European Commission Issues Guidance on Antitrust Compliance

By Oliver H. Geiss and Will Sparks

The European Commission recently released Compliance Matters, a booklet intended to help businesses comply with EU competition rules (now available). Described by the Director-General for Competition as "a sort of competition highway code" and "a road safety brochure ahead of the holiday period" the publication provides high-level guidance on essential principles of EU competition law, explains the consequences of breaking the law and offers guidance on how to establish and run a compliance program.

Leaving aside the rather strange driving metaphors (perhaps inspired by the Commission's current investigations in the automobile sector), the booklet serves a useful function as an exercise in raising awareness of the importance of antitrust compliance. Arguably, companies currently face greater antitrust exposure than ever before. Fines issued by the Commission and national authorities continue to escalate, while private enforcement – i.e., civil litigation brought by alleged victims of anticompetitive conduct – is actively promoted in the EU and beyond. However, companies and their counsel may be disappointed by the booklet, which is over-proscriptive and lacks any real substance on effective compliance.

Costs of Non-Compliance

Before offering guidance on compliance, the Commission begins by describing the potential costs of non-compliance and focuses on the very heavy corporate fines this can trigger. Perhaps regrettably, the two examples of recent fines that the Commission cites both relate to narrowly European (and in one case national) cartels. In light of how many fines recently have been issued against companies headquartered outside the EU, this seems like a missed opportunity to emphasize the international scope of competition rules. The Commission also notes that directors and advisers of firms that commit antitrust breaches may face personal liability; although the Commission cannot impose individual penalties, several national authorities can and do. Finally, with regard to non-compliance, the Commission reminds businesses of the reputational damage they can suffer due to the public nature of antitrust investigations.

Risky Business

Having explained the consequences of breaking antitrust rules, the Commission provides a basic overview of the rules themselves. These essentially apply to two types of conduct – abuse of a dominant position, and anticompetitive contacts or agreements. With regard to the latter, the Commission highlights "hardcore" prohibitions such as price-fixing and allocating markets or customers, which the majority of

businesses will recognize as illegal. The Commission also notes the high level of risk associated with exchanges of information between competitors. However, the Commission offers almost no advice on what types of cooperation in the market may be permitted, between whom or when. Given the economic pressures facing most businesses at present, some acknowledgement that horizontal and vertical agreements can be procompetitive and efficiency-enhancing – and will not raise antitrust concerns – would have been welcome.

Compliance Strategies

In the closing section, the Commission offers its views on how businesses can implement effective strategies to mitigate antitrust exposure. Importantly, the Commission states directly that every company's strategy must be tailored to its own risks. These will be a product of the market in which it operates (e.g., whether the market is concentrated and how aggressively parties compete), its position in that market, and the nature of its activities (especially the nature of its interaction with competitors). This being said, the Commission also identifies some of the common features that it believes effective compliance programs share. These include "visible and lasting commitment" on the part of senior management, "formal acts of acknowledgement by staff," reliable internal reporting structures and regular updates.

What's It Worth?

Despite describing the key criteria of a good compliance program, the Commission makes it clear that having a program in place will not counter a finding of antitrust infringement, nor will the Commission consider a compliance program a mitigating factor when setting antitrust fines. On this point, the Commission takes a sterner view than some national competition authorities (including in the UK and France). The Commission, it seems, is strictly of the opinion that the benefit to companies of maintaining compliance programs lies in the reduced likelihood of committing a breach. To this, we would add that companies that actively monitor their antitrust compliance are also more likely to detect inadvertent breaches sooner. Crucially, this may enable them to apply for either leniency or full immunity from fines in a subsequent investigation. Thus, notwithstanding the Commission's tough stance, a compliance program can still deliver a very real financial benefit.

Compliance and Your Business

The Commission's booklet is a timely reminder to all businesses, large and small, that no one can afford to ignore the consequences of breaking competition rules.

In identifying exposure and addressing threats before they become liabilities, there is no substitute for specific, risk-based advice from antitrust professionals. Squire Sanders' antitrust and competition team offers first-class counsel around the world and develops tailor-made compliance solutions.

For a more detailed discussion of competition issues, please see *Countering Competition Risks: Towards a Culture of Compliance* by Oliver H. Geiss and Will Sparks. For further information on how we can help your business meet its compliance goals, speak to one of our lawyers around the world.

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