QUITE RIGHT: GOOGLE: ANTITRUST VIOLATIONS AS A BUSINESS MODEL

The list of penalties imposed by the European Union for competition violations is so long that one has to ask oneself whether violations are a worthwhile business model.

The most recent example is the judgment against Google or Alphabet for deliberately exploiting its supremacy in the search engine market for online shopping (the company has since appealed).

The Commission accuses Google of listing its own price comparison offer first in the search results for online shopping, thereby putting its competitors at a disadvantage. The fine of €2.42 billion is a heavy fine and more than twice as high as the highest ever cartel fine of €1.06 billion imposed on the chip company Intel in 2009 for its abusive discount models. Other cartels of the recent past, such as the Libor cartel or the truck cartel, are in current perception due to the intensive press coverage. Airbus has already filed a voluntary disclosure.

Competition agreements seem attractive for many parties involved. They guarantee manufacturers and dealers reliable prices and higher margins. The agreements also offer the trading companies a further advantage - they give them leeway for private labels that can be reliably placed below the agreed price for brand products.

The optimization of the search engine by Google has a strategic component in addition to the obvious intention of increasing sales via their own portals. In the USA, competitors such as Yahoo and Microsoft's search engine Bing are used significantly more often than

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in Germany. This forces Google to remain innovative and constantly improve its search algorithms. A balancing act then?

How does the legal department position itself in this context? Does it point out the risks and leave the field of entrepreneurial risk to the decision-makers or that of sanctions to the competition authorities? Or does it perform the management function of law in the company in such a way that it initiates and maintains an active discourse among decision-makers about the implied ambivalence between the legal and illegal strategies for securing and expanding the market position?

In the case of many competition law infringements it remains unclear whether the legal department is even involved in the processes that ultimately lead to the decision on these - regularly occurring - ambivalences. To put it in somewhat more active terms: It remains unclear whether it is involved at all. If this were not the case, the legal department would not be directly represented in these critical issues. Provided that the decision-makers involved are sufficiently aware of the law, i.e. that the law is an integral part of top management's decision-making processes as a key decision-making category, the company is generally well positioned. The number of legally sanctioned competition violations suggests that the reality is often different.

Where is the responsibility?

Is the risk management process not working? The legal department cannot refer to this. The identification and avoidance of legal risks and their legal processing is the traditional task of the legal department (see Ebersoll/Storck in: Beck`sches Formularbuch für die Rechtsabteilung, G. Risikomanagement). This department is not only responsible for the examination, evaluation and design of legal issues. In terms of comprehensive risk management, risks must be systematically identified, made manageable and incorporated into the business decision-making processes. The responsibility for ensuring that legal auditing is an integral part of business decisions cannot be delegated by the legal department.

Hasn't the company declared its commitment to a legal culture in the sense of the United Nations Code of Conduct, elevated it to the guiding principle of legal action in the company and secured it organizationally as a guideline for management action? The Legal Department cannot delegate its responsibility for this either. The formation of a legal culture is part of the organizational management task of legal affairs in the company. This management task focuses on the contribution of law to the success of the company, to the achievement of the company's goals, to the implementation of the strategy and, in the long term, to the vital operation of the organization in the market environment (see also Groß in: Beck's Form Book for the Legal Department, B. IV. 2).

It would certainly be a lot shorter to blame the legal department for the legal breaches of their companies. Rarely is there a very clear, deliberate violation of law by the entire management. Especially the facts of the defeat devices show how difficult it is to stand up against almost the entire industry and not to use the interpretation possibilities of the exception of the thermal windows. In the case of Google, for example, it is also a matter of

weighing up whether the company decides in favour of the law in cases of doubt or uses the opportunity for a competitive advantage. Law within the company is primarily committed to the company, but secondarily also to the legal system as the supporting pillar of the common good. And thus the legal department must visibly and comprehensibly stand up for the fact that in case of doubt the rule of law dominates profit.