CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
June 2015 (2)

Why You Should Love Your Antitrust Compliance Monitor

Theodore L. Banks
Scharf Banks Marmor LLC

www.competitionpolicyinternational.com

Why You Should Love Your Antitrust Compliance Monitor

Theodore L. Banks[1]

I. INTRODUCTION

Compliance monitors in antitrust cases are not as common as in other areas of enforcement, but the subject has received attention recently due to the controversy surrounding the judicially appointed monitor in the *Apple eBooks* pricing case. Much of what has been written about that case focuses on some unique considerations there,[2] and, while it is hardly a representative situation, it does illustrate some of the "features" of a monitorship.

Before getting tied-up in Apple, it is worthwhile to take a step back and take a look at the customary role of a monitor, and, in my opinion, how a monitor can be very beneficial to a company as a way to resolve a government dispute and enhance a compliance program.

II. WHAT IS A COMPLIANCE MONITOR?

Think of a monitor as a compliance consultant, but one with a little more power than the consultant you would hire off the street. Think of him or her as "consultant +." The monitor is an independent party who is brought into a case to ensure that the terms of a settlement or judgment are followed. The monitor is appointed by an agency or a court, but is paid for by the company being monitored.

The monitor enables the government to off-load some work to someone who is an expert in the field in question. A monitor may be an attorney, accountant, investigator, engineer, etc. Optimally, the expertise in question relates to the substantive subject of the proceeding. In other cases, the monitor may have what I would call "procedural" expertise, with experience in conducting investigations or compliance programs. The monitor may actually serve as a compliance manager, and involve a team of experts in related subjects such as auditing or computers. While the monitor may be an attorney, there is no attorney-client privilege between the company being monitored and the monitor.[3]

In criminal areas other than antitrust, using a monitor as part of the resolution of a case has been called a "stroke of genius" since it may allow the government to resolve a case without the need to go through a full trial,[4] thus avoiding the costs of trial and the possibility of an outcome that is not to the government's liking. Once a settlement is reached, use of a monitor

---

[1] Partner, Scharf Banks Marmor LLC, Chicago, IL. The author serves as a compliance monitor for the Federal Trade Commission and the Competition Bureau of Canada. The opinions expressed herein those of the author and do not represent the positions of either agency or government.

[2] Some of the peculiarities of that case may derive from unique aspects of the Apple culture, which I discuss at T. Banks, *The Dominant CEO: Great for Business and Terrible for Compliance?* COMPLIANCE & ETHICS PROFESSIONAL 27 (March 2015).

[3] Such a privilege might be helpful. V. Root, *The Monitor-"Client" Relationship*, 100 VA. L .REV. 523 (2014).

[4] C. Ford & D. Hess, *Can Corporate Monitorships Improve Corporate Compliance?*" 34 J. CORP. L. 679 (2008), quoting J. Handzlik, CORP. CRIME REP. 12 (Sept. 10, 2007),

enables the government to have reasonable assurance that the terms of the settlement will be followed, without the need to use (or hire) government staff.

III. ARE THERE RULES?

Two memoranda from the U.S. Department of Justice ("DOJ") lay out the basic principles that the DOJ uses for the use of monitors. In the *Morford Memo* of March 7, 2008,[5] the agency acknowledged that a monitor may be a key part of resolving a matter with a non-prosecution ("NPA") or deferred prosecution ("DPA") agreement. The monitor's "primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals." The monitor would be used where appropriate, such as when a company does not have an effective compliance program. The monitor should be a "highly qualified and respected person or entity" and not present any conflicts of interest.

Although the memorandum states that the monitor is not an agent or employee of the government, this should be considered as a bit of a formality. In reality, the monitor is doing the job of the government and reporting to the government, acting "in loco imperium." So, maybe the monitor might be considered a *representative* of the government while not technically its "agent." The monitor's primary role, according to the memo, is to assess the effectiveness of the company's compliance program in preventing criminal misconduct. This is consistent with the standards in the Federal Sentencing Guidelines for an effective compliance program, and the directors and management of the corporation retain the obligation to the shareholders to implement such a program.

The memo acknowledges that the monitor needs to understand the scope of the conduct covered in the settlement agreement, but not to get involved in unrelated areas. Nevertheless, an understanding of historical misconduct may assist in compliance with the settlement, and each case is evaluated on its own facts.

The monitor is expected to communicate with the government as deemed appropriate. Periodic written reports to both the government and the monitored company should outline the monitor's activities, whether the company is complying with the agreement, and any changes necessary to facilitate compliance with the agreement. If the company does not accept the monitor's recommendations, the monitor should report that to the government, which would consider whether this refusal indicates a failure to abide by the settlement agreement.

The monitor is expected to disclose to the government previously undisclosed or new misconduct. The duration of the monitor agreement should be tailored to the problems that have been found and the remedial measures necessary to fulfill the monitor's mandate. The agreement should allow for the extension of the monitor where necessary, or where a change in circumstances allows for the elimination of the monitor.

[5] *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, Craig S Morford, Acting Deputy Attorney General (March 7, 2008).

Three years after the *Morford Memo*, another memo on the subject of monitors was issued by the DOJ.[6] The memo specified that a settlement agreement should explain the role of the DOJ in resolving disputes between the corporation and monitor. The DOJ does not consider itself a party to the monitor agreement, and will not arbitrate contractual disputes. The DOJ's role is limited to questions as to whether the company has complied with the terms of the agreement. If a company disagrees with the monitor's recommendation, it is urged to present an alternative and, if the parties cannot agree, then the DOJ would get involved.

It should be noted that for purposes of antitrust compliance these memos are interesting, but NPAs and DPAs are not used by the Antitrust Division of the DOJ at the present time (which of course may change at any time). The Antitrust Division had requested the appointment of a court-imposed monitor in the Apple[7] case (discussed below) and in AU Optronics.[8] The Antitrust Division sought probation to be supervised by a monitor because of a lack of commitment by the companies as to implementing a compliance program. Not only did AU Optronics refuse to acknowledge the illegality of its conduct, but it also refused to remove senior executives involved in price-fixing. A monitor, in the Division's view, was necessary to change the corporate culture and reduce the risk of recidivism.[9] The Antitrust Division insisted that indicted executives could not hold any pricing, sales, or marketing positions in the company.

In some cases, such as with Bridgestone Corp.,[10] probation may be part of a plea agreement where there are repeat offenses. The monitor may be appointed later if the company fails to make timely and complete reports. In general, the risk that a monitor will be appointed increases if a company refuses to take responsibility or simply refuses to implement a serious compliance program.

Compliance monitors (sometimes referred to as monitor trustees) are also sometimes used by the Federal Trade Commission ("FTC") as part of its consent agreement process. Interestingly, a 1999 study of compliance effectiveness by the Office of Inspector General noted that while the Compliance Division in the FTC Bureau of Competition was doing an effective job overall, there were some systemic improvements that could be made, and it needed more paralegals to assist in routine compliance monitoring activities.[11] The use of more independent monitors was not suggested.

However, since that time, the FTC has made use of monitors to extend the capabilities of the Compliance Division. In 2002, the FTC, in "Frequently Asked Questions About Merger

[6] "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," Gary G. Grindler, Acting Deputy Attorney General (May 25, 2010).

[7] United States v. Apple, Inc., No. 1:12-CV-2826 (S.D.N.Y. Sept. 5, 2013)(Final Judgment).

[8] United States v. AU Optronics Corp., No. CR-09-0110 (N.D. Cal. Sept. 11, 2012)(Sentencing Memorandum).

[9] *Prosecuting Antitrust Crimes*, Speech by Bill Baer, Asst. Atty. General (Sept. 10, 2014); *Compliance is a Culture, Not Just a Policy*, Speech by Deputy Asst. Atty. General Brent Snyder to International Chamber of Commerce, New York (Sept. 9, 2014).

[10] United States v. Bridgestone Corp., No. 14-CR-00068 (N.D. Ohio Apr. 30, 2014) (Plea Agreement).

[11] *Survey of the Systems and Processes Used by FTC's Bureau of Competition Staff to Ensure Compliance with Non-Monetary Provisions of FTC Administrative Orders in Competition Cases*, F. Zirkel, Inspector General, Audit Report No. 99-042 (July 16, 1999).

Consent Order Provisions,"[12] noted that a "monitor trustee is an independent third party appointed by the Commission to oversee certain terms of the consent order. The Commission has required a monitor trustee, sometimes called an auditor trustee or an interim trustee, in cases in which the order imposes obligations on the respondent of a specialized nature that may result in a temporary relationship between the respondent and the buyer of divested assets." It also noted that virtually every merger order issued by the Commission included a provision authorizing the FTC to appoint a "divestiture trustee," and that it had done so in 12 transactions. The terms of a divestiture order may include obligations to provide services to the recipient of the divested assets for a period of time.[13]

A monitor may also have specific expertise to supervise technical aspects of a consent agreement.[14] An order from the Commission may require a respondent to appoint a compliance officer acceptable to the Commission to supervise compliance with the order.[15] The FTC may seek a judicial appointment of a monitor in connection with injunction enforcement, but there should be some evidence that the respondent has violated the terms of the preliminary injunction.[16]

IV. WHY A MONITOR IS A GOOD THING FOR THE COMPANY

Having a monitor looking over your shoulder is an uncomfortable feeling, and it does add costs. But the cost element should be looked at in the same way the government looks at monitors that are put in place as part of a settlement agreement: you have saved the money that would have been expended by a protracted trial, and avoided the risk of a much worse outcome.

The monitor then can become a kind of insurance policy. The monitor's recommendations can help the company implement a compliance program that will almost surely satisfy the government[17] and minimize the risk of any enforcement actions.[18] Plus, the

[12] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Trustee Provision.

[13] *See*, e.g., the consent agreement with Reed Elsevier in connection with its acquisition of ChoicePoint, Inc., which included the appointment of a monitor to supervise the divestiture of certain assets to Thomson Reuters Legal Inc. In the Matter of Reed Elsevier NV, Dkt. No. C-4257 (June 5, 2009)(Decision and Order), https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-reed-elseviers-proposed-41-billion-acquisition (Sept. 16, 2008); In the Matter of Polyport International, Inc., Dkt. 9327 (Feb. 23, 2011)(Monitor Trustee Agreement); Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Jan, 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[14] *See*, e.g., In the Matter of America Online, Inc., Dkt. No. C-3989 (Dec. 14, 2000) (Decision and Order).

[15] In the Matter of Rambus Inc., Dkt. No. 9302 (May 14, 2009).

[16] FTC v. ProMedica Health System Inc., No. 3:11-cv-00047 (N.D. Ohio Feb. 3, 2012), denying the FTC's request to amend a preliminary injunction to appoint a monitor since the "assertion of a probability of violations is, under the circumstances, neither appropriate nor convincing." The court's civil contempt power was available to punish injunction violations.

[17] The author is unaware of any compliance recommendations made by a monitor that were found to be inadequate by an enforcement agency.

[18] Reliance on the advice of a monitor, if not preventing an enforcement action, would certainly mitigate any action. In the securities area, an SEC administrative law judge recently found that when the Robare Group relied on third-party compliance experts, there was no intent to defraud. In the Matter of the Robare Group, Ltd., File No. 3-16047 (June 4, 2015)(Initial Decision).

monitor can be used tactically by the compliance department in the company to get things done when it may have been facing budget or headcount resistance previously.

The compliance program that results from the monitor and the compliance department working together can benefit from the monitor's breadth of experience in compliance. At a minimum, the monitor can serve the same function as an outside consultant brought in to the review the compliance program. The monitor provides another set of eyes to identify areas where the compliance program can be improved, with the added benefit of providing a "stamp of approval" that will carry a lot of weight with the government. The monitor would be expected to be familiar with best practices in the compliance field, and bring to bear technical expertise (e.g., how to establish certain information technology procedures to effectuate a compliance program) that might not be available in the company.

The monitor can also mitigate the trust issue. In some cases, a monitor is part of a settlement or judgment since the government or a court needs additional assurances that the company will follow a compliance program. If there is a history of not following prior agreements or orders, even with a change in management, additional assurances may be needed. Third parties who are impacted by the case may also ask that a monitor be imposed.[19]

V. OK, SO WHAT ABOUT APPLE?

The *Apple eBooks* pricing case, and the disputes with the appointed monitor have attracted a lot of attention. Probably anything involving Apple and legal proceedings will attract attention because of the company's prominence, but the case involving its efforts to change the way that electronic books were distributed presented a particularly thorny conundrum for the antitrust community. Did offsetting the power wielded by Amazon in the distribution of eBooks justify the actions that Apple took in arranging a new, commission-based, system of distribution with the major publishers? Providing competition is usually thought of as a good thing, but here, the government alleged (and proved at trial) that Apple essentially coordinated a conspiracy among publishers to do business the way that Apple wanted. The evidence seemed to show that prices rose under Apple's system, which is usually not the hallmark of competition.

As part of the resolution of the case, the trial judge imposed a compliance monitor to ensure that Apple's antitrust compliance polices would deter future anticompetitive conduct. The monitor was expected to work with an internal antitrust compliance officer who would report exclusively to the outside directors on Apple's audit committee, and would be responsible for training Apple's senior executives about the antitrust laws and would ensure that Apple abides by the final judgment.

Apple, which disagreed with the outcome of the case, also disagreed with the imposition of the monitor. But the evidence seemed to indicate that Apple did not have a history of robust antitrust compliance programs. For a company of its size, this was surprising. So, one might assume that a monitor would be employed to create an antitrust compliance program, or

[19] On the assumption that a monitor imposes burdens on the monitored company that might not be borne by a competitor, the risk of some non-price predation as a tactical move is present, of course. But the glass-house syndrome should keep competitors who have raised the issue and thereby invited scrutiny in line.

revitalize the existing program. Compliance with the specific terms of the court's order would be something new for the company in any case. Monitors are usually expected to have access to senior management and executives as needed, and Apple resisted this.

Apple objected to many of the monitor's actions and sought to disqualify the monitor. The district court refused,[20] and the appellate court ruled that there was no abuse of discretion in declining to disqualify the monitor.[21] The appellate panel was somewhat critical of the monitor's behavior, and noted that there was a difference in approach between an imposed monitor and one that is in place as a result of a voluntary settlement of a case. There were *ex parte* conversations between the monitor and the trial judge, and with the DOJ, to which Apple objected. Notwithstanding language regarding assessment of compliance programs 90 days after the monitor was appointed, the monitor got started quickly, apparently in response to conversations with the trial judge. Apple resisted, the monitor complained of foot-dragging, and attempted to talk directly to senior officers. At the same time Apple complained about the monitor's fees, which resulted in a charge in excess of $130,000 during the first two weeks.

The court noted that a monitor is subject to the same disqualification rules as a judge: lack of impartiality, personal bias or prejudice, or a financial interest in the subject matter.[22] The appellate court could not say that the district court abused its discretion when it concluded that the monitor's ex-parte communications and declaration in opposition to Apple's attempts to stop or remove the monitor did not justify his removal. While the monitor's rate was high, it was approved by the court, and, since transparency is important in these matters, a negotiated reduced rate should not have been placed under seal. The amount of the fee would not work a hardship on Apple, and the mere fact that the monitor received a fee did not mean that he had a disqualifying financial interest.

As noted in a concurring opinion by Judge Furman, a dispute resolution procedure was established by the district court to resolve any future objections. If the parties could not resolve it themselves, then they could bring it to the attention of the court. Apple did not use this process in good faith. Rather it largely sat on its hands, allowing the relationship to worsen without the district court's knowledge. While the monitor may have used poor judgment in some of his actions, the court could not be faulted in failing to address issues of which it was unaware.

If one looks back at the Morford and Grindler memos from the Justice Department, most of the contentious issues between Apple and the monitor were addressed in those documents. If the parties have a dispute, it should be surfaced early. A monitor should not stray into areas unrelated to the violation, but does need to understand the context of the violation. From what has been reported, it does not appear that the Apple monitor went beyond his mission of making sure that an antitrust compliance program was implemented. Apple objected to the way he went about that mission as overly intrusive. The monitor viewed it as being diligent in following his mandate.

[20] United States v. Apple Inc., 992 F. Supp. 2d 263 (S.D.N.Y. 2014).
[21] United States v. Apple Inc., No. 14-60, 2015 U.S. App. LEXIS 8854 (May 28, 2015).
[22] 28 U.S.C. § 455, Fed. R. Civ. P. 53.

VI. WHAT DOES IT ALL MEAN?

Monitors can provide a lot of assistance to both parties as part of a negotiated resolution to a case. The government gets a quicker resolution than would be provided by a full-blown trial, and it has assurances that its remedies will be followed without devoting its internal resources to supervision. The defendant will have the benefit of an expert helping it implement a program to comply with the requirements of the antitrust laws and any specific terms of the settlement.

Monitors that are appointed by a court to implement a judgment may not be welcomed by the defendant. Nevertheless, under current DOJ policy, the conditions under which they are appointed certainly indicate that a monitor is appropriate: recidivism, failure to accept responsibility, or failure to implement a compliance program. The Apple objections to the activities of its monitor were unique, but do serve to illustrate that the terms of a court-appointed monitor's duties need to be consistently understood by all parties, even if the monitor is greeted with "chilly reticence" rather than "warm hospitality."[23] Apple seemed to engage in some of the same conduct as A.U. Optronics, the only other case (so far) where the Antitrust Division has sought a court-appointed monitor. But regardless of the reasons why a monitor was imposed, Apple failed to avail itself of the process that was available to resolve disputes with the monitor. Once it did, things seemed to get better.

So, if you have a chance to negotiate for a monitor, use the opportunity to get the best compliance program you can. See the monitor as your ally in improving compliance beyond what you might otherwise have been able to accomplish on your own. If the monitor comes as part of a judgment, even if your case is on appeal, make sure that you understand exactly what the monitor can do under the terms of the judgment. There should rarely be a reason not to follow the monitor's recommendations, but if it seems like there is overreaching, communicate with the court to resolve the differences.

[23] United States v. Apple Inc., No. 14-60, 2015 U.S. App. LEIS 8854 (May 28, 2015), Slip Op. at 5, n.1.