Introduction to Competitor Agreements and U.S. Law

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Business leaders have a passion to compete and win. How-to books tell them, "Make it happen." But, like a roughing-the-passer penalty, there are limits. Last week, C. S. Chung, V.P. of Monitor Sales (including flat-screen TVs) for LG, pled guilty in a San Francisco federal court in a global conspiracy to fix prices in the sale of LCD screens. He got a 7-month vacation at Club Fed . LG company agreed to pay a $400 million criminal fine. The next day, Sharp Corp. pled guilty (a $120 million criminal fine) to conspiracy to fix prices of display panels sold to Dell, Apple and Motorola. Another company and 3 other execs were also nailed. And the Justice Department says there's more to come.

So, if you're an exec or shareholder, do learn the boundaries set by competition law. It comes from both federal and state law. It's enforced by the Justice Department, the FTC, the states, and by your customers and competitors in private lawsuits. That means you, in any size business, should talk to an expert business lawyer *before* your competitor does. And if you act illegally with your competitor, he might become the best witness against you.

"Competitor collaborations" involve one or more business activities, such as R&D, production, marketing, distribution, sales or purchasing. Firms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present. A firm is treated as a potential competitor if, for example, entry by that firm is reasonably probable in the absence of the relevant agreement.

Under federal law, agreements of a type that almost always tend to raise price or to reduce output are "per se illegal", meaning illegal without any other proof of facts. These include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. Be sure never to agree, even implicitly, to any such arrangement with a competitor or with a supplier or customer who might be ready to compete with you.

Agreements that are not illegal per se might even so be illegal. These agreements are evaluated under "the rule of reason", which the Supreme Court describes as involving a factual inquiry into an agreement's overall competitive effect, which varies in focus depending on the nature of the agreement and market circumstances. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Some competitor collaborations are permitted by law, such as labor agreements (in which competing workers agree to fix the price of their labor), baseball teams (who agree to "drafts" of players to avoid bidding wars), and certain R&D directed to particular new or improved goods or processes (like curing cancer).

It's a complex area of law but it does apply to you. As Judge Selden said in the 1600's, "Ignorance of the law excuses no man."