

28 November 2011

BUSINESS COMPLIANCE WITH COMPETITION RULES

KEY MESSAGES

- 1 Competition provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice for the best price. Abiding by antitrust rules is fundamental for creating and sustaining a competitive economy.
- 2 Compliance with antitrust rules is not only a legal obligation, but also an attitude and a culture that can impact positively on business. Being compliant with rules and maintaining a strong reputation are fundamental matters for every enterprise.
- 3 The basic principles of antitrust compliance can start with basic, simple and cost-effective actions aimed at preventing breaches.

WHAT DOES BUSINESSEUROPE AIM FOR?

- *Promote competition compliance by identifying general principles and supporting companies' actions in this area.*
- *Encourage competition authorities to demonstrate greater interest and a more positive attitude towards compliance, in order to further encourage a competition compliance culture in the EU.*
- *Facilitate the exchange of best practices on compliance among businesses, to increase awareness, facilitate prevention and help enforcement*

KEY FACTS AND FIGURES

The European Commission can issue fines up to 30% of the company's relevant product sales

Since 2007, the Commission issued fines to companies involved in cartels for more than € 10 billion
(source: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>)



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1. WHY COMPETITION COMPLIANCE?

BUSINESSEUROPE wants to promote competition compliance by identifying general principles and supporting companies' actions in this area. At the same time, we encourage competition authorities to demonstrate greater interest and a more positive attitude towards compliance, in order to further encourage a competition compliance culture in the EU.

Full compliance with antitrust rules is not only a legal obligation, but is also an attitude and a culture that can impact positively on a company's business. Remaining compliant with rules and maintaining a strong reputation are fundamental matters for every enterprise.

We believe that a lot that can be done in this area through cooperation between Europe's businesses and the authorities enforcing the competition rules.

1.1 What are the benefits for companies?

Balancing sustainable efforts to abide by the rules with the overall need to reduce costs can be perceived as difficult, but is certainly achievable and will often lead to a number of advantages. In particular, compliance action brings the following benefits:

- Reducing the risk of reputational damage connected with an infringement
- Being seen as a progressive and ethical business
- Improving internal procedures and making them safer
- Attracting ethically conscious consumers and investors
- As an employer, attracting and retaining ethically conscious talent
- Reducing the risk of fines, or benefiting from the competition authorities' settlement or leniency procedures, and/or mitigating circumstances in the setting up of the fine
- Lowering legal costs

Reinforcing a competition compliance culture in Europe will have positive effects for its competitiveness and is therefore in the direct interest of European companies. BUSINESSEUROPE strongly believes that competition provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice for the best price. Abiding by antitrust rules is fundamental for creating and sustaining a competitive economy.



Improvements in the company's image, substantial reductions in costs and efficiency gains together with a boost in consumer confidence are some of the positive aspects of compliance which are currently enticing more companies to try improving their antitrust compliance and business practices.

This paper has been developed with the objective of encouraging business to develop and apply competition compliance in their daily activity, provide them with general guidance to do so, and awaken antitrust authorities to the importance of supporting and encouraging companies' compliance efforts.

2. WHAT ARE THE KEY DRIVERS OF COMPLIANCE WITH COMPETITION RULES?

We believe that in order to achieve effective results, any good compliance programme should be based on the key drivers of compliance for businesses. Identifying the motivation for competition law compliance activities within businesses is an important precondition for any competition compliance policy.

The basic legal responsibilities of a company's management include supervising and ensuring compliance with the law, including antitrust rules. The aim is to ensure that any breaches of the law are prevented or discovered and remedied early enough, so that the company can avoid administrative and civil liability, protracted proceedings and high legal costs. Providing authorities with volumes of required data to prove that your company is compliant is expensive, it diverts resources and limits productivity, diminishing competitive advantage.

In addition, improving awareness and knowledge of basic competition law principles will help prevent or tackle at an earlier stage any issues that might arise within the company. This can substantially diminish the risk of liability that might have otherwise derived from any misconduct. It can also avoid or decrease costs related to external legal advice.

Ensuring the observance of antitrust law enables the company to prevent reputational and/or financial damage. But there are other key factors that need to be better underlined.

With compliance being a manifest requirement of doing business with suppliers and customers in many countries, it makes good business sense for companies to take action to meet legal requirements. The immediate consequences of non-compliance, such as heavy penalties, reputational damage and loss of customers are severe.

The image of the company is a key factor. A business actively engaged in compliance will project the image of an ethical business, which will add substantially to its corporate image. Active engagement in antitrust compliance will also inspire trust from customers and consumers at large. It should not be forgotten that an antitrust infringement – especially in cartel cases - questions the ethics and business model of the company involved. The potential economic impact deriving from the reputational damage can be even greater than the risk of a penalty as it can lead to customer loss and financial loss.



Since failure to comply will result in strict sanctions and fines, along with media and public scrutiny, companies recognise compliance as one of their priorities. Bad press can cost a company much more than taking a few steps to improve its compliance and limit the risk of violations as much as possible.

3. WHAT TO DO AND WHAT NOT TO DO WHEN IMPLEMENTING COMPLIANCE PROGRAMMES AND ACTIONS?

Competition rules are often considered very complicated and technical, and the simple idea of developing compliance actions to address them could be a challenge, especially for SMEs which have limited resources and might not have a legal team to develop a fully-fledged programme.

However, the content of a compliance programme must be tailored to the business's particular requirements and there is no standard compliance programme that can apply in all cases.

“The perfect is the enemy of the good”

To attain perfect compliance could probably be perceived as extremely difficult. It indeed becomes infinitely more difficult as you near it, and this can discourage a small enterprise to take action in the first place. However, BUSINESSEUROPE stresses that instilling the basic principles of antitrust compliance can start with basic, simple and cost-effective actions. Enhanced regulatory awareness will also lead to a better understanding of the consequences of illegal behaviour.

Identifying basic and simple principles to guide companies – and especially SMEs – in their compliance efforts is key.

Any company's compliance action ought to create a positive reaction and generate interest among employees. Primarily, it should simply encourage them to seek advice any time they have a doubt as to whether something might raise an antitrust problem.

Many employees in a company may at some point have to deal with an issue where antitrust law plays a role: this can range from a decision on the issues for discussion in a business meeting to dealing with competitors in the context of trade associations, or responding to a request for information from competition authorities and regulators, etc. Those employees should be clearly identified and receive appropriate education and training.

It is key that employees feel encouraged to contact the relevant in-house or external counsel/officer for compliance and that it is made clear that the latter is at any employee's disposal to advise and provide practical guidance and help, and not to evaluate or judge the conduct of the staff.

All compliance efforts must be based on a company's commitment to conducting business in conformity with the law. Therefore, compliance programmes will contain basic ingredients necessary for robust antitrust compliance. They must also help companies identify and minimise/eliminate risks that infringements occur.



Obviously, how elaborate and detailed the programme needs to be depends on a number of factors, e.g. the structure and size of the organisation, geographic presence and activity. In any case, one should take care not to make it more complex than necessary. Without going into the details of how a model compliance programme should be structured and what it should contain and address, we can identify certain general features that should be considered in any such compliance programme to make it work effectively. These are:

1. Endorsement by and commitment of senior management: this is absolutely key. There must be a strong and clear policy statement by top management that competition compliance is a core part of the corporate culture and that the company's management expects employees to comply with competition rules. Corporate commitment is a fundamental precondition for effectively instilling a culture of compliance within a business. This will in most cases be reflected in the company's standards of business conduct, or any similar internal code in an SME, and must send a clear and unambiguous message from the management to the employees

2. Proper policy and procedures: every company, big or small, to different degrees has policies and procedures that govern its internal functioning, including key control checklists to ensure that risks of any nature are readily identified, prevented, remedied or mitigated. These procedures and key controls should be tailored to accommodate the demands of a robust anti-trust compliance programme. In an SME context, this could, for example, mean introducing the employees' duty to seek preliminary legal advice in case of any doubt of non-compliance. Everyone concerned should know whom to contact.

3. Identification of responsibilities: senior management is responsible for instilling a culture of compliance and integrity. A member of the staff should be appointed as responsible for the compliance programme. This is likely in most cases to be a senior member of the legal team and will report to the board. An SME could either assign this role to its in-house counsel or outsource this function to its external legal adviser.

4. Adequate resources: a robust compliance programme needs to be adequately resourced. Compliance efforts should focus first and foremost on those aspects of competition law where the company is most exposed. Whether a group of companies is decentralised or strictly governed from the centre, there will be a need for some structure capable of ensuring that risks are identified and dealt with, and that training and advice are provided. An SME is likely to need a much less complex programme than a large corporation, and the resources should of course be proportionate to that specific programme.

5. Specific training: ideally all employees ought to be exposed to a general training session, notably as part of their introduction when joining the organisation. Targeted sessions will also be needed on the issues that certain categories of employees are most likely to be confronted with. The legal team should undergo specific training enabling it to counsel colleagues on the details of competition law. In case of SMEs, it will be sufficient to ensure that employees regularly receive simple, clear and up-to-date information on the major and most common antitrust issues they might be confronted with in their daily activity and a plain obligation to consult the in-house counsel in case of doubt.



6. Effective control: any compliance action will need to be followed-up by an effective control from the management. However, ideally the compliance action should instil in each employee the consciousness that respecting the rules is in the interest of all the staff in the first place. Therefore, a certain degree of self-control is desirable to achieve really effective compliance.

7. Sanctions and rewards: The code of conduct of the company must make it absolutely clear that violation of any law, including competition law, will not be tolerated and will lead to disciplinary action, including termination of employment as appropriate. At the same time, initiatives and proposals by the staff that improve compliance should be visibly rewarded, as they contribute to the compliance culture and promote discipline.

8. Regular evaluation and evolution: nothing remains static. It is important to monitor and improve the functioning of programme, notably by regularly testing the level of competition law knowledge of employees, or by collecting the experience of the various business units throughout a region and encouraging comments and reports on the workings of the programme.

4. HOW CAN PUBLIC AUTHORITIES ENCOURAGE AND PROMOTE COMPLIANCE?

"An Ounce of Prevention is Worth a Pound of Cure"

BUSINESSEUROPE believes that the interest of businesses in compliance programmes should be driven in the first place by the willingness to take all the possible measures aimed at decreasing the likelihood of an infringement taking place.

However, given the resources and cost involved in creating and applying a compliance programme, it is at the same time important that antitrust authorities send a positive signal on the importance of compliance to encourage companies' actions. Recognizing and promoting companies' efforts in fostering a compliance culture will have a decisive preventive effect that can only be stronger over time

Antitrust authorities must take enforcement action where necessary, but should also support businesses seeking to achieve competition law compliance culture, so that breaches of competition law are avoided in the first place. Companies keep on making huge efforts to ensure their compliance, but there is a perception that public authorities do not recognise these efforts. This perception needs to be addressed.

Very often the policy of antitrust authorities to achieve compliance with competition law relies almost exclusively on deterrence through fines and other sanctions. BUSINESSEUROPE stresses that there are other factors, mostly endogenous to business like the ones mentioned earlier in this paper, which strongly influence compliance.

However, the fact that most of these factors are endogenous does not mean that antitrust authorities cannot influence them through their positive attitude and action. Such actions could be aimed at:



1) Promote and highlight the importance of compliance programmes by recognising their value:

Preventing anti-competitive practices is far more efficient than investigating and sanctioning violations after they occur. Preventing illegal conduct depends primarily on the spread of efforts within individual undertakings to enforce compliance with the law, and more broadly on the efforts of both the business community and public authorities to foster a culture of competition in which illegal conduct is unambiguously condemned.

One of the steps for a business to achieve a compliance culture is to see recognition of the importance of its efforts. This would further encourage businesses to adopt and implement an effective compliance programme, which in itself will help to prevent illegal actions from arising in the first place.

Currently there is no widespread recognition by competition authorities within the EU for those companies which invest the funds, staff and time needed to undertake effective compliance actions. BUSINESSEUROPE recommends that companies subject to investigations should at least be granted the possibility to prove their compliance efforts and have this recognised and valued by the Commission or the national competition authorities. This would create certainty on what needs to be done and certainty on the value of these efforts in the event of violations.

Some antitrust authorities - like the UK's Office of Fair Trading - might take into account the existence of a compliance programme in an infringing business as a mitigating factor when calculating the level of a financial penalty and that it will not generally view the existence of a compliance programme as an aggravating factor resulting in an increase of the fine¹. The French Autorité de la Concurrence showed a recent interest in the development of compliance programmes, ordering an independent study on compliance policies in Europe (released in October 2008). The Autorité de la Concurrence is currently working on guidelines on the subject and already took into account compliance programmes to mitigate fines in the context of settlement procedures (reduction of fine subject to commitments, such as a compliance programme).

While acknowledging that this is not a rule or common practice among antitrust authorities, we stress that this approach can certainly send a very strong positive signal to business as regards the importance that an authority can attach to the existence of an effective compliance programme.

We therefore encourage antitrust authorities to grant businesses subject to investigations the possibility to prove their compliance efforts and take these favourably into account when calculating the level of a financial penalty.

In practice there is no such thing as a foolproof control system. Slip-ups will occur even in the best of worlds. When a programme is shown to be of a robust nature and in active operation, it must be assumed to have been beneficial by upholding compliance over time, even though it might have been circumvented in some instance.

¹ See OFT report "Drivers of Compliance and Non-compliance with Competition Law", May 2010.



In addition, an antitrust authority should look at the broader picture and consider that the more efficient compliance programmes are encouraged and implemented, the less likely are infringements from taking place in a market. Clearly, individual violations can still happen, but as a whole the balance will be positive.

2) Facilitate the exchange of best practices:

Public authorities are in the ideal position to encourage and facilitate the exchange of best practices on compliance among businesses. They should also make additional efforts to give directions to companies willing to implement compliance programmes.

This already happens in other areas of law, where it is not unusual that public authorities concretely support compliance efforts, provide information and encourage exchange of information.

BUSINESSEUROPE believes that enforcement of competition rules would greatly benefit from increased commitment of public authorities to facilitating practical activities such as public seminars and information sessions for small businesses. This could also be co-organised with business organisations.

3) Clarify effectively the approach to the application of competition rules:

The European rules on competition are becoming increasingly complex. Integrity and compliance are a challenge for all companies and their significance should not be underestimated.

Competition rules and their application in practice by antitrust authorities are often difficult to understand and predict. This leaves companies with many unclear aspects when running their daily business. We believe that the way competition rules are designed should ensure not only that authorities and judges are able to apply them correctly and consistently, but also that companies are able to self assess where they stand and take the necessary measures to ensure compliance.

In this context, we appreciate the efforts of the European Commission and other competition authorities to provide guidance through different guidelines and communications. However we believe that, to fit this purpose, these documents should include more and clearer examples concerning borderline cases. This would be extremely useful in responding to the need of clarity for companies wanting to assess their compliance with competition rules.

Where they fail to do so, these documents do not meet the objective of giving directions to companies which look to the European Commission and other authorities for guidance as to how they can run their daily activity in compliance with antitrust rules.

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Contact
Guido Lobrano
BUSINESSEUROPE
E-Mail: g.lobrano@businessseurope.eu