

## Competition Compliance in the EU: The European Commission Publishes its “Highway Code” but Maintains its Fining Practice

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Following the lead set by national competition regulators in the EU, in November 2011 the European Commission (EC) published its own guidance on EU competition law compliance.<sup>1</sup> It refers to the guidance, which is aimed at the non-specialist, as *“a sort of competition highway code which will help [companies] comply with the applicable rules.”*

The guidance is complemented by a new page on the EC’s website<sup>2</sup>, which includes links to: speeches on the EC’s view on competition compliance programs; the guidance; EU competition legislation; compliance materials published by the International Chamber of Commerce and other third-party organizations; and a fact sheet explaining how fines for infringements of EU competition law are set.

The guidance explains the basics of EU competition law and compliance well and is a welcome further “official” recognition of the need for suitable competition law compliance programs. However, it gives no hope to those pushing for recognition of the existence of a competition law compliance program when a fine is considered.

### THE GUIDANCE

The guidance, which is fairly short at only 22 pages, is divided into four sections. The first three sections are introductory, with the EC’s recommendations as to compliance programs set out in section 4. The main thrust of section 4 will be familiar to those with experience of competition compliance in the EU:

- the strategy should be focused on a company’s particular risk areas and the risk profile of its employees since “there is no ‘one size fits all’ model”
- *“unequivocal senior management support is vital”*
- mitigation measures should be taken, with, for example, training “[playing] an important role”, the establishment of “a clearly identified contact point” for use when concerns arise and employees being given positive incentives to comply with competition law
- internal controls such as audits and real-time monitoring (for example of a bidding process) are “surely important to underpin the internal credibility of a compliance strategy.”

The EC also makes the point, crucial in practice, that one advantage of an effective compliance strategy is that it might allow a company to take advantage of the EC’s and/or national leniency programs in the EU. There is also a warning that “competition authorities are . . . on constant lookout for markets showing signs of distorted competition.” The EC and other national regulators in the EU are keen to emphasize this point, in particular so as to destabilize cartels and to incentivize leniency applications, particularly for early-in-life cartels.

<sup>1</sup> “Compliance matters: What companies can do better to respect EU competition rules”, November 2011.

<sup>2</sup> [http://ec.europa.eu/competition/antitrust/compliance/index\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/index_en.html).

<sup>4</sup> Decision No. 510, issued by the Commission on July 8, 2005. Available at <http://www.mecon.gov.ar/cndc>.

<sup>5</sup> Considering an exchange rate of AR\$4.3 for US\$1.

### A PROGRAM WHICH DOESN'T WORK WILL (STILL) NOT HELP YOU BEFORE THE EC

The EC's consistent position has been that the existence of an EU competition law compliance program is not relevant when it comes to setting a fine for infringement of the law. Despite its strong endorsement of the value (and indeed need for) a competition law compliance program, the guidance maintains this position. It states that the EC will not endorse any individual program and that:

"If a company which has put a compliance program in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No."

The EC goes further in the guidance, also making it clear that rushing to set up a program after an infringement is found will not help:

"Nor will the setting up of a compliance program be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement."

A comparative analysis is interesting in this regard. The U.K. Office of Fair Trading (OFT), to take one example of an EU national regulator, is prepared, provided an "adequate" program was in place, to give a fine reduction of up to 10% should an infringement nevertheless be detected.<sup>3</sup> In addition, court precedent supports the OFT giving a discount for the establishment, post-infringement, of a compliance program, with this being justified on the basis that "it serves as an inducement to infringers to take appropriate steps to avoid infringing in the future, and reflects the mitigating circumstance that the infringer intends not to do so."<sup>4</sup>

The EC does, however, indicate clearly ("it goes without saying") that the existence of a competition law compliance program will not be considered as an aggravating circumstance justifying the increase of a fine if an infringement is found. By contrast, the OFT indicates that in exceptional circumstances this will be a possibility.<sup>5</sup>

The EC's position that a compliance program will not give rise to a fine reduction in any circumstance provides a reminder that, although EU competition law applies in all EU member states and the states base their national competition law on EU law, at a detailed level there can be differences in the practical application of the law, and the EC can be out of line with other regulators in the EU (and elsewhere).

### COMMENT

Coming as it does from the EU's (and one of the world's) leading competition law regulators, the publication by the EC of its competition law guidance is important. It emphasizes the EC's support for compliance and it will no doubt encourage businesses

3 The OFT published its own compliance guidance in June 2011: "*How your business can achieve compliance with competition law*" (OFT1341). This states "*Where the OFT considers that adequate steps have been taken and that a discount from the financial penalty is justified, the OFT will consider reducing the amount of the financial penalty by up to 10 per cent.*" This position is provisionally confirmed in the later consultation on the "*OFT's guidance as to the appropriate amount of a penalty*" (fining guidelines), (OFT423con, October 2011). However, in order to reach the "adequate" level, a reasonably sophisticated programme will need to have been in place.

4 See for example *Kier Group and others v. Office of Fair Trading*, Competition Appeal Tribunal (11 March 2011).

5 The OFT's June 2011 guidance (see footnote 3) states that such a circumstance may be "*where the purported compliance programme had been used to facilitate the infringement, to mislead the OFT as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.*" The October 2011 consultation on penalties (see footnote 3) makes the same point.

across the EU to update and/or implement programs. The guidance, while not groundbreaking in its content, also provides a useful framework describing the basics of compliance program design, which should be studied by anybody advising in the area.

The EC, like other regulators, is careful to make the point that small and medium-sized businesses need a program (albeit suitably tailored) just as much as larger companies do. This is a point which many SMEs in the EU have still not yet accepted, so is also a welcome message.

It is however a shame (albeit not at all surprising) that the EC has declined to show even the slightest hint of relaxation of its view that the existence of a competition law compliance programs is not relevant to any fine which is imposed for an infringement. Recognizing the existence of a compliance program as a mitigating factor would further encourage the use of such programs and would put the EC in line with other leading jurisdictions which take this approach (including Canada, the U.S. and the U.K. as well as, to a limited extent, France).

The EC should also have shown greater awareness of the wider compliance risks faced by businesses. Competition law compliance is of course only one compliance issue (alongside, to name but a few, anti-bribery and corruption, internal anti-fraud control, health and safety, data protection, environmental, sectoral regulation and human rights) and is usually not at the top of the list. Representatives of the OFT, for example, are careful to recognize whenever they speak about compliance that the compliance agenda is very wide and that competition compliance needs to be looked at as one aspect of this. This approach in fact ties in well with the emphasis on a risk-based approach (as advocated by the EC), since this is used in other compliance disciplines.