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Competition Compliance Programmes – Note by the European Union

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-compliance-programmes.htm.

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European Union

1. Summary

1. Compliance with competition law continues to be important for authorities and is still in the self-interest of every company. The most effective way to stop a violation is to ensure it never starts. Effective corporate compliance markedly contributes to this end. Indeed, it has a preventive dimension, which complements the investigative and sanctioning enforcement of agencies.

2. Enforcers rarely have the opportunity to stop antitrust violations before they start and rather rely on deterrence. Fines are fundamental in this respect: they are a powerful tool in drawing the attention of undertakings to the potentially significant consequences of illegal practices. However, the ultimate aim of cartel and antitrust policies is not to levy repeated and high level fines – the goal is rather to minimise the need for such sanctions because companies follow the rules. This is why compliance is of the utmost of importance.

3. In terms of promoting a compliance culture, the Commission faces a context, which is likely different compared to other jurisdictions given its exclusive reliance on fines to achieve deterrence, the large size of the companies it deals with and its long history of enforcement actions and high level of sanctions.

4. The Commission's approach to compliance programmes is based on a few guiding principles: compliance with competition law, as in any other field, is the responsibility of companies but the Commission welcomes and supports compliance efforts by companies. Moreover, compliance efforts bring their own rewards and rewarding companies for their compliance programmes is not necessary.

5. The Commission is committed to support compliance initiatives by increasing awareness and offering guidance, it published its "Compliance Matters" guidebook for companies in 2011. Moreover, the Commission supports compliance also by giving access to a significant amount of reference materials on compliance strategies from various business organisations and other competition authorities on its website.

6. The Commission's starting point is that there is no "one-size-fits-all" compliance programme that can be used as panacea to any possible competition concern. Compliance depends on a range of specific factors, which vary according to the company.

7. Finally, in an evolving world, particularly in the context of the pandemic, there is an obvious link between compliance and guidance. Consequently, in recent times, the Commission has been more openly engaging with businesses, for instance, by activating its existing tools for providing more formal guidance on particular arrangements and adopting a temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak.

2. Framework within which the Commission operates

8. A brief description of the context within which the Commission operates can provide a better understanding of its approach to compliance. In this regard, it is worth mentioning the following three relevant aspects.

9. First, the Commission has the power to impose fines itself for the infringement of EU competition law[1]. These fines are administrative in nature and are imposed on companies with no criminal or individual sanctions available. Therefore, compared to other jurisdictions with the availability of various sanctions, the Commission relies exclusively on its power to impose fines on companies in order to ensure the necessary deterrent effect.

10. Secondly, the Commission shares its competition enforcement competences with the EU Member States' national competition authorities. Within this decentralised system, the Commission and national competition authorities have parallel competences and apply the same set of substantive rules. The Commission usually deals with larger cases, which affect more than three Member States.

11. Considering the scope of the markets in these cases, the companies that are generally involved are multinationals operating at an EU or global level. Hence, most of these companies will have large in-house legal departments including antitrust specialists with the necessary resources to invest in comprehensive compliance programmes. Indeed, over the last 10 years a significant commitment by multinationals to compliance has been observed both generally and also specifically in relation to competition law.

12. Thirdly, the Commission has been active in cartel and antitrust enforcement in the EU for several decades. Moreover, this activity has recently been heavily reinforced since the Commission began sharing its competence with EU national competition authorities. This prolonged period of enforcement combined with the imposition of high fines has served to deter companies from engaging in anti-competitive practices and encouraged them to comply with competition law.

13. Thus, in terms of promoting a compliance culture, the Commission faces a context, which is likely different compared to other jurisdictions given its exclusive reliance on fines to achieve deterrence, the large size of the companies it deals with and its long history of enforcement actions and high level of sanctions.

3. The Commission's guiding principles when approaching compliance programmes

14. The Commission's approach to compliance programmes is based on a few guiding principles.

15. First, compliance with competition law, as in any other field, is the responsibility of companies. Indeed, it is companies themselves that are best placed to prevent antitrust infringements having regard to their size, sector, risk exposure and resources to seek advice. Moreover, this approach is also consistent with the EU legislative framework. For instance, Regulation No. 1/2003, with regard to the application of Article 101(3) of the Treaty on the Functioning of the EU, replaced the burdensome notification system by one of self-assessment.

16. Secondly, the Commission has a long-standing policy to welcome and support compliance efforts by companies because they are a win-win scenario not only for companies but for society as a whole. Indeed, compliance programmes benefit: i) companies by leading to a level playing field; ii) consumers by allowing them to reap the benefits of fair competition; iii) public authorities by reducing the need for enforcement thus allowing scarce resources to be deployed elsewhere.

[1] Art. 23(2)(a) of Regulation No. 1/2003.

17. Thirdly, another important guiding principle is that compliance efforts bring their own rewards and rewarding companies for their compliance programmes is not necessary. Indeed, the Commission has never granted a reduction of a fine because of the existence of a compliance programme at the time of the infringement[2]. The EU Courts have consistently upheld this policy, pointing out that the implementation of a competition programme "*does not alter the reality of the infringement and does not oblige the Commission to grant a reduction in the amount of the fine*"[3].

18. The Commission rather sees the rewards of compliance programmes as primarily allowing companies to avoid (or limit) the imposition of potentially large fines from public authorities and civil damages from private actions. Compliance programmes contribute to the detection of illegal cartel behaviours that can be reported by the company under the Commission's leniency programme, which gives automatic immunity from fines for the first to report the cartel. Finally, compliance programmes help companies to preserve their reputations, which can be severely damaged if found to have committed antitrust violations.

19. As a final point when considering rewards for compliance programmes, it is important to recall the enforcement context in which the Commission operates where fines are the only means of sanction to ensure deterrence and that additional reductions beyond those already existing under the leniency and settlement programmes[4] may lead to fines that are under-deterrent.

4. What the Commission is doing for compliance

20. The Commission is committed to support compliance initiatives and three key elements can be identified.

21. First, the Commission sees its role as being to support compliance by increasing awareness and offering guidance. Indeed, compliance with regulatory obligations and guidance go hand in hand. The Commission does it through various means, by:

i. disseminating information on the EU competition rules;

[2] However, in seven decisions adopted between 1982 and 1992, the Commission granted a fine reduction because the companies concerned adopted a compliance programme after the start of the Commission's investigations.

See, Commission Decisions of 7 December 1982, National Panasonic, [1982] L 354/28; of 14 December 1984, John Deere, [1985] OJ L 35/58; of 16 December 1985, Sperry New Holland, [1985] OJ L376/21; of 18 December 1987, Fisher-Price/Quaker Oats – Toyco, [1988] OJ L 49/19; of 22 December 1987, Eurofix-Bauco/Hilti, [1988] OJ L65/19; of 18 July 1988, British Sugar, [1988] OJ L 284/41; of 5 June 1991, Viho/Toshiba, [1991] OJ L 287/39; and of 15 July 1992, Viho/Parker Pen, [1992] OJ L233/27.

[3] Judgment of the General Court of 6 March 2012 in Case T-53/06 UPM-Kymmene v European Commission, paragraphs 123-124; Judgment of the Court of Justice of 28 June 2005 in Joined Cases C-189/02 P etc., Dansk Rorindustri and Others v Commission, paragraph 373; Judgment of the General Court of 12 December 2007 in Joined Cases T-101/05 and T-111/05, BASF and UCB v Commission, paragraph 52; and Judgment of 13 July 2011 in Case T-138/07, Schindler v Commission, paragraph 88.

[4] Additional reductions are possible for mitigating circumstances under the Commission's Guidelines on Fines.

ii. maintaining a dialogue with the business and legal community, which is important when it comes to refining the Commission's guidelines and other information materials;

iii. attending events to promote compliance;

iv. producing guidance to assist compliance efforts (i.e. numerous sets of Guidelines[5] and Block Exemption Regulations).

22. Secondly, the Commission published its "Compliance Matters" guidebook for companies in 2011[6]. The guidebook, published on the Commission's webpage dedicated to compliance, sets the Commission's core messages on compliance, which are as valid today as in 2011.

23. In particular, it states, as aforementioned, that compliance is the responsibility of companies. Moreover, it explains the benefits of compliance for companies and identifies the types of practices that should be avoided. Finally, it outlines the key elements of how to implement a compliance policy.

24. Thirdly, the Commission supports compliance also by giving access to a significant amount of reference materials on compliance strategies from various business organisations and other competition authorities on its website.

5. Cornerstones of a successful compliance programme

25. The Commission's starting point is that there is no "one-size-fits-all" compliance programme that can be used as panacea to any possible competition concern. Compliance depends on a range of specific factors, which vary according to the company. In this respect, the Commission underlines its position that compliance is primarily a matter for companies.

26. Nevertheless, the Commission has identified a number of non-exhaustive preconditions, building on its experience in the field, which it considers relevant in order to increase the effectiveness of a compliance programme.

5.1. A compliance programme is not just a piece of paper.

27. A compliance programme has to be embedded in a company culture fully endorsed by senior management. The message that compliance with antitrust laws is a fundamental policy of a company needs to be clearly endorsed and communicated from the top down. This is an essential element of creating a culture of respect for the law within any company. In particular, if senior management does not actively support and cultivate a culture of compliance, the company will have a good compliance programme on paper but not an effective one in practice.

[5] Guidelines on the application of Article 101(3) TFEU, Horizontal Guidelines (on the applicability to horizontal co-operation agreements), Guidelines on Vertical Restraints. Also, R&D Block Exemption Regulation, Specialisation Block Exemption Regulation, Technology Transfer Block Exemption Regulation and the Vertical Block Exemption Regulation.

[6] European Commission, "Compliance matters – What companies can do better to respect EU competition rules", November 2011, accessible at https://ec.europa.eu/competition/antitrust/compliance/

5.2. Proper internal reporting mechanisms

28. A further essential feature of a successful compliance strategy is the inclusion of clear reporting mechanisms. Staff must not only be aware of potential conflicts with competition law but also need to know whom to contact and in what form when concrete situations of conflict arise.

5.3. Training and education.

29. A compliance programme requires educating and training all executives and managers and most employees. It means providing training for subsidiaries, distributors, agents. In particular, clear, targeted and jargon-free trainings are highly recommended. The trainings should also be duly adapted to the needs of that particular company or even particular employees with a high-risk profile such those with sales and pricing responsibilities.

5.4. A compliance programme is not a 'one time' effort

30. A company should ensure that it has an ongoing and pro-active approach to its compliance programme. This means that risk activities are regularly monitored and audited. Also, that there is a periodic evaluation and review of the compliance programme.

5.5. Incentives for compliance and penalties for non-compliance

31. To foster adherence to a compliance programme companies should consider putting in place positive incentives for employees to respect the rules. Equally, penalties for breach of internal compliance rules could be considered[7].

6. The new challenges of compliance

32. In an evolving world, particularly in the context of the pandemic, there is an obvious link between compliance and guidance. Consequently, in recent times, the Commission has been more openly engaging with businesses, which are also regularly contacting it.

33. For this purpose, in cases of genuine uncertainty or novelty, the Commission can activate its existing tools for providing more formal guidance on particular arrangements, such as decisions of inapplicability within the meaning of Article 10 of Regulation No. 1/2003, or under its 2004 notice[8]. However, both of these tools presuppose that the Commission has a good knowledge of a given practice, based on the assessment of certain sets of facts as presented by a particular business.

34. Moreover, the Commission's openness to engage with businesses and provide swift assistance has been evident during the COVID-19 crisis. Indeed, the Commission not only launched, very early on in the crisis, a dedicated contact channel for companies, but also adopted a "*Temporary Framework for assessing antitrust issues related to business*

[7] Such penalties would need to be consistent with national employment law.

[8] See Article 10 of Council Regulation (EC) No 1/2003 (Finding of inapplicability) and Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (Text with EEA relevance), OJ C 101, 27.4.2004, p. 78-80.

cooperation in response to situations of urgency stemming from the current COVID-19 outbreak".

35. In particular, the Commission introduced the new and temporary tool of *ad hoc* comfort letters, in order to ensure fast and sufficient comfort to companies in response to certain urgent situations related to the pandemic. This tool was introduced as an exception to the self-assessment rule, and in addition to the aforementioned existing routes for providing guidance in specific situations.