CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
March 2012 (2)

Does Compliance Really Matter to DG Comp?

Joe Murphy, CCEP

Does Compliance Really Matter to DG Comp?

Joe Murphy[1]

Editor's Note:

In February 2012, the CPI Antitrust Chronicle published a special two-part issue on Compliance. The following is a response to one of those articles, Compliance with Competition Rules—The Way to Go,[2] written by members of the EU's DG Competition.

While the DG Comp staff members' article purports not to represent the Commission, I will assume, based on experience, that it has been reviewed at DG Comp and will treat it as official. I also observe that while the brief filing raises many questions that should be addressed, I can only note a few here in the interests of brevity. I have treated the Commission's publication, *Compliance Matters*, in a longer piece,[3] and covered the topic of competition law compliance programs in a white paper written on the OECD Competition Committee's behalf.[4]

The DG Comp posting speaks about ignorance not being a defense. But ignorance is not and never was the issue. It is the reality that organizations are not individuals, and that there is no means known to humans to control the conduct of every individual, every day, in any large organization. So society wisely elects to encourage organizations to make the most diligent efforts to prevent misconduct through compliance programs with the knowledge that such efforts will not and cannot be perfect. Government then distinguishes those companies that try from those that do not. DG Comp's refusal to do so is the issue.

The article tells us all that matters is the result—compliance with the law. That might sound more credible if the Commission actually practiced this approach. But it grants giant rewards to those who willfully violate the law, as long as they are first to report co-conspirators. But if, as the article suggests, the harm from the offender is the same, and all that matters is following the law, why this difference in treatment? The answer is that there are important policies involved in promoting competition law. One is the desire by enforcers to make examples of violators. This does not take away from the harm caused by the leniency applicant, but meets the agency's purposes. Exactly the same is true of companies making effective compliance and ethics efforts. The harm by the violator may be the same (although the existence of a program may, in fact, have hampered the conspirators' ability to steal, thus diminishing the harm), but truly diligent efforts meet a crucial societal need. That is why they should be recognized by enforcers.

---

[1] Director of Public Policy, Society of Corporate Compliance and Ethics.

[2] Ingrid Breit, Jeroen Capiau, & Andrew Essilfie, *Compliance with Competition Rules—The Way to Go*, 2(2) CPI ANTITRUST CHRON. (Feb, 2012).

[3] J. Murphy, *The EU Takes a Tentative First Step Toward Compliance Program*, ETHIKOS 9 (Jan/Feb 2012)

[4] J. Murphy, Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play? (June 2011), *available at* http://www.oecd.org/dataoecd/12/13/48849071.pdf .

Moreover, it is fundamentally unfair to treat two companies the same when their behavior is so different. Consider one company that is completely indifferent to the law, has no training, no auditing, no discipline, no compliance officer, and none of the many things required for an effective program. A second company has done all these difficult compliance program steps, carefully monitors its employees, has interactive training, has an empowered and independent chief compliance officer, disciplines senior executives for even coming close to the line, and has a highly diligent program. But one rogue employee from this second company calls a sales person at the first company and initiates a cartel. When the second company learns about it and begins investigating, the first company hears of the investigation and races to DG Comp and gets leniency; the first could not because it "initiated" the cartel. Where is there anything in this scenario that is even remotely fair? What is the policy purpose of punishing those who try, and rewarding those who do not try?

The posting also leaves open the question, if compliance programs matter, why does DG Comp use them against a company as evidence of intent? Why use them against a parent company to establish control over an errant subsidiary? Why not also accept a parent company's diligence as a factor in disassociating the parent from the subsidiary for purposes of determining appropriate turnover in calculating penalties?

The filing sites cases that did not require DG Comp to consider programs in setting fines. The fact that courts (at DG Comp's urging) have not legally required penalties be reduced says nothing about what approach the Commission **should** take in setting its own policy and in its own decisions. As we say in the compliance and ethics field, the mere fact that you have the right to do something does not make it the right thing to do. DG Comp can ignore or give credit for programs in the same way it can give leniency applicants a free pass or prosecute them.

The EC's brochure offers advice to companies on their programs, some of which is very good. But hasn't the Commission completely forfeited any leverage it might have had by its doctrinaire refusal to consider programs for any positive purpose? When an enforcement authority actually examines and considers compliance programs, industry takes notice because it needs to. But when an agency like DG Comp completely ignores even diligent programs, why would industry listen to what they have to say? Sadly, this means that the Commission loses the ability to get companies to make much-needed improvements in their anti-cartel compliance programs.

Practitioners could be excused for believing that DG Comp just does not like dealing with compliance programs. For example, it gives no explanation why the leniency program does not include any requirement whatsoever for implementing a compliance program in the offending company. DG Comp sets the terms for admission into the program and could add this to the standards, like the World Bank does in its anti-corruption leniency program.

Finally, the comment does not acknowledge DG Comp's assault on in-house legal counsel. DG Comp (after successfully pursuing this right in court) can use in-house counsel's confidential communications with employees. But this is another example where the legal right to do something does not make it the right thing to do. Why not state that DG Comp will respect company legal counsel, and not pursue their records unless there is a reasonable basis to believe they have been involved in misconduct? "Compliance Matters" speaks of companies creating an

environment that encourages employees to speak up, but DG Comp then goes out of its way to undermine that by using legal counsel's confidential employee communications.

DG Comp says "Compliance Matters,"— but, regrettably, not to DG Comp.