



International Chamber of Commerce

The world business organization

Policy and Business Practices

ANNEX 3

COMPLIANCE AS AN ANTITRUST LAW ENFORCEMENT TOOL

1. Introduction

A genuine antitrust compliance programme is a substantial, on-going commitment. It requires significant time and resources from individuals at all levels of the business if it is to be successful. Prudent organisations see compliance programmes not merely as a cost, but as an investment in risk management. Meanwhile, a number of agencies are starting to recognise that antitrust compliance programmes can actually be helpful to them in their enforcement priorities.

A number of commentators have suggested¹ that enforcement agencies should use a combination of regulatory styles or strategies to improve compliance, rather than relying on deterrence through fines alone. Simple deterrence may fail to produce compliance commitment because it does not directly address business or societal perceptions of the morality of regulated behaviour – it merely puts a price on non-compliance².

The tools an antitrust agency uses should include the encouragement (or perhaps even the requirement) to introduce a credible compliance programme. The European Parliament supports the call for the use of a wider combination of enforcement measures, including the promotion of compliance programmes:

[The European Parliament] “calls for the development of a wider range of more sophisticated instruments covering such issues as individual responsibility, transparency and accountability of firms [...] corporate compliance programmes and the development of European standards; favours a ‘carrot-and-stick’ approach with penalties that serve as an effective deterrent, in particular for repeat offenders, while encouraging compliance”³.

¹ For example CE Parker, ‘The compliance trap: the moral message in responsive regulatory enforcement’. University of Melbourne Legal Studies Research Paper No 163. Available at SSRN: <http://ssrn.com/abstract=927559>

² Psychological research suggests that normative commitment is an important factor in explaining compliance with the law - see WPJ Wils, ‘Is criminalization of EU competition law the answer?’ (2005) 28(2) *World Competition: Law and Economics Review* 117.

³ European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009, para 60. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0023+0+DOC+XML+V0//EN&language=EN>

2. Promoting Compliance

Recent years have seen an expansion in the number of jurisdictions with antitrust law enforcement, more severe remedies and more powerful investigative tools. These developments are welcomed by companies: well-devised rules and meaningful antitrust law enforcement serve to create a level playing field which is welcomed by the private sector. Consistent and robust antitrust law enforcement is vital to our economies. Clarity and guidelines must be balanced with the obligation for agencies to enforce. Where violations occur, it is important that agencies have the appropriate means at their disposal to sanction illegal behaviour by ensuring that anti-competitive behaviour is brought to an end and fines or other penalties be imposed on individuals or companies that are accountable for such violations. But there is a role for compliance programmes too at the enforcement stage, to encourage future compliance commitment and to help avoid future violations.

Arguably, it is the legislators' and agencies' role and responsibility to provide a clear and unambiguous set of rules and guidelines that can easily be comprehended and adhered to by the private sector. However, with a move towards more economics-based assessments in the field of antitrust policy, agencies often find themselves in situations where clear and unambiguous guidance is difficult to provide and where a particular company's behaviour is difficult to assess. In this regard, guidance from the regulators in terms of establishing and developing compliance programmes could be very helpful to companies. From a policy perspective, one may argue that it is the task (and possibly even the duty) of the antitrust agencies to not investigate, punish and deter infringements, but also to more proactively work to minimise violations by advocating the adoption of compliance programmes, and giving suitable guidance (recognising the a "one size does not fit all" on the contents of a credible programme.

For companies (and especially smaller companies) operating on the international stage, designing, implementing and monitoring a compliance programme that meets the requirements of all the relevant jurisdictions is an increasingly complex but also increasingly important issue for companies.

3. A credible compliance policy has significant benefits

Company compliance programmes have a critical role to play in achieving antitrust policy objectives. The primary objective of a credible compliance programme is to reduce the scope for future infringements through training and controls, and by uncovering

potential infringements through various means (including “help lines” and internal whistle blower protections).

Preventing violations means that markets remain competitive and that violations are avoided. This reduces or eliminates harm to third parties such as customers and suppliers and avoids very heavy penalties for the companies themselves (and ultimately a reduction in shareholder value). Clearly from a policy perspective prevention is better than cure, since it is more effective in reducing competitive damage and is cheaper for society.

These benefits are well understood by most companies. Companies are committing increased resources to compliance organisations (including a significant growth in the number of specialist in-house antitrust counsel). Companies also increasingly retain advice from outside antitrust counsel to ensure planned commercial strategies are compliant. These developments demonstrate a genuine desire on the part of companies to put appropriate internal structures in place to prevent antitrust violations, including written compliance standards, regular training programmes and compliance audits, internal communication policies, disciplinary mechanisms, and (above) the development of a “culture of compliance” through the commitment and leadership of senior management.

4. What could agencies do?

It is undoubtedly beneficial to companies, agencies and competition in general that true compliance ultimately replaces deterrence. With an increasing awareness of antitrust law in the industry and more and more companies implementing compliance programmes, companies are looking to possibilities for cooperation with agencies to improve compliance beyond mere deterrence. Compliance programmes should be welcomed and actively promoted by antitrust agencies as part of their enforcement toolbox.

This is clearly a challenging topic for both agencies and companies: the difficulties companies face in implementing a compliance programme generally relate to areas where agencies require a certain amount of discretion/flexibility. The issue is thus what companies and agencies could do together to improve the culture of compliance at a more general level. This is not a call for reduced enforcement but a request for more engagement. DG COMP through its role in the ECN and ICN is particularly well placed to drive the compliance agenda.⁴

⁴ As demonstrated in Annex 1 of this letter, several antitrust authorities, including the Australian, Brazilian and Canadian agencies have already taken considerable steps to promote the importance of compliance

As part of agency outreach, agencies should consider raising their profile in guidance / awareness activities and initiating a more open dialogue with companies, in-house antitrust lawyers and the private bar in relation to compliance. Examples could include joint research programmes, studies, and workshops, which could be industry initiated / supported. This would enable companies to be able adapt/update their compliance programmes where necessary. One example of awareness activities is the Brazilian agency, which has been particularly active in this regard and has taken many initiatives to instil an antitrust law culture to the Government and the Brazilian society more generally (e.g., campaigns in the media, publications by senior antitrust officers, significant participation in courses and seminars, working group discussions, etc.).⁵

Finally (whilst not relinquishing self-assessment), additional administrative resources could potentially be committed for agencies to provide guidance and advice (for example through the provision of opinions on certain issues). Since the introduction of self-assessment in the EU, the opportunities to seek guidance from agencies are somewhat limited. Indeed, at the EU level, companies can only seek *informal* guidance if the case "give[s] rise to genuine uncertainty because [...] [it] present[s] novel or unresolved questions".⁶ The OFT is particularly active in this regard and introduced last year a short-form opinion procedure to provide guidance on novel or unresolved issues of wider interest arising in the context of a specific prospective collaborative initiative within a short time period.⁷

5. Conclusion

Detection and prevention of antitrust law violations will remain the primary focus of compliance programmes. The purpose of a good compliance programme is to ensure that a company operates according to ethical standards. A credible compliance programme is a risk management tool that helps a company achieve this goal. At the same time, the antitrust agencies could and should do more to encourage companies to invest the considerable resources needed to have a credible compliance programme. The incentives of agencies and companies need to be aligned to deliver compliance with the law.

programmes and to raise society's awareness of the vital contribution compliance plays in the health of the economy. The ACCC targeted a range of individuals and organisations (such as industry associations, compliance professionals) with the capacity to understand the possible reputational damage caused by publicity and encouraged the business compliance community to put in place compliance controls.

⁵ See http://r0.unctad.org/en/subsites/cpolicy/docs/IGE1104/Brazil_Antitrust.pdf.

⁶ Regulation 1/2003, paragraph 38.

⁷ See the OFT's Annual Plan 2010-11, available at http://www.of.gov.uk/shared_of/about_of/706647/of1215.pdf.