# FRAMEWORK FOR THE RECOGNITION OF COMPETITION COMPLIANCE PROGRAMS AND DILEMMAS FACED BY COMPETITION AUTHORITIES

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*Should competition authorities reward compliance? How could competition authorities reward compliance? This article aims to examine these questions by analysing the approaches taken by the competition authorities, and the positive and negative effects that may result if competition authorities reward competition compliance programmes. Finally, the paper sets out the frameworks of recognition of competition compliance programmes and dilemmas faced by competition agencies when rewarding ex-ante and ex-post compliance efforts.*

## I. INTRODUCTION

From time to time the question arises whether competition authorities should take into account competition compliance programs.[1] This Note discusses whether competition authorities should reward ex-ante and/or ex-post competition compliance programs, and if so, how this could be achieved in practice.

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[1] See e.g. Anne Riley and Margaret Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More?' (2011) 1 Competition Law Journal 21; Wouter P.J. Wils, 'Antitrust compliance programmes and optimal antitrust enforcement' J. of Antitrust Enforcement (2013) 1 (1): 52-81; University of Florida Levin College of Law Research Paper No. 16-3; Damien Geradin, 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils.' J Antitrust Enforcement (2013) 1 (2): 325-346; Anne Riley, Daniel Sokol, 'Rethinking Compliance' 3 J. of Antitrust Enforcement 31 (2015).

Section II outlines the pros and cons of competition compliance rewards before examining the different approaches taken by a number of competition authorities around the world. Section III (based on the experiences of different competition authorities) sets out the frameworks of recognition of competition compliance programs and dilemmas faced by competition agencies when rewarding ex-ante and ex-post compliance efforts. Finally, section IV contains the conclusion of this Note.

## II. SHOULD COMPETITION AUTHORITIES REWARD COMPLIANCE?

### *A. Differentiating Between ex-ante and ex-post Compliance Recognition*

At this point it is necessary to distinguish between ex-ante and ex-post recognition of competition compliance programs. Ex-ante recognition of competition compliance refers to a situation in which a competition compliance program was already implemented prior to the finding of a competition law infringement, whereas ex-post recognition of competition compliance refers to a situation in which a compliance program is either adopted or upgraded as a consequence of a competition law infringement.

### *B. Arguments in Favor of Rewarding Competition Compliance*

Both companies and competition authorities have a vested interest in the prevention of competition law infringements but companies themselves are best positioned to prevent or detect such infringements in the first instance.[2] As a consequence, competition authorities should take into account the opportunities presented by the technological developments that have taken place in relation to compliance, which enable companies to better prevent or detect corporate infringements.

Another argument for promoting compliance is that it may help to avoid and prevent competition law infringements, or if ongoing unlawful conduct is found to exist, it may help to reveal and put an end to the conduct at an early stage.[3] Some authors argue

[2] Wils (n 1) 54.

[3] Ibid 56.

that compliance programs could enhance the effectiveness of leniency policies.[4] It is argued that a company that is able to better detect potential infringements internally is also in a better position to report infringements to the competition authority before other cartel members.[5][6] Consequently, competition compliance programs may complement leniency in the detection of cartels.

### *C. Arguments Against Rewarding Competition Compliance*

On the other hand, competition law compliance faces a number of difficulties due to the fact that competition law norms are formulated in a very abstract manner and competition law expectations are heavily developed by case law. Accordingly, competition law compliance requires a constant review of the developing practices of the competition enforcers and the courts, thus making competition law compliance more onerous.

The Court of Justice of the European Union (hereinafter "CJEU") highlighted some drawbacks of compliance programs in the elevator cartel case.[7] According to the CJEU, the compliance program in question made it even more difficult for the infringement to be uncovered as the employees of the company were under threat of serious penalties and therefore tried to hide the infringement.[8] Another argument against considering compliance programs as a mitigating factor is that this practice would discriminate against those small and medium-sized enterprises (hereinafter "SMEs") that do not have sufficient resources to develop compliance programs, and which would accordingly be unable to benefit from this reward. Vice-President Almunia said in 2010, "[…]why should I reward a compliance programme that has failed?"[9] Later,

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[4] Florence Thépot, 'Can Compliance Programmes Contribute to Effective Antitrust Enforcement?' Forthcoming in J. Paha (ed.) 'Competition Law Compliance Programs? An Interdisciplinary Approach' Springer (2016). 5.

[5] See ibid. 6. and Geradin (n 1) 328.

[6] However Geradin states that compliance programmes only contribute to effective leniency programmes if they allow early detection of infringements. Geradin (n 1) 341.

[7] Case T-138/07. *Schindler Holding Ltd and Others v European Commission.* ECLI:EU:T:2011:362.

[8] Ibid. para 280.

[9] Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, 'Compliance and Competition policy' (Speech at Businesseurope & US Chamber of Commerce. Competition

he added that "A successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition."[10]

### *D. Approaches Adopted by a Number of Competition Authorities*

In the 1980s and '90s the Commission of the European Union (hereinafter "Commission") took into account compliance programs as a mitigating or aggravating factor.[11] By the 2000s, the Commission's approach had changed and it began to take a neutral position concerning compliance programs, with the result that the adoption of a compliance program was now considered as neither an aggravating factor, nor a mitigating factor, in terms of fines.[12] This paradigm shift was also confirmed by the CJEU.[13]

Some competition authorities have adopted slightly different approaches to that of the Commission and have adopted fining systems that reflect the benefits presented by operating compliance programs.

On February 10, 2012, the French Competition Authority (hereinafter "Autorité") issued a framework document regarding competition compliance programs.[14] According to the Autorité, the

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conference, in Brussels, 25 October 2010) available at <http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm> accessed 09 November 2017.

[10] Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, 'Cartels: the priority in competition enforcement.' (Speech at the 15th International Conference on Competition: A Spotlight on Cartel Prosecution. Berlin, 14 April 2011) available at <http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en> accessed 09 November 2017.

[11] *Napier Brown - British Sugar* (Case No IV/30.178) Commission Decision 88/518/EEC [1988] OJ L 284/41 para 85.

[12] Simone Pieri, Jacques Moscianese and Irene de Angelis, 'In-house Compliance of EU Competition Rules in Practice.' 5 Journal of European Competition Law & Practice (2013) 71.

[13] Joined cases T-101/05 and T-111/05 *BASF AG* (T-101/05) *and UCB SA* (T-111/05*) v Commission of the European Communities* [2007] ECLI:EU:T:2007:380, para 52.

[14] Autorité de la concurrence, 'Framework-Document of 10 February 2012 on Antitrust Compliance Programmes' available at

mere existence of a compliance program should not in itself result in the reduction of a fine, and a compliance program should not per se be considered as a mitigating factor. However, if it turns out that high ranked managers or other corporate personnel have participated in a competition law infringement, this cannot be taken into account as an aggravating factor, despite the fact that the company's officials were obligated to comply with all of the compliance rules of the organization. The only factor that can be taken into account as a mitigating circumstance is if a company can prove with objective and verifiable evidence that it had ceased, on its own initiative, the violation before the competition authority became aware of the conduct.[15] In addition, if a company decides to settle and offers to implement a compliance program or to strengthen an existing one, the Autorité will grant an additional 10% fine reduction.

The main objective of the Competition and Markets Authority's (hereinafter "CMA") policy with regard to compliance programs is to encourage companies to prevent infringements by adopting robust compliance programs. The CMA's (and its predecessor's, Office of Fair Trading's) guidance on penalties[16] highlights that there is no automatic fine reduction. A fine may be increased where a compliance program has been used to facilitate an infringement or to mislead the CMA. Nonetheless, the CMA will assess whether the steps taken by the undertaking were adequate enough to merit a 10% fine reduction. The guidance emphasizes that the mere existence of a compliance program cannot be considered as a mitigating factor. However, if a company can prove, that proper steps have been taken to achieve a clear and unambiguous commitment to competition law compliance in the form of measures taken to identify, assess, and mitigate risks, then such measures will probably be treated as a mitigating factor.[17]

Italy has adopted an ex-post regime. The Autoritá Garante della Concorrenza e del Mercato (hereinafter "AGCM") may grant a fine reduction of up to 15% if the company in question undertakes to set up a compliance program or to improve an existing

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<https://goo.gl/Gw0S6v> accessed 09 November 2017

[15] Ibid.

[16] Office of Fair Trading, 'OFT's guidance as to the appropriate amount of penalty.' [2012] OFT423. available at <https://goo.gl/J3GRiO> accessed 09 November 2017.

[17] Richard Whish and David Bailey, *Competition Law* (8th Edition edn, Oxford University Press 2015) 438

program. The company's compliance program must involve the top management, include measures aimed at identifying risks and provide for incentives, sanctions, adequate training programs, an audit, and a follow-up mechanism to ensure compliance with the program.[18] The recent decision of the AGCM highlights the importance of implementing effective compliance programs in order to benefit from a mitigation of the fine.[19] The United States has adopted an ex-ante regime with the result that only genuine compliance efforts will be taken into consideration when calculating the fines to be imposed on companies. According to Brent Snyder, Deputy Assistant Attorney General, "[o]nly compliance efforts that go further, that reflect in some way genuine efforts to change a company's culture, will receive consideration in calculating a company's fine."[20]

Under the Brazilian Competition Commission's guidelines issued in 2016 on competition compliance programs, a company which has sought to implement a "robust" compliance program (comprising of proportionate and good faith measures) is eligible for a penalty reduction in the event of a competition law violation.[21]

## III. FRAMEWORK OF THE RECOGNITION OF COMPLIANCE EFFORTS AND DILEMMAS FACED BY A COMPETITION AGENCY

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[18] Pieri and others (n 12) 7.

[19] Veronica Pinotti, 'Compliance Programs – The Italian Competition Authority Highlights the Importance of an Effective Implementation and Update' available at <http://www.antitrustalert.com/2017/01/articles/italian-developments/compliance-programs-the-italian-competition-authority-highlights-the-importance-of-an-effective-implementation-and-update/> accessed 09 November 2017.

[20] The DOJ granted fine reductions in two plea agreements due to the implementation of effective compliance programmes going forward after the infringements. Brent Snyder, Deputy Assistant Attorney General, 'Deputy Assistant Attorney General Brent Snyder Delivers Remarks' (Speech at the Sixth Annual Chicago Forum on International Antitrust, Chicago, June 8, 2015) available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago> accessed 09 November 2017.

[21] Conselho Administrativo de Defese Economica (CADE), 'CADE publishes the English version for the Compliance Guidelines' (CADE's official website, 18 February 2016) available at <http://en.cade.gov.br/press-releases/cade-publishes-the-english-version-for-the-compliance-guidelines > accessed 09 November 2017

After providing an overview of the approaches taken by different jurisdictions, it can be concluded that the mere adoption of a compliance program should not in itself lead to immunity or the total reduction of fines in any case, as this would allow companies to maximize the profits and benefits stemming from illegal conducts, and thus competition compliance would become a "cheap insurance policy against competition liability."[22]

An automatic fine reduction in the case of compliance programs that existed prior to the finding of an infringement may incentivize companies to implement 'cosmetic' compliance programs.[23] Based on international experiences, only genuine compliance efforts should be recognized, which means that a company must be able to demonstrate how its competition compliance regime resulted in the detection and termination of the infringement and the discovery of new or added value evidence in the case in question. If this is the case, authorities may further reduce a fine by an extra 5-10%.

On the other hand, automatic ex-post recognition of compliance may undermine the adoption of compliance programs, which could prevent or detect illegal activities before any actual infringements are committed. However, ex-post recognition of compliance can be used to improve the attractiveness of cooperation and/or administrative burden saving procedures such as settlement or non-full immunity leniency. A fine can be reduced by a few (up to a maximum of five) percent in the case of a company that adopts or upgrades an existing compliance program to ensure effective competition compliance for the future in a settlement and/or leniency application for a fine reduction, or if the company has compensated the damages caused by its infringement during the procedure. The granting of a reduction of a fine in the case of ex-post compliance could be made conditional on the compliance program in question meeting an established international minimum standard, the use of innovative solutions (e.g. applying modern technologies), a guarantee that the program is viable, etc.

The recognition of compliance may raise the question of whether such recognition can only be positive. I am confident that if a company deliberately breaches its compliance program, which it adopted in a previous competition procedure, then this can be regarded as an aggravating circumstance. However, there are a

[22] Wils (n 1) 70.

[23] Ibid

number of grey areas, for example, concerning what can be regarded as a deliberate breach, or what a competition authority should do when it learns that an ex-ante compliance program has also been used to hide a competition infringement. For instance, if a competition authority is in possession of evidence that a compliance program was effective and the responsible officers of the company knew of the infringement but did not stop it or report it to the competent authority, should the company be required to report the wrongdoing identified as a result of the effective compliance program, or it is enough if the company brings the infringement to an end based upon the internal compliance alert?

The informant reward mechanism also raises important questions. Based on experience, informants normally do not provide high-quality, first-hand evidence and therefore a very limited percentage of informant applications are sufficient to trigger a cartel investigation.[24] Consequently, it is desirable if a potential informant who is subject to a company's compliance program first reports his/her finding to the competent compliance officer(s), unless such an informant would suffer adverse consequences as a result. Furthermore, it is also important that the company in question has sufficient resources to collect and submit evidence according to the competition authority's needs. If this is not the case then it is preferable that potential informants have a direct line of communication to the competent competition authority, provided that companies may be tempted to hide infringements reported to them by informants from the authority.

Finally, compliance programs as a mitigating factor would discriminate against those SMEs that do not have sufficient resources to develop compliance programs. It is important that consideration is given to how we can ensure that ex-post and ex-ante considerations of compliance programs do not discriminate against SMEs.

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[24] András Tóth, *The Use of Leniency Policy in Cartel Cases* (Speech at the Taiwan International Conference on Competition Policy/Law Strategies of Competition Policy in the Global and Digital Economy, Fair Trade Commission. Taipei, Taiwan, June 28 – 29, 2016).

## IV. CONCLUSION

It may be assumed that there are additional reasons for rewarding competition compliance programs based on international experiences, but a number of questions still need to be answered.

It is evident that rewarding compliance programs is beneficial for leniency programs, as the reward may accelerate the competition between the potential cartelist applicants to report the infringements to the competent authorities at an earlier stage. Competition authorities should also not ignore technological developments, since technological developments enable companies to more effectively detect infringements. This is in the public interest as companies continue to be in the best position to detect infringements. While it is clear that granting total immunity from fines for a compliance program is not desirable, automatic benefits should also not be granted for compliance. Additionally, cosmetic compliance programs should not be rewarded, but care must be taken to ensure that ex-post compliance remedies do not incentivize companies to prefer ex-post compliance programs in place of ex-ante programs, since it is the ex-ante programs that can truly contribute to the detection of unlawful activities. It also seems to be apparent that ex-ante programs should exclusively be rewarded if a company provides new evidence to the competition authority in the framework of a leniency application for fine reduction and the company can prove that the submitted evidence stems from the effective operation of its compliance program. Consequently, ex-ante recognition of competition compliance can be used to further increase leniency or other forms of cooperation through the provision of a higher reward. However, some questions still remain unanswered (e.g. concerning the relationship between the informant reward scheme and the companies' compliance programs) and relating to deliberate breaches of compliance programs as an aggravating circumstance.