Benefits of Having an Effective Competition Compliance Programme

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Introduction

In recent years, companies have made significant efforts to develop effective compliance programmes for different areas of the law, which are aimed at ensuring their daily business, as well as the conduct of their employees, complies with, among others, tax law, criminal law, data protection law and competition law.

Regarding competition law, competition authorities throughout the European Union have expressly acknowledged the potential benefits of having an effective and successful competition compliance programme in place.

Companies with a competition compliance programme will benefit from some general advantages. They will be able to ensure full compliance with competition rules and eliminate anti-competitive conduct and will therefore avoid fines. Alternatively, they will be able to detect any conduct contrary to competition rules promptly, which will allow them to adopt the necessary measures to put an end to such conduct and eliminate, or at least mitigate, the risk exposure.

In addition to these general benefits, companies that establish[1] an effective competition compliance programme may be rewarded with an important additional advantage, such as a reduction of the fine, due to it being considered a mitigating circumstance. This aspect has been discussed for years – the result varies depending on the EU jurisdiction investigating the potential infringement.

This article aims to highlight all the advantages that companies could obtain if they have an effective competition compliance programme and to provide an overview of the different approaches adopted by the competition authorities within the EU.

Concept and features of a compliance programme

A compliance programme could be defined as a set of internal rules that aim, on the one hand, to raise awareness of the importance of complying with regulations and thereby promoting a compliant and ethical culture within the company; and second, to anticipate and detect any conduct that is contrary to applicable regulation at an early stage.[2]

According to some authors, a competition compliance programme is 'an internal business policy designed by a company to educate directors and employees to avoid risks of anti-competitive conduct'.[3]

Competition authorities would not consider all competition compliance programmes equally. As highlighted by the European Commission, 'the mere existence of a compliance programme is not enough to counter the finding of an infringement of competition rules – companies and their employees must, in fact, comply'.[4]

To ensure compliance with competition rules, companies should have an effective compliance programme. In this regard, competition authorities have issued different guidelines on compliance programmes and indicated the features such programmes should include to be effective.

First, it is important that compliance programmes are tailor-made and focused on covering each company's specific needs, rather than designed using general standard terms. Second, they must be practical and easy to understand, rather than complex and drafted in general theoretical terms. Third, they must be applicable and binding for all company employees involved in business decisions, starting with senior managers, who must be actively involved and set an example to employees (in the words of the European Commission, a 'top-down compliance culture'). Fourth, they must have a deterrent effect, aiming to discourage employees from violating them. Finally, they must foresee punishing measures in the event of non-compliance.

Considering the above, an effective competition compliance programme should include the following steps or phases:

Design

To design and implement a customised competition compliance programme, each company should identify real situations that its employees face in their day-to-day business and explain in practical and understandable terms how to detect potential risks and the way to act or react, with the aim of avoiding a breach of competition rules, which might have severe consequences for the company and/or the employee.

Training

All business employees and managers of the company must regularly receive practical and comprehensive training. To ensure real practicality and effectiveness, it would be useful for employees to be entitled to ask questions about their doubts. Keeping physical records of training sessions may be useful to demonstrate the thoroughness of the compliance programme.

Monitoring

The company must ensure ongoing supervision of the compliance programme to verify its effectiveness and amend or modify any aspects where there is room for improvement. In this sense, some measures, such as carrying out regular audits or establishing internal reporting mechanisms – that is, a hotline for employees to report anti-competitive conduct – will allow the company to identify whether a breach of the compliance programme is taking place, as well as which aspects should be improved. This will allow the company to take measures aimed at ensuring the competition compliance programme is rigorous and updated to reflect any new scenario faced by the employees.

Adoption of measures

As a consequence of the previous steps, the company will be in a position to adopt any necessary measures. These measures will be put in place to either improve the compliance programme and keep it up-to-date and/or to apply penalties for employees who violate it.

Different approaches to competition compliance programme as a potential mitigating factor to reduce the fine

As anticipated, depending on the EU jurisdiction, competition authorities (and relevant courts) have a different approach regarding the possibility of considering the existence of an effective competition compliance programme as a mitigating circumstance that would reduce a potential fine.

European Union

Starting at an EU level, the European Commission (the 'Commission') and European Courts have strict views on the benefits that companies may gain from establishing or having in place a competition compliance programme.

The Commission expects companies to comply with competition rules and evaluates positively any effort made by them in this respect. However, it is reluctant to take into consideration the existence of a competition compliance programme as a mitigating circumstance for the calculation of the fine. It makes it clear that, 'the mere existence of a compliance programme will not be considered as an attenuating circumstance'.[5]

The Commission considers that not infringing competition law and therefore not being subject to fines are the main (and sufficient) rewards for companies that have an effective compliance programme. In the words of former Commissioner Almunia, 'the benefit of a compliance programme is that your company reduces the risk that it is involved in a cartel in the first place. That is where you earn your reward'.[6]

The Commission bases its approach to compliance programmes on an assessment of the results obtained by the companies to avoid infringements. Its Brochure on Compliance Matters sets out that, '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.'[7] In the Commission's view, the existence of a compliance programme at the time of the infringement cannot be considered a mitigating circumstance insofar as it has failed and has proven to be ineffective in avoiding anti-competitive conducts.

In this vein, former Competition Commissioner Almunia made it clear that when a company operating a compliance programme is found to be involved in anti-competitive practices, it should not receive any preferential treatment and will not be entitled to any fine reduction. It sets out that, 'to those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?'[8]

In spite of the above, this has not always been the approach adopted by the Commission towards competition compliance programmes. Between 1982 and 1992, the Commission took into account the implementation of competition compliance programmes by some companies after the initiation of their investigations and considered it as a factor when calculating the fine.

This is expressly recognised in some Commission decisions.[9] In this regard, for instance, the decision on Case *IV/31.017 – Fisher-Price/Quaker Oats Ltd – Toyco* states that, 'the Commission has taken into account the implementation by Quaker Oats Ltd of a compliance programme for the whole of the European

Economic Community'.[10] And more clearly, the decision on Case *No IV/32.879 –Viho/Toshiba* sets out that:

> 'In determining the amount of the fine to be imposed on TEG, the Commission has taken into account, in particular, the following factors: (…) 6. Toshiba has now drawn up, and introduced from October 1989, a wide-ranging EEC competition law compliance programme for its EC subsidiaries, including TEG, in order to help ensure future compliance with the competition rules'. [11]

However, since then, although the Commission has welcomed companies introducing compliance measures, it has not granted any fine reduction on the basis of the existence of competition compliance programmes either prior to or after initiation of the investigation.

Jurisdictions within the European Union with the same approach as the European Commission

The competition authorities of several EU Member States, such as Germany, the Netherlands and Spain, agree with the approach adopted by the Commission.

According to these authorities, the main benefit of an effective compliance programme is being able to anticipate and prevent potential infringements, therefore avoiding the imposition of fines, and being able to collaborate with the authorities through the leniency programme. However, they consider that competition compliance programmes do not qualify as a mitigating circumstance for calculation of the fine.

Regarding Spain, after an amendment in 2015, the Criminal Code now expressly recognises the possibility of considering as an attenuating circumstance the existence of a compliance programme established before the oral hearing takes place.[12] Nonetheless, although administrative disciplinary law is inspired by criminal law principles, the Spanish competition authority, Comisión Nacional de los Mercados y la Competencia (CNMC) has not admitted an analogical application of the attenuating circumstance foreseen by criminal regulation to competition law.

However, recently, the CNMC has seemingly left some room to appreciate that the existence of an effective competition compliance programme established after initiation of the investigation is a factor that could affect the fine.

In this regard, the CNMC has claimed that,

> 'although the adoption of compliance measures once infringement proceedings have been launched formally shows the willingness of the company to comply, the real effect of such measures for the purpose of respecting competition regulation shall only be assessed within the monitoring or supervision phase of the infringement decision. This does not prevent it possibly being considered as an element to modulate the fine, depending on the particular circumstances of the case.'[13]

Jurisdictions within the European Union that foresee the possibility of considering an effective competition compliance programme as a mitigating circumstance

In contrast to the Commission, Germany, the Netherlands and Spain, some other competition authorities, such as France or the United Kingdom, have granted fine reductions as a consequence of the existence of an effective and rigorous competition compliance programme established after the initiation of infringement proceedings.

In spite of the above, these competition authorities have the same approach to competition compliance programmes existing before the initiation of infringement proceedings as the one indicated for the Commission, Germany, the Netherlands and Spain. They also consider that the mere existence of competition compliance programmes does not entitle companies to a reduction of the fines.

In fact, both the UK's competition authority, the Competition and Markets Commission (CMA), and the French competition authority, Autorité de la Concurrence, published guidelines on compliance with competition rules, expressly recognising that, 'there is no reason to treat a compliance programme per se, as a mitigating circumstance', and that, 'this fact [the existence of a compliance programme] should not be taken into consideration in itself when making an individual decision on the amount of the financial penalty to be imposed, insofar as it did not prevent the occurrence of the infringement'.[14]

However, in relation to competition compliance programmes established after the initiation of infringement proceedings, the CMA foresees reductions of the fine by up to ten per cent if the infringing company can provide sufficient evidence on the fulfilment of adequate steps to achieve a clear and unambiguous commitment to competition law compliance throughout the company. Such adequate steps would include risk identification, risk assessment, risk mitigation, and review activities.[15]

In the same vein, the Autorité de la Concurrence sets out the possibility of the same reduction (up to ten per cent) if the company either agrees to set up a compliance programme based on the main principles indicated in its Guidelines, or improves an existing programme to the extent necessary.

Conclusions

Companies should have an effective and rigorous competition compliance programme, since it will promote an ethical and compliant culture and will lead to significant rewards.

Although benefiting from a reduction of the fine will vary depending on the jurisdiction investigating the infringement, there are some general advantages the companies will benefit from, irrespective of the jurisdiction. Primarily, compliance programmes allow companies to anticipate potential breaches of competition law and adopt any measures necessary to eliminate, or at least mitigate, risk exposure.

In addition, some jurisdictions, such as France or the UK,[16] expressly foresee the possibility of considering competition compliance programmes established after the initiation of infringement proceedings as a mitigating circumstance, thereby granting the company up to a ten per cent reduction of its fine.

To be effective, competition compliance programmes should be customised, depending on the market and each company's needs and situation. All business employees and senior managers should receive practical and comprehensive training. It should have the effect of deterring anti-competitive behaviour and should foresee clear penalties in the event of non-compliance.

About the author

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[1] Also in some instances when an existing competition compliance programme is improved after an infringement has occurred.

[2] Esperanza Hernández Cuadra. *VI Jornada de Diálogos de Compliance* (31 May 2017).

[3] Luis Blanquez, European Competition Attorney at Bona Law. *What is an antitrust compliance program?*

[4] European Commission. *Compliance Matters. What companies can do better to respect EU competition rules* (2012) (section 4.6, page 21).

[5] See above note 4. Also, Joined Cases T-101/05 and T-111/05, BASF and UCB (paragraph 52) and Case T-138/07, Schindler Holding (paragraph 282).

[6] Former Competition Commissioner Joaquin Almunia. Speech 10/586. *Competition Conference of the Businesseurope & US Chamber of Commerce* (25 October 2010).

[7] See above note 4 (section 4.6, page 20).

[8] See above note 6.

[9] Among others, Commission Decision of 7 December 1982 on Case *IV/30.070 – National Panasonic*; Commission Decision of 18 December 1987 on Case *IV/31.017 – Fisher-Price/Quaker Oats Ltd – Toyco*; Commission Decision of 22 December 1987 on Case *IV/30.787 and 31.488 – Eurofix-Bauco v Hilti*; Commission Decision of 5 June 1991 on Case *No IV/32.879 – Viho/Toshiba*; Commission Decision of 5 June 1991 on Case *No IV/32.879 – Viho/Toshiba*.

[10] Commission Decision of 18 December 1987 on Case IV/31.017 – Fisher-Price/Quaker Oats Ltd – *Toyco* (paragraph 27).

[11] Commission Decision of 5 June 1991 on Case No IV/32.879 – *Viho/Toshiba* (paragraph 28).

[12] Article 31 quarter of the Spanish Criminal Code sets out that, 'Only the following activities, carried out after the crime and by means of its legal representatives, can qualify as mitigating circumstances of criminal liability of legal persons: […] d) Having established, before the initiation of the oral hearing, efficient measures to prevent and detect crimes that might be committed in the future by means of the legal person' [internal translation of original Spanish version].

[13] CNMC Decision of 6 September 2016 on Case *S/DC/0544/14 MUDANZAS INTERNACIONALES*. Please note that quote has been internally translated from its original version in Spanish.

[14] Autorité de la Concurrence. *Framework-Document on Antitrust Compliance Programmes* (10 February 2012) (paragraph 31). In the same sense, OFT's Guidance as to the appropriate amount of a penalty states that, 'the mere existence of compliance activities will not be treated as a mitigating factor' (section 2.19, page 13).

[15] Please note that the CMA also foresees the possibility of considering competition compliance programmes as an aggravating factor under exceptional circumstances. In particular, where they are used to conceal or facilitate an infringement, or to mislead the CMA during its investigation.

[16] The Department of Justice of the United States ('DOJ') also sets out the possibility of granting a reduction of fines. In fact, in 2015 the DOJ granted a reduction of fines in two different cases, to Barclays PLC and to Kayaba Industry Co Ltd, based on the fact that they had established rigorous antitrust compliance programmes after the violation.