

The importance of Antitrust Compliance Programmes in enforcement policy

As cartels are clearly the most harmful restrictions of competition, high priority is rightly given to the prevention, deterrence and punishment of cartels.

But the role of antitrust agencies should properly be both the enforcement of the antitrust rules AND the encouragement and promotion of pro-competitive behaviour. Herr Stoffel mentioned in his opening remarks is that companies should look at compliance not just for the purpose of reducing fines but should promote compliance “because the company thinks it is the right thing to do”. I believe that most – and probably all - companies would agree with that sentiment, but we would invite the antitrust agencies to play their part too in encouraging and recognising compliant behaviour.

I think business would say that competition policy should ensure that the regulatory environment fosters competitive markets, and should encourage a competition compliance culture in the jurisdiction in which they operate. It goes without saying that prevention is always better than cure or post facto retribution. I would suggest, therefore, that as a matter of policy, more thought and effort should be given by agencies to prevention (encouraging compliant behaviour) as well as to punishment.

To achieve compliance and to prevent violations, it is necessary to effect a lasting change in corporate behaviour. A successful compliance programme will engender a culture of compliance within an organisation, and will assist companies to become and remain good corporate citizens.

In terms of antitrust policy objectives, deterrence is clearly a key factor. But “deterrence” seems to be interpreted by some agencies as meaning only punishment. Deterrence is – and should be - much more than merely punishing infringers for violating the law. Deterrence should also involve the positive aspect of encouraging compliant behaviour. Antitrust agencies should be actively encouraged to develop compliance programmes, and the agencies should work with business to

establish the expectations of what a “best practice” or “effective” antitrust compliance programme might comprise.

Some jurisdictions recognise the value of an effective (or best practice) compliance programme in mitigating the level of fines or other sanctions. For example, the requirements of an “effective” compliance programme are listed in the US Federal Sentencing Guidelines, and some antitrust agencies, such as the OFT have published their views on the requisite elements of an antitrust compliance programme.

The agency that has possibly gone further than most in assisting businesses to understand what the components of a best practice compliance programme are is the Australian ACCC, which has issued the Corporate Trade Practices Compliance Programme Guide.

These efforts by agencies to engage with business are very much to be welcomed. I believe the ICC and business generally would encourage the antitrust agencies – through the ICN – to engage with business to develop some guidance on the constituent elements of a “best practice” compliance programme.

Once the elements of a “best practice” antitrust compliance programme have been established, these could be taken into account in establishing the appropriate level of any fine – should (despite a company’s best compliance efforts) an infringement unfortunately occur. The existence and active promulgation of a “best practice” compliance programme (evidenced by a real commitment to and culture of compliance) is also relevant to the question of parent-subsidiary liability, and to the question of whether a violation has been committed intentionally or negligently. Where a parent company is clearly not involved in the violation and where senior management have taken all reasonable steps to drive a real culture of compliance (including the implementation of a best practice compliance programme), then arguably the parent company should not be held liable for the infringements committed by a subsidiary which has flouted both the law and company policy.

So in summary, I would invite the agencies to engage actively and openly with business to establish the requirements of a best practice antitrust compliance programme. This would underpin agency enforcement objectives by encouraging companies to comply and would show business what the agencies' compliance expectations are.

Thank you.