

Client Alert

Business Litigation & Antitrust Practice Group

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European Commission Issues Guidance on How to Comply with EU Competition Law

On November 23, 2011, the European Commission (Commission) issued for the first time guidelines for companies on how to comply with EU competition law (EU Compliance Guidelines). The EU Compliance Guidelines are welcome at a time when regulators in the EU and beyond show no signs in relenting in their enforcement against violations of competition laws. While the EU Compliance Guidelines focus on preventative steps to be taken to avoid competition law violations in the first place, they have been criticized as not providing sufficient incentives for companies to comply.

Complying with Competition Law in Europe

The Commission states that “[i]t is the prime responsibility of large, medium and small companies alike to comply with these rules. Companies need to be aware of the risks of infringing competition rules and how to develop a compliance strategy that best suits their needs. An effective compliance strategy enables a company to **minimize the risk** of involvement in competition law infringements, and the **costs resulting from anti-competitive behaviour.**”

EU competition law affects every business with activities or customers in the EU, even if the company has its headquarters outside the EU. Companies who infringe EU competition law risk fines of up to 10 per cent of annual worldwide turnover. Although individuals cannot be penalized under the EU rules for failure to comply with EU competition law, in some Member States, including the UK and Ireland, anticompetitive conduct may result in criminal penalties (fines and jail), possibly in addition to the fines imposed on their companies.

What Companies Can Do to Promote Compliance

The EU Compliance Guidelines provide an overview of the EU competition rules, the benefits of compliance and the sanctions for failing to comply. They deal with more obvious areas of infringement such as unlawful contacts and agreements between competitors to fix prices, share markets or customers (*i.e.* cartels) and also abuse of dominance.

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The EU Compliance Guidelines introduce a risk management framework for promoting compliance. While this may not be particularly ground breaking for those companies who already have a compliance programme, it is encouraging that the Commission has consolidated and stated what may be considered best practices in the area of competition law compliance.

The Commission emphasizes that in order to ensure effective compliance, companies should develop tailor-made solutions for their situation, rather than reacting to problems only when they occur. According to the Commission, a successful compliance strategy would be based on a combination of the following elements:

- A clear compliance strategy: identifying the overall risk and individual exposure based on the sector of activity, the frequency/ level of the company's interaction with competitors and the characteristics of the market; making the strategy explicit through simple "jargon-free" guidelines that business people can understand.
- Formal acts of acknowledgement by staff and consideration of compliance efforts in staff evaluation: this might include asking staff for written acknowledgement of receipt of relevant information about competition law compliance and putting in place positive incentives for employees to consider the compliance objective seriously, such as incorporating compliance as part of job descriptions.
- Constant update, contact points for advice and training.
- Monitor and audit. The appropriate procedure depends on the specific needs of the company, although the Commission notes that "some form of control is surely important."

Comment

Regulators around the world have given guidance on the features of effective compliance programmes. For example, the UK Office of Fair Trading has published guidance that explains the importance of competition law and shows the different ways in which competition law can be infringed.¹ The publication highlights practical steps that businesses can take to seek to ensure compliance, with a focus on a four-step process for achieving competition law compliance. These four steps comprise: (1) risk identification; (2) risk assessment; (3) risk mitigation; and (4) review and action. The U.S. Sentencing Guidelines² also identify what the US Sentencing Commission has defined as the key elements of an "effective compliance program."

The EU Compliance Guidelines are a welcome step in engagement between the Commission and business in promoting compliance. However, much to the regret of businesses and practitioners, the Commission has not endorsed the role of compliance programmes when considering the approach to penalties in an actual investigation. The Commission could, for example, acknowledge a company's compliance efforts as mitigating circumstances when calculating the appropriate level of a penalty but has so far declined to do so. The reason for this appears to be that the Commission is reluctant to evaluate individual compliance programmes, even against accepted benchmarks.

There are many obstacles to compliance within a business ranging from lack of awareness, lack of recognition of the relevance of the rules to the company's business, culture or apathy. Where in-house budgets are stretched, compliance programmes will be competing with other initiatives for investment time and money. The Commission's answer to this situation is that any effort by a company to ensure compliance with EU competition rules is "laudable" and that

¹ OFT 1341.

² Section 8B2.1.

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effectiveness—avoiding or bringing to an end a violation as quickly as possible—is the sole benchmark of success. It is hoped that the dialogue that the Commission has opened with its pre-holiday guidelines will continue. Meanwhile, the onus is very much on individual companies to self-assess their risk exposure and put in place the policies and procedures that are right for them.

How We Can Help

King & Spalding can assist companies in developing competition compliance solutions in the EU and internationally, including in relation to the following:

- competition compliance policies and programmes;
- training through seminars, role play and other interactive training, including e-learning;
- FBI and dawn raid guidelines and simulations including “mock” dawn raids;
- promoting awareness of competition law compliance.

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