

Final - July 24, 2010

Dear Sir/Madam

The ultimate goal of European antitrust policy is to deter practices which restrict competition in the European single market. We are writing to you now because we believe the time is ripe to add a new dimension to EU antitrust deterrence strategy. Other jurisdictions such as the United Kingdom, United States, Canada and Australia have already moved in this direction.

Business notes and welcomes the UK OFT's recent report on Drivers of Compliance with Competition Law. Business in particular welcomes the OFT's observation that "the majority of businesses want to comply with competition law" and the OFT's statement that it will not generally view the existence of a compliance programme as an aggravating factor resulting in an increase of the fine. The EU's antitrust deterrence strategy today relies almost exclusively on the presumed wider deterrent effect of ever-increasingly high fines on undertakings found to have broken the law.

However, when setting the level of fines the European Commission does not take into account whether or not organizations have promoted a compliance culture and have established generally accepted antitrust compliance standards.

We have no doubt that formally recognising an organizations' efforts in instilling a compliance culture will decisively enhance their wider deterrent effect. It will also promote greater cooperation between corporations and antitrust authorities for the rapid identification of unlawful corporate behaviour.

One of the steps for an organization to achieve a compliance culture is to recognise the vital importance of efforts implemented by that organization to create and maintain a compliance culture. Genuine compliance efforts made by the organization ought to be acknowledged as a mitigating factor in the setting of fines. Currently there is no recognition for those organisations which invest the funds, staff and time necessary to introduce and maintain robust group-wide compliance programmes. In addition, this would create certainty on what needs to be done and certainty on its legal value as a defence in the event of violations.

Business would urge the European Commission and EU NCAs to take active steps to encourage the adoption of robust antitrust compliance standards, and as a result the agencies should not generally treat genuine compliance programmes as an aggravating factor when setting the level of any fine.

By the same token, organizations which have completely failed to take appropriate measures to prevent infringements through the implementation and enforcement of a robust compliance programme should clearly not receive any credit for any programme they may have.

This strategy will bring EU antitrust enforcement in line with EU antitrust law itself, which holds that a fine may be imposed on an undertaking *if it has either intentionally or negligently broken the law*. The current European Commission fining policy ignores this condition when fining an organization for a violation anywhere within its group, irrespective of the efforts of the organization to prevent it.

We believe that preventing anti-competitive practices is far more efficient than investigating and sanctioning violations after they occur. This is particularly true where illegal cartel conduct is concerned. Preventing cartel conduct depends primarily on the spread of efforts within individual undertakings to enforce compliance with the law, and more broadly on the efforts of both the business community and public authorities to foster a "culture of competition" in which cartel conduct is widely and unambiguously condemned with the appropriate sanctions.

In this perspective there is growing interest in introducing a new, preventive dimension to current EU antitrust policy, based on the recognition that the adoption by more organizations of more robust antitrust compliance programmes best serves the ultimate goal of prevention.

With a view to accelerating the EU's move towards such an enhanced deterrence strategy, we have set out in the **Annex** to this letter an outline of generally accepted standards applicable for a robust antitrust compliance programme which reflect those now in place in the United Kingdom, Australia, Canada and the US, and takes into account our experience operating across the European Union.

We look forward to an opportunity to discuss this with you in the near future.

Yours sincerely,

Annex: outline of generally accepted standards applicable for a robust antitrust compliance programme: Further enhancing the foundation for a European culture of antitrust compliance

All compliance efforts must demonstrate a company's commitment to conducting business in conformity with the law, and as such, compliance programmes will contain basic ingredients necessary for robust antitrust compliance. Programmes are designed to:

- Help companies identify and minimize/eliminate risks that infringements occur, and to provide evidence of the implementation of the programme both internally (e.g. towards the board/audit committee) and externally (e.g. towards competition authorities)
- Serve as a basis for consideration by European competition authorities and legislators of the formal recognition of compliance programmes meeting this standard as mitigating factors in possible sanctions for antitrust violations.

The design of a robust programme depends on the size, geographic presence, activity and structure of a specific company, so flexibility must be built into any description or acceptance of best practice. However, although there is no one-size-fits all programme or template, common components of a robust programme include:

Antitrust compliance embedded as company culture with management commitment

- Formalisation of the compliance commitment which demonstrates and reflects all management levels' commitment to comply with strong support from the top/senior management levels;
- Compliance is considered a business priority at all levels of the corporation:
 - Compliance is identified as part of the corporation's core values;
 - Senior management accepts that it is its responsibility to create and maintain the compliance culture; it communicates and operates that illegal or unethical behaviour is not tolerated;

Antitrust policies and procedures

- Appropriate policies and procedures should be implemented;
 - The appointment of a specialist compliance executive and advisor with overall responsibility for the programme reporting to senior management;
 - Identification of individuals responsible for each element of the programme;
- Disciplinary action will be taken internally against staff who intentionally or recklessly involves the organization in infringements of antitrust laws;

Antitrust training

- Training (on-line, face-to-face or a combination of both) to ensure that staff understands the compliance dimension of its work;
- Availability of a clear and jargon-free antitrust law compliance manual addressing the specific risks faced by the organization;

Risk assessment and controls

- Regular reporting and periodic reassessment of compliance risks and response:
 - Commitment and main elements of the programme communicated internally and externally to stakeholders;
 - Continuous re-evaluation and upgrading of the programme;
 - Independent internal audits and appropriate due diligence where risks have been identified;
 - Mechanisms for reporting antitrust infringements or concerns up the corporation's ladder