



COMPLIANCE WITH THE COMESA COMPETITION REGULATIONS

COMESA COMPETITION COMMISSION
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FOREWORD BY THE DIRECTOR

The principle objective of the Treaty establishing the Common Market for Eastern and Southern Africa ("COMESA") is to ensure the attainment of regional economic integration for the Member States of COMESA. The adoption of the COMESA Competition Regulations by the COMESA Council of Ministers, under Article 55 of the Treaty, was in realization that enforcement of competition and consumer policies in the Common Market can help to facilitate the achievement of this goal. The Council realized that the benefits of market integration would only be achieved in a dynamic and competitive market environment devoid of new market barriers erected in place of those being dismantled by the wave of liberalization and privatisation.

Competition within the Common Market is ideal for business and for consumers. Vigorous competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets in the Common Market would enhance the competitiveness of the regional firms on the global market, raise economic growth and standards of living in the Common Market, create jobs and benefit consumers by ensuring lower prices and a wide variety of goods and services.

Despite the commendable progress made in the removal of the traditional trade barriers such as tariffs and quotas, the benefits of a Common Market may be stifled by malpractices on the market in the form of cartels, abuses of a dominant position and other forms of restrictive business conducts which can be just as effective in curtailing market entry as do the government regulations. There is need, therefore, to complement the privatization and deregulation drive with an effective competition policy that guards against a transition from government promoted to private sector induced monopolies.

We recognise the efforts being undertaken by the majority of businesses to comply with competition law in general at regional and national level. Whilst we will still take enforcement action where necessary, we also wish to support businesses seeking to achieve a competition law compliance culture so that breaches of competition law are avoided in the first place. They say prevention is better than cure!

This booklet, therefore, intends to assist those companies willing to stay on the side of the law by ensuring adherence to the provisions of the Regulations. It provides a synopsis of the rules which companies need to follow and the dangers associated with non-compliance with the law. The brochure also sets out the practical steps that can be taken by companies to ensure compliance with the Regulations and the national laws.

Stakeholders need to appreciate this brochure as a guide to their conduct on the market with the view to ensuring transparency and mutual understanding between the businesses and regulators for the benefit of all. It is my sincere hope that this brochure will assist companies big and small to understand what is at stake if management or staff take the issue of compliance casually.

I would like to renew our thanks to the many companies which have interacted with us in the inception phase through notifications, inquiries, complaints, etc. These interactions have helped us appreciate the needs of companies and hence our contribution through this guide. We look forward to more such collaboration as we strive to expand and deepen the competition gospel in COMESA!

George K. Lipimile

What Companies Can do Better to Respect the COMESA Competition Regulations?

1. Complying with the COMESA Competition Regulations: Every Company's Responsibility

The COMESA Competition Regulations ("the Regulations") concern every firm which conducts business in the Common Market. These Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market except for those activities expressly exempted by the Regulations. This means that firms, whose market conduct falls short of compliance with these Regulations, run the risk of incurring high fines or face other negative consequences of their non-compliance. Managers and employees of companies, therefore, have the responsibility to make choices that are in the interest of their respective companies.

Much as the Regulations do not provide for sanctions against individuals for their role in the non-compliance of the companies they serve, the careers and jobs of these individuals are not entirely safe as their conduct may threaten the very existence of the company they misled. In addition, the bad record of the concerned individuals would make it practically difficult for them to get employment elsewhere. It must also be understood that in some Member States of COMESA, an involvement in anti-competitive business practices may attract criminal sanctions on individuals including imprisonment in addition to the fines levied on the involved company(s).

General Obligations to Comply

As is the case with any other law, the responsibility to comply with the Regulations lies squarely with those who are subject or affected by it. Compliance with the Regulations should be taken as a daily responsibility of all companies doing business in the Common Market. Ignorance of the provisions of the Regulations will not be a mitigating factor from the consequences that would follow from non-compliance with them. Ignorance of the law is not a defense.

There is no one size fits all mechanism companies would employ to comply with the Regulations. The onus is on the responsible companies themselves to decide on measures that would ensure that they are not on the wrong side of the law. This is so because companies differ in terms of size, resources at their disposal, exposure to risk of non-compliance, etc. What is important for companies is to be conversant with the provisions of the Regulations and that would inform the appropriate mechanism of complying with them taking into account their individual peculiarities.

Important Compliance Obligations under the COMESA Treaty

The COMESA Treaty contains important provisions on the obligations of Member States which facilitates compliance with the COMESA Competition Regulations and Rules by companies. The following are some of such provisions:

Article 55 on Competition

The Member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited and to this end, they agreed to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market. To facilitate the implementation and enforcement of this important prohibition, the Council of Ministers is mandated to make regulations to regulate competition within the Member States. Hence, the COMESA Competition Regulations.

Article 5 on General Undertakings

All the Member States are obliged to make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of the Treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the Common Market or the implementation of the provisions of the Treaty.

To this effect, each Member State shall take steps to secure the enactment of and the continuation of the necessary legislation to give effect to the Treaty and in particular to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory among other things.

Article 10 on Regulations, Directives, Decisions, Recommendations and Opinions of Council

The Council is given power to make regulations, issue directives, take decisions, make recommendations or deliver opinions in accordance with the provisions of the Treaty.

A regulation made by Council shall be binding on all the Member States in its entirety.

Article 12 on Entry into Force of Regulations, Directives and Decisions of the Council

Regulations made by Council shall be published in the Official Gazette of the Common Market and shall enter into force on the date of their publication or such later date as may be specified in the Regulations.



"It is important, therefore, that every company plays a role in ensuring a level playing field in doing business in the Common Market."

Benefits of Compliance

Credible companies should always be wary of the damage the high fines would have on their operations. The other potentially serious consequence of non-compliance is the loss of trust and credibility in society resulting from doing business unethically.

The most important thing for companies is to always consider ethical business as a governance issue and, therefore, approach the issue of compliance as a positive contribution to society. A vigorous and reassuring compliance strategy is a prerequisite to enhancing the reputation of a company in society. Compliance with the Regulations is, therefore, not only a legal obligation, but also an attitude and a culture that can impact positively on business. Being compliant with the Regulations and maintaining a strong reputation are fundamental matters for every enterprise doing business in the Common Market. Some of the specific benefits of compliance with the Regulations include:

- (a) Reduction in the risk of reputational damage connected with an infringement
- (b) Improvement of the image of a company as being a progressive and ethical business
- (c) Ability to attract ethically conscious consumers and investors
- (d) As an employer, helps to attract and retain ethically conscious talent
- (e) Reduction of the risk of fines
- (f) Reduction of legal costs arising from litigations in courts

It is important, therefore, that every company plays a role in ensuring a level playing field in doing business in the Common Market. Companies can play a positive role in this regard by reporting existing or potential malpractices to the attention of the COMESA Competition Commission ("the Commission") or the national competition authorities. Companies involved in cartel conduct may also apply for leniency with the Commission or the national competition authorities as a means of bringing the cartel to an end. Companies may also lodge a complaint with the Commission or the national competition authorities should they become a victim of the business malpractice.

Need for Action not Lip Service

When it comes to the issue of compliance with the Regulations, what matters most is the faithfulness of the companies to follow what they have pledged to do. Companies need to take verifiable practical steps to ensure compliance with the Regulations as their efforts will be assessed based on the actual results on the market. Companies need to come up with compliance programmes that are built on firm foundation of commitment from management and supported by a clear 'top-down' compliance culture. It should be noted that mere lip service will not help companies in any way as the law will always catch up with them.

2. The Costs of Non-Compliance for a Company

Fines on companies

The fines which the Commission imposes on companies that infringe the Regulations can be very substantial, even as high as 10 % of a company's annual turnover. This level of fines may be imposed for all types of infringements involving anti-competitive practices, mergers and consumer protection. Hence, the risks associated with the infringement of the COMESA competition law are quite high. Of course, in fixing the appropriate fines the Commission is guided by the provisions of the Regulations and Rules on what may constitute mitigating or aggravating factors.

Sanctions on Individuals

Whilst the provisions of the Regulations and Rules do not provide for criminal sanctions and are silent on the imposition of fines and the other forms of sanctions on individuals like the company directors, some Member States do provide for fines and disqualification for individual directors. The laws of some countries even allow custodial sanctions for individuals involved in general competition law infringements and/or in certain pre-defined types of infringements like bid-rigging. Such sanctions can be separate or cumulatively applied on top of pecuniary sanctions. Company managers who behave in an unlawful way therefore run the risk of jail in certain Member States.

Illegal agreements are void and may attract damages

Restrictive agreements which are incompatible with the COMESA Competition Regulations and Rules are automatically void and therefore cannot be enforced in court by the parties involved. Notifiable mergers that are carried out in contravention of the Regulations have no legal effect and the rights or obligations imposed on the parties by any agreement to the merger are also not legally enforceable in the Common Market. This means that a party cannot be obliged to honour an agreement which is illegal. Negative consequences for business can therefore be considerable.

In addition, if an infringement of the COMESA competition law causes or has caused harm to a third party, the Commission is empowered to order payment of compensation to the affected persons in accordance with Article 8 of the COMESA Competition Regulations.

Bad press for lawbreakers and other collateral consequences

The Commission is obliged to publish all decisions made by the Board of Commissioners on any infringement of the COMESA competition law. The publication must state the names of the parties and the main content of the decision, which obviously include the penalties imposed on the parties. Hence, the resulting media coverage, both general and specialised, could have a detrimental impact on the reputation of the involved companies. Moreover, they may face hostility from clients and consumers who may feel cheated by their anti-competitive practices.

Investigations by competition authorities can be time-consuming and costly for companies. Managers may become embroiled in lengthy legal discussions and hearing sessions, thereby distracting attention from their core business activities.



“The COMESA Competition Regulations are about the competitive behaviour of companies and they apply in all COMESA Member States.”

3. Compliance with COMESA Competition Regulations — Are you certain you have covered the risk?

There are specific provisions of the Regulations that deal with the market behaviour of companies. Article 16 of the Regulations prohibits agreements between companies which restrict competition, unless they produce substantial benefits to customers and consumers. Article 18 of the Regulations outlaws abuses of dominance by companies. Part 4 of the Regulations provide for the notification of all mergers that meet the required threshold in order to enable the Commission to control those transactions that are likely to substantially prevent or lessen competition.

These fundamental provisions and prohibitions are further clarified by the COMESA Competition Rules (the Rules) adopted by the COMESA Council of Ministers. The Rules defines the procedures to determine agreements, decisions and concerted practices prohibited; and abuse of dominance. The Rules also outline the process of investigation. The Guidelines on Restrictive Business Practices (Application of Article 16 of the Regulations) and Guidelines on Abuse of Dominance (Application of Article 18 of the Regulations) were also prepared by the Commission to provide clarity and predictability as regards the general analytical framework of the Commission in determining cases of vertical, horizontal restraints and abuse of dominance. The Guidelines also aim to assist undertakings to make their own assessments as regards practices and behaviors they are involved in vis a vis the provisions of the Regulations.

3.1. When are the COMESA Competition Regulations Applicable to Companies?

The Regulations are applicable to all undertakings operating in the Common Market as long as their conduct is likely to have an appreciable effect on trade between Member States and would restrict competition in the Common Market.

There are two basic types of behaviour companies might be engaged in their business transactions, which are prohibited by the Regulations:

- a) Illegal contacts and agreements between companies
- b) Abuse of Dominance

a) Illegal contacts and agreements between companies

Anti-competitive contacts between companies which, irrespective of their form, may distort the normal play of competitive forces and they are prohibited. Such contacts can take many forms and do not require the formal acceptance by the companies involved through an agreement. Even informal arrangements among business representatives can be considered illegal.

Anti-competitive contacts between companies may lead to include price fixing, sharing markets or customer allocation, production or output limitation, whether through bid rigging or otherwise. Such practices are often kept secret and generally referred to as 'cartels'. They are qualified as 'hardcore' restrictions of competition in legal jargon as they are by their very nature most likely to restrict competition. These hardcore infringements can result in companies being heavily fined.

Private exchanges between competing companies of individualised information, concerning their intended future prices or quantities can also amount to hard core infringements. More generally all exchanges of confidential and strategic information between competitors can give rise to competition concerns.

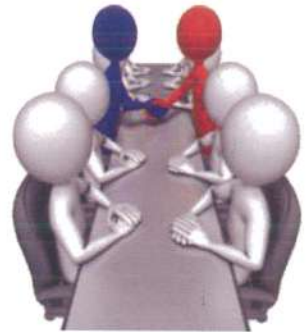
This concerns all types of information that reduces strategic uncertainty in the market, for example relating to production costs, customer lists, turnover, sales, capacities, qualities, marketing plans, etc.

Furthermore, even the unilateral disclosure of strategic information by one company via email, phone calls or meetings to its competitors can be considered problematic.

Agreements between companies at different levels of the supply chain, typically distribution agreements between suppliers and resellers, which aim at fixing prices or artificially portioning the internal market, are also illegal.

For instance, a supplier may not oblige its distributor to refuse to sell goods to customers residing outside of a given territory. In addition, it may not impose on its distributors a resale price for a given product.

In short, managers and employees of companies should always be kept in mind the following when they deal with competitors



“Anti-competitive contacts between companies include price fixing, sharing markets or customer allocation, production or output limitation, whether through bid rigging or otherwise.”

- NOT TO engage in agreements fixing prices, which hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- NOT TO engage in collusive tendering and bid-rigging;
- NOT TO make market or customer allocation agreements;
- NOT TO allocate by quota as to sales and production;
- NOT TO do collective action to enforce arrangements;
- NOT TO make concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- NOT TO engage in collective denials of access to an arrangement or association which is crucial to competition.

It is important to keep in mind that agreements between competitors and companies at different levels of the supply chain can also have anti-competitive effects even if they do not contain any of the above-mentioned hardcore restrictions.

For example, the agreement might have a negative impact on one of the parameters of competition, namely price, output, innovation, or the quality or variety of goods and services.

Such restrictive effects also need to be assessed by companies. A detailed framework for analysing the competitive impact of such agreements is provided by the Commission in specific guidelines.

b) Abuse of Dominance

What is a dominant position?

Article 17 of the Regulations defines a dominant position as being created when one or more undertakings occupy such a position of economic strength which enables it to operate in the market without effective constraints from its competitors or potential competitors.

Abuse of a Dominant Position

It is the intention of every successful company to vie for an increase in its market share in the market. In many instances, a dominant position depicts the genuine success of that company. Dominance is, therefore, not forbidden but it is the abuse of that dominant position which attracts scrutiny and sanctions by the Commission. A dominant firm will, by definition, have the means and the strength to act independently of the market players. A Dominant firm, in this regard, has the special responsibility not to allow its conduct to distort competition on the market.

Examples of Abusive Practices

The following are the examples of abusive practices of a dominant firm which are prohibited by the Regulations:

- Selective price cuts below average cost with the view of preventing entry or eliminating an existing competitor.
- Raising the costs of inputs supplied to a downstream competitor with the view to drive the competitor out of the downstream market.
- Entering in unusual long-term supply or purchase arrangements with the aim of excluding competitors from a substantial portion of the market.
- Exclusive dealing where one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal.
- Refusal to supply an essential facility that is objectively necessary for the another firm to compete effectively on a downstream market
- Charging unreasonably high prices
- Depriving smaller competitors of customers by selling at artificially low prices they can't compete with.
- Refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the dominant company.
- Making the sale of one product conditional on the sale of another product.

Companies in a dominant position cannot simply ignore the potential risks of their dominance. They must determine what they can and cannot do if they are or might be dominant in a market.

3.2. Merger Control

The purpose of merger control in the Common Market is to ensure that competition between undertakings operating in the market is not significantly reduced through for example the creation of monopolies. Reduced competition in the market stifles innovation and efficiency, an outcome that does not benefit consumers. According to the Regulations, a merger occurs when one company purchases or leases shares or assets in another company, an amalgamation of two companies or any other means that might have similar effects.

Companies that have operations in the Common Market and are contemplating to merge should ensure that they comply with the Regulations. The Regulations provide that where both the acquiring firm and the target firm or either the acquiring firm or the target firm are operational in two or more COMESA Member States, then the merger should be notified to the Commission

The Commission has through its Guidelines set the criteria for transactions that should be notified as follows:

- (a) at least one merging party operates in two or more Member States (an undertaking "operates" in a Member State if it has annual turnover in that Member State exceeding US \$5 million);
- (b) a target undertaking operates in a Member State;
- (c) it is not the case that more than 2/3 of the annual turnover in the Common Market of each of the merging parties is achieved or held within one and the same Member State.

Further, in order for a merger to be notified, it should meet the merger notification thresholds set under Rule 4 of the Rules on the Determination of Merger Notification Thresholds which was issued in accordance with Article 23 of the Regulations. Pursuant to this Rule, the merging parties should satisfy the following cumulative thresholds:

- the combined annual turnover or value of assets (whichever is higher) in the Common Market of all parties to a merger equals or exceeds US\$ 50 million; and
- the annual turnover or value of assets (whichever is higher) in the Common Market of each of at least two of the parties to a merger equals or exceeds US 10 million, unless each of the parties to a merger achieves two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.

Therefore, before companies merge, they should notify the Commission of their transaction in order for the Commission to conduct an assessment. Through this assessment, the Commission is able to determine whether or not the merger will benefit consumers and will not significantly reduce competition in the Common Market. Failure to notify a notifiable merger is an infringement of the Regulations and is punishable by a fine of up to a maximum of 10% of either or both of the merging parties' annual turnover in the Common Market.

3.3. Are Small & Medium Enterprises Subject to the COMESA Competition Regulations?

All companies are subject to the COMESA Competition Regulations, with no differentiation according to their size. Being small is no excuse for not complying with the applicable Competition laws, as long as the companies meet the prescribed thresholds.

3.4. Enforcement Institutions

Enforcement of the Regulations falls under the Commission, the Board of Commissioners and COMESA Court of Justice to ensure that the Regulations are complied with.

The Commission ensures effective application of these Regulations throughout the Common Market. It investigates suspected infringements and addresses binding decisions to companies in order to bring established infringements to an end. The Commission also has the power to impose fines on companies which have been found to infringe the COMESA competition law.

Besides, Member States plays a pivotal role in the enforcement against illegal activities as the Commission liaisons information to the national competition authorities or competent authorities of Member States for purpose of establishing the existence of infringement of Articles 16 or 18 of the Regulations or obtaining negative clearance or a decision in application of Article 16 (4) of the Regulations.

3.5. Complying with the Regulations

The Commission endeavours to make it easier for companies to acquaint themselves with and know the Regulations which they must respect.

Certain types of agreements are exempted from general prohibition if their restrictive nature can be justified by benefits for consumers and the economy as a whole. The hardcore practices mentioned above are unlikely to bring such benefits.

Companies have to assess for themselves whether their behaviour complies with the Regulations and in doing so they might consider seeking legal advice.

General guidance as to whether an agreement is deemed exempted or not is provided by the Regulations. The Regulations exempt restrictions in certain categories of agreements in the following cumulative and exhaustive conditions are met:

- a) Whether the practice creates efficiencies, that is whether it contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- b) Whether consumers receive a fair share of the created efficiencies;
- c) Whether the practice is indispensable to create the efficiencies; and
- d) Whether the practice does not eliminate competition.

Finally, formal Commission decisions and Notices are publicly available, and the Commission publishes the formal opening and closing of proceedings on its website and/or by issuing a press release.



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Proper Internal Reporting Mechanisms

A further essential feature of a successful compliance strategy is the inclusion of clear reporting mechanisms. Staff must not only be aware of potential conflicts with the Regulations, but also need to know whom to contact and in what form when concrete situations of conflict arise. A company may for example consider appointing a compliance officer who directly reports to the company's Management. The communication channels should in any event allow Management to take swift action. Time is usually of the essence, irrespective of whether or not competition authorities are already aware of the particular problem. If an employee or manager discovers or even suspects an infringement, the compliance strategy should provide her/him with concrete guidance on how to proceed. An environment that encourages employees to speak up when they are confronted with questionable situations can be decisive for the effectiveness of the compliance strategy.

Constant Update, Contact Points for Advice and Training

Obviously, it is not enough just to put down a strategy on paper. Where a manual is made available to staff, it should be reviewed regularly. There should also be a clearly identified contact point where advice can be sought by staff in case of doubts about the compatibility of certain types of behaviour or agreements with the Regulations. Training on the Regulations also plays an important role. Many companies already offer their staff, in particular newcomers, an ambitious training programme. In such cases the development of a module on competitive behaviour would be advisable. Where a company's analysis has indicated particular risk areas, training should be provided to those staff members who are most likely to be confronted with situations that could lead to the company becoming involved in infringements, for example sales personnel and sales managers as regards price agreements between competitors and anyone attending trade associations or industry events.

The specific details will vary from one business to another, depending on available resources and expertise. In any case, a compliance strategy will be more effective if it incorporates a clear mechanism for ensuring that updates of the written policy can be obtained by staff at any time and that all employees and managers are kept informed about new developments.

Monitoring / Auditing

Monitoring and auditing can serve as effective tools to prevent and detect anti-competitive behaviour inside the company. Monitoring, for instance by verifying the company's own behaviour in the competitive process in bidding markets, would mean a more preventive approach. Auditing would tend to discover anti-competitive behaviour only after it had already occurred. Both mechanisms can also be combined. The appropriate procedure depends on the specific needs of the undertaking, but some form of control is surely important to underpin the internal credibility of a compliance strategy.

The strategy has failed to ensure full compliance? It may still serve to limit exposure!

An effective compliance strategy will be expected to simply prevent any infringement from happening. Yet it may prove insufficient to ensure compliance, and there may nevertheless be instances of wrongdoing.

Stopping the infringement at the earliest possible stage

In such a case, the existence of a compliance strategy on condition that it incorporates appropriate reporting mechanisms will allow mishaps to be nipped in the bud. It will enable the company to take appropriate measures without delay, so that any potential infringement is swiftly brought to an end. This will contribute to limiting damage to competition and minimising the company's exposure.

A practical set of 'DON'Ts' and 'RED FLAGS' can be a useful tool:

- A list of 'DON'Ts' could include clearly illegal conduct such as price-fixing agreements, the exchange of future pricing intentions, allocation of production quotas and the fixing of market shares;
- RED FLAGS' are warning signs which serve to identify situations in which infringements of competition rules can be suspected. They would encourage managers and employees to exercise particular caution in seeking to avoid any infringement on the part of their own company.

Visible and lasting commitment to the compliance strategy by senior management

Apart from choosing the right strategy and making it accessible to all staff, unequivocal senior management support is vital. The message that compliance with the law is a fundamental policy of a company needs to be clearly endorsed. This is an essential element of creating a culture of respect for the law within the company. Designating an individual member of the senior management to take overall responsibility for compliance is considered advisable to ensure lasting commitment to and visibility for this objective. Small and medium-sized companies have the advantage that the 'tone from the top' can more easily be disseminated to the employees, who are fewer in number.

Whilst the Commission does not wish to be prescriptive, a company should devote sufficient resources appropriate to its size and the risks it faces to ensure it has a credible programme.

Formal acts of acknowledgement by staff and consideration of compliance efforts in staff evaluation

Backup measures taken by companies as regards adherence of their staff to the adopted compliance strategy might include:

- asking staff for written acknowledgement of receipt of relevant information on compliance with the Regulations, for example when providing them with a manual or after dedicated training sessions. This form of explicit recognition helps to make individual staff members more aware that compliance concerns each and every one of them;
- putting in place positive incentives for employees to consider this objective with utmost seriousness. Compliance duties could for instance be part of job descriptions. A particularly vigilant attitude in that respect may also form part of the staff evaluation criteria.
- penalties for breach of the internal compliance rules. Such penalties would however have to be consistent with national employment law and checked with legal advisers first.

The Commission welcomes Compliance Efforts by Companies

The Commission welcomes and supports all compliance efforts by companies as they contribute to developing a competitive culture in the Common Market. The Commission would advocate a more proactive approach that avoids infringements of the Regulations from the outset. It cannot be overemphasised that a compliance programme worthy of the name must ensure that companies do not infringe competition law. As has already been pointed out, it is not so much the effort made, but the result achieved, which counts once competition authorities become involved and launch an investigation. The quality of a compliance programme stands or falls by its effectiveness.

The Commission's attitude towards compliance programmes can, therefore, be summarised as follows:

- Compliance programmes need to be tailor-made to the company concerned. The range of situations that a compliance programme may need to address is wide. Equally the type, size and resources of companies which may find it useful to adopt a compliance programme vary considerably. Consequently, there is no 'one size fits all' model: an exhaustive all encompassing model would not be adequate. It is for each company to reflect on its needs to ensure compliance and develop its own strategy. Further legal advice can be sought if considered appropriate.
- Access to useful information can be provided by the Commission but there will be no endorsement of any individual compliance programme. While the Commission constantly seeks to improve the accessibility of relevant legislation and information on the Regulations, it considers it not to be the task of competition authorities to formally advise on or approve individual compliance programmes. Indeed, companies know best what is required for their own compliance strategy. This brochure provides companies with food for thought about the nature of their own compliance strategy. This includes for example creating the necessary positive and negative incentives to ensure compliance.
- Although all compliance efforts are welcomed, the mere existence of a compliance programme is not enough to counter the finding of an infringement of the Regulations. Companies and their employees must, in fact, comply. If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of the law.
- Regulations, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No Compliance programmes should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is 'caught.' The purpose of a compliance programme should be to avoid an infringement in the first place. For the purpose of setting the level of fines, the specific situation of a company is duly taken into account. But the mere existence of a compliance programme will not be considered as an attenuating circumstance, nor will the setting-up of a compliance programme be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement. It would nevertheless be encouraged by competition authorities as a preventive means to avoid the occurrence and possible repetition of illegal behaviour in the first place.
- It goes without saying that the existence of a compliance programme will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities: if the programme has failed to deliver results, the sanction will come in the form of the fine imposed. In other words: a credible competition compliance programme can only deliver benefits to a company.

About US

The Commission is an international organization established by Regulations which were issued in the COMESA Official Gazette Vol. 9 No.2 as Decision No. 43 of Notice No 2 of 2004. The Commission promotes and encourages competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and protecting consumers against offensive conduct by market actors.

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