzo Nobel's premises in the UK last February. The Commission went in and took documents and e-mails as it usually would, but including e-mails and documents from Akzo's in-house counsel; Akzo's in-house counsel is a registered member of the Dutch bar. And Akzo requested that the Commission return the documents. The Commission refused and was using the documents in its investigation of Akzo's behavior. Akzo then challenged the Commission's decision before the European Court with respect to the seizure and the reliance on the in-house counsel's opinions. Akzo first went for interim measures before the Court to prevent the Commission from relying on these documents and the Court granted the interim measure in Akzo's favor. The Court, significantly, acknowledged in granting the interim measures that the applicant's arguments "justify raising again the complex question of the circumstances in which written communications with a lawyer employed by an undertaking on a permanent basis may possibly be protected by professional privilege, provided the lawyer is subject to rules of professional conduct equivalent to those imposed on an independent lawyer." They didn't go into the details, they didn't need to on the interim measures case. We are awaiting the final judgment, but unfortunately it may take quite some time. But I think there is some possibility, a little window of opportunity, that there may actually be a change in the rules.

On sensitive issues requiring written advice on compliance with EU competition rules, or with national competition rules of EU Member States, it is advisable to work closely with external counsel.

—Catriona Hatton

Now, the practical difficulties of trying to manage all of this is that you've got very different rules. Obviously, the rules are different from the U.S. rules on in-house professional privilege. But also they differ from certain EU Member States' rules. So, for example, Ireland, the UK, the Netherlands, Spain, Norway, and some others recognize in-house counsel privilege. That all creates quite a patchwork of laws that are difficult to deal with when you've got investigations going on in the EU and the U.S. or EU and parallel investigations by a national member state. You could be faced with a situation where, for example, the EU seeks to rely on in-house counsel opinion delivered by UK counsel, and the UK authority would not have access to the same opinion and could not rely on it. So, here are some practical suggestions pending a change in the current rules:

- On sensitive issues requiring written advice on compliance with EU competition rules, or with national competition rules of EU Member States, it is advisable to work closely with external counsel. This does not mean that you need an opinion from external counsel on every issue of EU competition law, but there will be situations which may involve serious restrictions where it is advisable to have external counsel provide the opinion.
- It is important to ensure that communications are headed appropriately. So, for example, a communication from in-house counsel to the company that repeats or summarizes advice from external counsel should be headed "Privileged Report on Advice Received From External Counsel," or similar wording.
- Similarly, advice from outside counsel should always be headed with appropriate language (e.g., "Attorney-Client Privileged Communication ") to show that it is privileged and confidential and that it is received from external legal counsel.

- The question arises as to how you should treat in-house counsel communications. Since in-house counsel communications to his/her company are considered privileged under national rules of some EU Member States and under U.S. law, and given the pending *Akzo* case, you should continue to label advice from in-house counsel privileged, with an indication that the advice is from in-house counsel. (In the event of a European Commission dawn raid, the Commission will likely review that advice; but, for example, the UK competition authority would not.)
- As to the form in which the advice is provided, you should avoid providing advice in the body of an e-mail or, if you do, always add a header indicating that the content of the e-mail is privileged and confidential. It is preferable to put the advice in an attachment. Request your outside counsel to provide their advice in attached Word or .pdf documents and that they provide appropriate headings for those e-mails.
- With regard to your paper files kept in Europe, hard copies of advice from external counsel should be kept in a separate file and clearly labeled as such. Given the pending *Akzo* case and the fact that some EU Member States recognize the privileged nature of in-house counsel's advice, hard copies of in-house counsel advice held at European premises should also be kept separately and labeled as "In-House Counsel Advice/Privileged."

The EU rules are very much in favor of protecting all personal information—even information that on any sort of reasonable consideration wouldn't be considered very personal.

—Catriona Hatton

On the data protection side, that's another thorny issue and, I think, one that may be very difficult to understand from the U.S. perspective because, again, the rules are so different and the EU rules on data privacy are very, very stringent. The EU rules are very much in favor of protecting all personal information—even information that on any sort of reasonable consideration wouldn't be considered very personal. There are quite sweeping rules, which govern any kind of data processing. For example, compiling even a telephone directory with individual's names is processing personal data. Likewise, accessing e-mails is processing personal data. So, that gives rise to certain issues when you're conducting an antitrust audit in the context of a compliance exercise in-house or if you engage an external team to do that, or indeed if you have a request from the U.S. FTC or DOJ for a document production that may involve you going through documents in Europe. There you need to be very careful with regard to protection, particularly of employees' e-mails, particularly the personal e-mails. As a general rule, the employer cannot demand access to computer files and e-mails that the employee has explicitly labeled as personal or private. In principle, those e-mails are protected under local privacy laws even though they are stored on the employer's equipment. There are some exceptions to this. For example, in the event of suspected criminal behavior, there may be reasons to access even the employee's personal e-mails. But because the rules vary from one Member State to another, it's quite a sensitive issue.

So, if you're in a situation where you need to access private personal e-mails of employees, you should seek advice first, or at least consider the issues probably on a national basis before doing that. If an employee has not distinguished—and some employees will not distinguish between those general business e-mails and the personal e-mails—then, in general, you can look at all e-mails, but the employee may challenge that position.

Finally, in carrying out an antitrust audit exercise or document production, you do need to be careful about what information is transferred outside of the EU because the EU data protection authorities generally consider transfers of personal data to the U.S. as illegal unless the receiving company has signed the safe harbor agreement or entered into a model contract or some other fairly limited exceptions. So that's another consideration to be taken into account.

I'm going to give a few practical suggestions as to how to deal with some of these issues when you are doing an antitrust audit or document production. I think it's a good idea to have an inter-

nal document which sets out the scope of the exercise you're carrying out and why you need to review certain employee files or e-mails. The document should show that you have given consideration to the European privacy issues and that you've taken appropriate measures to protect the employee's data as much as possible. For example, the protection measures might be limiting the number of people who review the data strictly to people who really need to see it. If possible, make the data anonymous, so that you don't identify the person from whom the data is coming. And again on the transfer issue, only transfer data outside of the EU where that's really essential.

In dealing with issues on the spot with the employees, you should provide an explanation to the employees concerning the purpose of the review. This may be an on the spot review and they may not have had prior notice but you should provide that sort of explanation to them there and then and you should also explain that you will not be reviewing e-mails that are labeled personal or private. If you have external lawyers who are doing that exercise for you, you need to give them appropriate instructions as to how to treat employees' personal or private e-mails.

Finally, again, because the transfer issue is one of the most sensitive, if the objective of the exercise can be achieved by gathering data in the EU and providing a report back to the U.S. where individuals are not identified in the report, then that's the preferable course. That won't be possible in every instance but where it is, that is the better option. It minimizes the risks. So, that's the myriad of difficult EU rules that you sometimes find yourself having to navigate.

You would need people in a hundred different countries to respond to the current laws and you probably need people in all the other countries to get ready for the laws that are coming.

—Aimee Imundo

ELISE KIRBAN: Because of time pressures, let's go right to Aimee's presentation.

AIMEE IMUNDO: We have heard about all the things that competition law advisors to international organizations have to worry about. I've been asked to talk about how you staff it. And, I'll say a little bit about GE's model and how that tends to work for us.

The short answer is that it would be really nice to have full-time competition law specialists everywhere. But, nobody can do that. It's just impossible. You would need people in a hundred different countries to respond to the current laws and you probably need people in all the other countries to get ready for the laws that are coming. So, bear in mind that, right from the outset, it's all about compromise and trying to make a blend that's going to work for you. You just cannot have inside antitrust expertise everywhere.

GE works on a specialist model, which means that we concentrate at the corporate level with full-time specialists in certain substantive areas. Antitrust is one, environmental is another, and so on. For antitrust that will be me and a small staff to worry about these things on a global basis. Then, the company also tends to put regional experts on the ground, in Asia and Europe. Those people are going to be pan-regional experts. They're going to have local language expertise, perhaps several languages, but they're not going to be full-time competition law specialists although you're going to have some substantive specialists there if you can. For example, we've got one full-time competition lawyer in Europe now, which is tremendously helpful, but that's the only region where we have one. It would be ideal if we could have a full-time person in each region. We just can't. So, given that, that's where the full-time expertise is concentrated. Then at the business level, that's where the lawyers are closest to the business in those countries. They tend to have a litigation or a deal background or specialized regulatory expertise that might be called for by their particular business. And then, of course, for everything else, you have to rely on outside counsel. I'll say more in a little while about how we use and select outside counsel and how that tends to work for us.

I've already said a little bit about how the substantive specialists work. We don't have an army of antitrust lawyers, and I suspect nobody does. So, at many of your firms it may be just one per-

son or it may be half a person, or a quarter of a person. But as I said, in addition to the corporate specialist, if we can get somebody at a region level, that's fabulous. We've got one, and then what's left for us is at a business level. Something that we do that I think is very, very helpful and that I would recommend, is to try to designate a lawyer at each business to be that business's "expert" in antitrust law. I put it in quotes because that person probably already has one and a half full-time jobs and so can never be an expert in competition law the way those of us who do it all day, every day can be. But, if a person can be designated, then you could institute what we have, which is a practice group. Then we try to make that person in each of the businesses be a target of update communications, which is going to help them spot issues and flag things and call up to corporate when they need us. The beauty of having one person do that is that that person is going to gain a little expertise just through interacting with you. The same questions will come up within his or her business and that person will be able to handle those questions and not call you all the time. And while, in a perfect world, I would say to everybody "call me anytime," I really don't want that to happen. I don't want everybody calling me at any time because then I could get ten different lawyers from the same business calling with the same question—instead, it's much better to grow a little expertise at the business level. And, luckily, we employ very, very smart lawyers. They get it quickly. Nobody ever calls with a stupid question—it's just that you don't want ten people calling with the same question. Of course, in a massive organization like this one, you actually wind up with a pretty robust practice group that can start trading information or get up to speed on what the corporate resources are in terms of training and let a thousand flowers bloom; but they need to be fed, they need to have a contact point. And then, best of all perhaps, they develop a relationship with the corporate resources, and because they know me, and there's a relationship that always eases the way that these things work, of course.

Try to designate a lawyer at each business to be that business's "expert" in antitrust law.

—Aimee Imundo

The role of regional experts really ends up to be coordinating the way that each of the substantive areas are handled or making sure that we're operating in a coordinated way. So I may not know what's happening in terms of licensing law that may affect some of the GE businesses or what's happening on the environmental side of a transaction that I'm working on, but somebody at the regional level is going to be thinking about that. That way I'm using a set of broad experts and it's very, very helpful in terms of coordinating across fields but not so much going down deep into a substantive area.

In the businesses, I would just point out that we have our general counsel, who I think have more of a consistency role across disciplines. Then you have your lawyers right down in the business level at the P&Ls, and it is important that a relationship be developed there because in a pinch, those are the people who know the business people who have the facts that you need. And if there's no relationship there, getting your facts is that much harder—you become almost paralyzed. And it's an opportunity to grow the expertise that you need right there. There are one or two GE businesses that have devoted a lawyer almost full time to antitrust work, although that's really the exception; generally, it's very specialized. So in our appliance business, for example, there is a lawyer who has focused full time on competition work and he has become an expert—I think he probably was before he came here—in distribution and Robinson-Patman and some of the issues that come up uniquely in that kind of business.

That brings us to outside lawyers. Though we've done the best that we can in-house, we're still going to need outside help because we can't be everywhere. We don't have lawyers everywhere. I think it's always the case that it's a bit of a patchwork quilt. You might have a business supported by a lawyer who really supports the business two or three subs up and is located, we hope, on the same continent. I can't say that's always the case.

How do we use outside lawyers, and when do we bring them in, and which ones do we pick? It's all about the outside lawyer developing expertise with the business. We're going to pull people in on big deals that are going to require a full-time person to help coordinate or actually do filings. The person at corporate, like me, may have the job of running the competition aspects of a deal, but even I can't really do that full time without dropping the ball on everything else that this company is worried about. So, to manage an international transaction and all the issues that Ken talked about—all those filings—I'll be the one more or less in charge of delivering the bad news, which is probably always the role for the inside lawyer. I'll be the one telling people how long this is going to be, the expectations, and of course helping you, as outside counsel, work efficiently and helping make sure that we are all coordinated with each other. I tend to work with a series of people, depending on what continent we've got filings in. I may focus on a smaller group to help me coordinate if we wind up with fifteen other people around Europe in Member or Non-Member states that we need to worry about.

In Europe, if there are multiple national filings I will tend to pick one counsel to help me coordinate that. And then, let's say, there are also filings in the the U.S. and Canada; so I may wind up with lead counsel in the U.S., Canada, and then somebody in Europe, and kind of leave it to them to make sure that at least those three lawyers are talking among themselves and with me, and that we get on the same page in terms of market definition, which is probably the most important thing for consistency's sake. We get on the same page on market definition and our methodology for measuring markets, how we're going to talk about the market, and perhaps even most of all, get consistent with what GE has said before in other filings (which sounds so basic and yet is so difficult to do because the lawyers wind up being the institutional memory on all of these things). Then I will leave it to those folks to coordinate on their ten separate national filings in Europe. I'll really rely on one central European lawyer to manage all that as much as possible. They may even draft a template of how the contents of a filing might generally look, sort of outline the way that we're defining the market and overall, how we see trends in that industry. Then, of course, there is the issue of getting the facts and making sure they actually work in that country, but that will be done on a more local basis, usually using a deal lawyer who is on the ground there in that country, at least in the business affected by the transaction.

On compliance matters, we tend to use outside lawyers a fair amount but usually it will be for a very specific mission. It will be because there's a particular area that has come to my attention as needing some attention either in terms of conducting an internal investigation where I'm curious about what's happening in a business or where I've identified an issue of training materials. Then I may ask an outside lawyer to get involved, maybe do some interviews at a business either to learn about its training needs or investigate something that I think needs investigating and then create some materials or, if need be, help me interact with the regulators that might have an interest there.

Of course, we've got to be mindful about privilege issues in that kind of a setting, and that's all the more reason I will rely on outside counsel there. There's just too much specialized knowledge needed about dealing with the regulators in a particular country for us to really have it inside. And I think that means probably nobody can have it inside if we can't.

As far as selecting outside counsel, I think probably like the other inside lawyers listening to this program, I tend to develop a short list and focus on those relationships. Those people will tend to learn the business. Of course, that's a life's work in GE and nobody on the outside can really know all of our businesses—probably nobody on the inside can either. So it's never going to be just one firm, but there is a lot of fluidity, especially if you have deal counsel who are trusted deal counsel

who concentrate on a certain part of the business. I will tend to use those antitrust lawyers a fair amount because I see it as an opportunity to grow the expertise. I'm always looking for opportunities to use new outside counsel on something that's less than a bet-the-company deal the first few times I use them, to gain a little confidence. And there are always conflicts, so you can never concentrate just on one firm.

I look for someone with local relationships who can get informal guidance if that's appropriate, or also who is familiar enough with the practice to be able to operate where there is not a developed body of written law.

—Aimee Imundo

On a national level I think there's a little bit more fluidity in terms of developing a network. There is a network that we tend to use, but with much less consistency. Especially where it's a developing competition law regime, I really value outside lawyers I can find who, on the one hand, have had some experience working with U.S. clients or at least understand the U.S. business mindset, which helps them communicate with me and helps me in turn communicate expectations up or into the business. But also, I look for someone with local relationships who can get informal guidance if that's appropriate, or also who is familiar enough with the practice to be able to operate where there is not a developed body of written law. I'll give an example of something where we got tremendous help from local counsel I had never used before. It was in an EU applicant state which at that time a couple of years ago had a new merger regime. They had the form, so that was good. We did the form and we were all ready to go—we had the filing fee ready but they didn't have a bank account set up to receive the filing fee. We were just going crazy doing this, and we found a local counsel who could make all the phone calls to sort of help them get that going and find out where we could send our money. I was ready to go there with a suitcase full of cash, but I was advised that that would violate other laws, so we couldn't do that. But that's the kind of thing—there's nothing written about it in the book, so you need somebody on the ground with great local relationships, the language, the practice. I don't think it's possible to have that on the inside, you have to get that from the outside.

For GE—and I'm sure this is true for others—one of the things that makes everything so difficult is that we're not just a multinational organization, we're a multi-organization organization. That means you can acquire things and have businesses all over the world and you're not always operating with the same set of ground rules even when you think you are, as far as even controlling your own businesses or getting them to recognize the structure and how it's there to help them on something that requires some attention. I have sometimes found in some businesses a resistance to drawing in corporate resources. I think there are a couple of rationales behind that. One, is people feel like they can just do it themselves and they don't need to bother anybody and don't want to call attention. Others just feel like "I just want to be helpful, I got this nice Article 11 request from the EU and I want to be helpful so I'm just going to respond to it and send it back." That kind of thing I think happens all the time in multinationals. It's a culture there—a business culture as well as true culture—that always makes it hard. I think part of our job is to bring some real sensitivity to that and help meld the organizations. ●