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Round Table on:

Roundtable on "Strengthening private sector capacities for competition compliance"

Contribution

by

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Roundtable on "Strengthening private sector capacities for competition compliance"

Note prepared by the services of the European Commission

Directorate-General for Competition

OECD Competition Committee
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1. GENERAL INTRODUCTION

Efforts of undertakings to ensure compliance with EU antitrust rules are laudable. The European Commission (hereafter "the Commission") welcomes such efforts and notes a growing awareness within the business community of the importance to ensure compliance with competition rules.

This note sets out the Commission's approach to compliance and in particular highlights the different instruments which the Commission uses to promote compliance by companies with EU competition rules. It describes the advocacy initiatives and efforts to promote compliance and the enforcement tools which the Commission uses to convince companies to comply with the EU antitrust rules. In addition, it explains the Commission's approach towards corporate competition compliance programmes and its general policy in that respect.

2. DETERMINANTS OF COMPLIANCE

High fines on undertakings provide certainly a major incentive for companies to engage in compliance efforts. In addition, companies may have many other reasons for setting up compliance programmes, such as the fear of reputational damage. Companies subject to a negative decision for infringing competition rules may suffer from a general loss of reputation and face hostile reaction of clients and consumers or their own shareholders who feel cheated. Moreover, investigative measures by competition authorities may also turn out to be very time consuming and costly for firms. Inspections on their premises - which firms are obliged to accept - may disrupt day-to day work. Preparation of a defence may occupy considerable resources and cause high expenses for legal advice and representation. Finally, also the increase over the last years in corporate governance requirements and expectations has obliged companies to invest further in compliance.

3. PROMOTING BETTER COMPLIANCE

3.1 Compliance as advocacy tool

In order to ensure their effective compliance with EU antitrust rules companies must be aware of these rules and of potential conflicts with these rules. They should also know how to avoid conflicts on all levels of the company, from employees to middle and top management. To help companies take that responsibility, the Commission has developed different ways of clarifying the applicable EU antitrust rules (Article 101 and 102 TFEU). Furthermore, the

application of these rules has also been made transparent to allow companies to acquaint with their practical application and to be informed of every development in their enforcement. Such guidance on the legal framework and its enforcement should enable companies to better assess ex ante their actions in the market and prevent their involvement in any anti-competitive conduct.

3.1.1 Guidance on EU antitrust law

The Commission has made significant efforts to clarify and explain the scope of application and the substance of the EU antitrust rules.

First, the Commission has exempted certain types of agreements from the general prohibition contained in Article 101(1) TFEU on anticompetitive agreements if their restrictive nature can be justified by countervailing benefits/efficiencies. Such guidance as to whether an agreement is deemed exempted or not from Article 101(1) TFEU is provided on a regular basis in particular by way of so-called Block Exemption Regulations. Such regulations exempt a number of restrictions in certain categories of agreements (e.g. R&D, Specialisation or Distribution agreements) up to a particular level of market power, defined in terms of market share, provided that there are no "hardcore" restrictions and that certain conditions are met. In 2010, the Block Exemption Regulation covering distribution agreements has been updated taking into account the development in the last 10 years of the Internet as a force for online sales and for cross-border commerce[1]. In the same year, the Commission has also revised the Block Exemption Regulations applying to specific types of horizontal agreements adding further clarification as to the applicable rules in this area[2]. Additional assistance is provided in accompanying guidelines of the Commission on both vertical restraints[3] and horizontal co-operation agreements[4] which set out its policy and decisional practice on a variety of contentious competition issues such as information exchange and standardisation. As regards abusive behaviour, the Commission has published guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings[5]. These regular reviews of the guidance on the substantive antitrust rules are conducted in close cooperation with business people and other stakeholders through their involvement in public consultations on provisional drafts.

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1 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L102/1 of 23.4.2010.

2 Commission Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements, OJ L 335/38 18.12.2010 and Commission Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements, OJ 335/43 of 18.12.2010.

3 Commission Guidelines on vertical restraints, OJ C 130/1 of 19.05.2010.

4 Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C11/1 of 14.01.2011.

5 Communication from the Commission, OJ C45/7 of 24.2.2009.

In addition to guidance on the applicable rules, the Commission has also provided guidance on its fining policy[6]. These fining guidelines clarify the financial risk which companies run if they do not comply with EU competition rules. Fines aim at deterring companies from engaging in anticompetitive behaviour. Therefore, they serve as a further incentive to comply with the competition rules.

Moreover, the Commission encourages firms which are involved in certain hardcore infringements of EU competition rules (cartels) to come forward and fully cooperate with it during administrative procedures. An immunity from, or reduction of the fine that may be imposed for breaching the rules, may be obtained if the applicant significantly contributes to the disclosure and punishment of the infringement by providing information and evidence on the cartel. Under its so-called Leniency Notice[7], the Commission thus provides firms with incentives to unveil secret horizontal cartels or to hand over evidence which is decisive in proving that such a cartel exists. The conditions to be met by firms in order to qualify for full immunity from fines or for a (substantial) reduction of the fine which would otherwise be imposed on them are explained in the Notice. The Commission has made it especially transparent for companies which information they need to provide and which procedural framework applies. In doing so, companies can better assess whether they would qualify for immunity or a reduction before actually coming forward with the relevant information and evidence on their involvement in an infringement.

Clarity about the Commission's policy and practice is further provided through constant dialogue with all stakeholders including business representatives. The Commissioner for Competition, the Director General and other high level officials of the Commission regularly participate in conferences. In their speeches they highlight the most important developments and priorities of the Commission and provide further guidance for companies on its enforcement actions and policy reflections. The overall aim is that companies are aware of the EU competition rules and policy and to encourage them to comply with it.

The Commission also publishes an annual report on competition policy[8] and a number of informative brochures explaining EU competition policy from different angles. The annual report provides a yearly comprehensive overview of recent developments in antitrust rules and policy and the enforcement actions of the Commission. This is complemented by a number of brochures which target different audiences and allow them to become familiar with EU competition policy from different angles. The existing brochures on EU competition policy in general, the framework for distribution agreements and the benefits of competition for consumers are currently being updated to continuously reflect the actual status of the law.

3.1.2 Application of antitrust law to individual cases

The Commission is conscious of the fact that it does not suffice for companies to consider the law in isolation but that their behaviour in the market should be considered against a specific factual background. To guide them in defining the appropriate actions in conformity with EU

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6 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, published in OJ C 210/2 of 1.9.2006.

7 Commission Notice on Immunity from fines and reduction of fines in cartel cases, published in OJ C 298/17 of 18.12.2006.

8 http://ec.europa.eu/competition/publications/annual_report/index.html

competition rules, the Commission makes all its antitrust decisions publicly available on its website. These decisions are normally accompanied by a press release to bring them to the attention of a much wider audience than the limited number of companies directly involved. In addition, the Commission publishes the formal opening and closing of proceedings on its website or by issuing a press release[9].

A similar communication strategy has been put in practice by the General Court and the Court of Justice of the European Union. Their judgments reviewing decisions of the Commission in the area of antitrust are made public in all languages of the EU on the Courts' website and the particularly important judgments are accompanied by a press release[10].

4. CORPORATE COMPETITION COMPLIANCE PROGRAMMES AND THE COMMISSION'S POLICY IN THIS RESPECT

The prime responsibility to comply with the law, as in any other field, lies with those subject to the law. EU competition rules applying to undertakings are a fact of daily business life to be reckoned with, because failing to know the law will not avoid the consequences of breaking it.

While it is clear that companies are under an obligation to comply with the rules, they are largely free to decide how to go about it. This is only natural, given that the size of companies, their resources for seeking advice, their field of activity and their exposure to the risk of becoming involved in infringements of EU competition rules vary considerably. Awareness of the rules, however, is a precondition for effective adherence to them in any case.

Certainly the major reason to comply with the law is the potentially high costs of non-compliance. But compliance can also - and indeed should - be approached positively. An active and supportive strategy of compliance with the law can certainly serve to distinguish a firm for promotional and recruitment purposes, very much like an explicit environmental or family-friendly agenda would do. It can help to raise job satisfaction of staff and contribute to a constructive sense of belonging, even pride, within a firm. Staff which is aware of what constitutes illegal behaviour will also be more alert to infringements which competitors or other commercial partners commit and can help more actively to bring such market failures to the attention of the competition authorities in order to have the level playing field re-established.

Any effort of a company to ensure compliance with EU competition rules is important. What is however key is the fact that the rules are actually complied with. When it comes to taking practical steps to ensure compliance, firms should keep in mind that their efforts will be assessed by competition authorities on the basis of results, or in other words, by their success in avoiding infringements.

It has been the Commission’s long standing policy to welcome compliance efforts by undertakings. However, the Commission does not reward corporate compliance programmes

[9] The same applies in cases where proceedings have not been formally opened but DG Competition has already made public the fact that it was investigating the case (e.g. by having publicly confirmed certain inspections). See DG Competition's Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU.

[10] http://curia.europa.eu

when setting the fine. The Commission takes the stance, as endorsed by the case law of the European Courts[11], that it is a duty of companies to respect the law. Therefore compliance programmes have not been taken into account (neither as attenuating nor as aggravating circumstance) when setting the fine[12]. This policy has been explained towards the business community repeatedly.

As additional and more elaborate source of information on its compliance policy the Commission has issued a brochure in 2012 entitled "Compliance matters" http://ec.europa.eu/competition/antitrust/compliance/index_en.html). It addresses in a condensed fashion a wide range of issues and provides advice as well as a list of do's and don'ts, which should facilitate companies compliance efforts, in particular, by small and medium sized enterprises, which may not have access to specialised legal counsel.

5. CONCLUSIONS

The Commission stimulates and supports the development of a culture of competition law compliance in the business community as it represents an important complement to its overall policy to improve the functioning of the markets while reducing, at the same time, the need for interventions and sanctions. The Commission is aware that throughout the EU many companies are responsive to this call and have adopted compliance programmes. This development is welcomed by the Commission. However, as in other fields of law, compliance with the rules is not a circumstance which merits by itself a softening of sanctions in case of infringements.

[11] See judgment of the General Court, Case T-65/99, Strintzis Lines SA v Commission [2003] ECR 2003 II-5433, at paragraph 201; judgment of the General Court, Case T-224/00, Archer Daniels Midland v Commission, [2003] ECR II-2597, paragraphs 280 and following. See also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon Co. Ltd and Others v Commission, [2004] ECR-II-1181, paragraph 343.

[12] See e.g. Commission decision of 18.7.2001, Graphite electrodes, OJ L 100/2002, p.1; decision of 21.11.2001, Vitamines, OJ L 6/2003, p.1; decision of 5.12.2001, Citric Acid, OJ L 239/2002, p.18; decision of 11.12.2001, Zinc phosphates, OJ L 153/2003, p.1; decision of 2.7.2002, of 2.7.2002, Methionine, OJ L 255/2003, p.1; decision of 20.11.2007, Professional videotapes, OJ C 57, p.10 (summary) and of 7.10.2009, Power Transformers, OJ C 296, p.21 (summary)