The French Competition Authority (Autorité de la Concurrence) is urging economic players to set up compliance programs

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After issuing guidance in May 2011 on how it determines antitrust fines, the Autorité de la Concurrence introduced on February 10, 2012, two new draft guidelines: one regarding antitrust compliance programs and the other regarding its antitrust settlement procedure. Both documents aim at easing the process of setting up a compliance program.

The framework document sheds light on the added value of having a corporate compliance program in place, provided that it is both powerful and effective. Not only do such programs play a preventive and educational role, but they can also be a key asset in helping the company’s board to detect antitrust offenses and to deal with them, in particular by swiftly submitting a leniency application to the Autorité de la Concurrence. The French Competition Authority is bound by the specifications of this document.

The framework document on Antitrust Compliance Programs explains how to create a credible and effective compliance program, and how the Autorité de la Concurrence will take such programs into account when dealing with individual cases of anticompetitive agreements between companies or cases of abuses of dominant position.

The Authority invites economic players to develop this type of program if they do not already have one, and if they have already implemented such a tool within their company, to ensure that it includes all the features required to guarantee its effectiveness.

Although no standard compliance program exists, the Authority recommends five key actions to develop an efficient program:

1. Define a clear, formal, and public position of support to be adopted by the company's management bodies

The governing bodies of the company must take a public stand in favor of respecting the rules of competition law (prohibition of cartels and anticompetitive agreements in general, as well as abuse of dominance), and commit personally to follow these rules in order to encourage all employees to do
Appoint one or more persons responsible for developing and operating the program

One (or more) person(s) within the company must be specifically and exclusively responsible for setting up, operating, and managing the compliance program in all its aspects. The Compliance Officer must be designated by the governing bodies of the company in order to be given legitimacy, and must have unquestionable authority. As such, he must have appropriate financial resources. Indeed, he must be able to speak to the supervisory bodies directly and at all times in order to report on the implementation of the compliance program within the company. He must also ensure the effective implementation of the program through the powers conferred on him, and most importantly the launching of an alert procedure for known violations or suspected violations.

Inform, train, and develop the awareness of staff

Regarding the compliance program itself, its first target is to ensure that the officers and employees concerned within the company are systematically informed, and that their awareness is developed as to the importance of competition rules and their proper enforcement, as well as to the various internal advisory and warning procedures available. The information can be communicated through guides, display of notices within the company, or regular e-mailing to the staff. Training, which should preferably be made compulsory, must also be undertaken, and specific training should be provided for employees whose position within the company exposes them to specific risks (pricing). The training can be organized via e-learning procedures, software, or through the company intranet, or take the form of group seminars or training exercises provided on a timely basis and, where appropriate, by professional service providers. Lastly, it is advisable, once the compliance program has been adopted, to inform the company’s shareholders and business partners (major suppliers or distributors) accordingly.

Set up internal control, audit, and whistle-blowing procedures

The program’s second target is to allow the company’s employees to seek advice at any time from the person in charge of the compliance program concerning competition law issues. Employees must also be able to initiate, if necessary, an alert procedure in a totally confidential manner by way of a dedicated phone line or a specific form available on the company intranet for example, without incurring any subsequent blame in this respect. Regular assessments of individual compliance with the company’s compliance policy and the program itself must be made, for example in the form of annual reports on the training carried out. Similarly, monitoring and whistle-blowing procedures must be put in place, and may take the form of mandatory legal and business audits, especially in areas subject to risk (mergers/acquisitions), or simulated visits and seizures by the Authority.

Establish a system for reviewing reports on misconduct and taking relevant action

Lastly, the compliance program must include a system allowing the quantification of requests made for advice and the analysis of alerts. It must also provide a system of proportionate sanctions, especially disciplinary, going as far as “termination of the person concerned and/or removal from office in the event of a serious breach of the company’s policy . . . for compliance with competition rules.” In compliance with the leniency application procedure that companies can file before the Authority, the latter raises the possibility of setting up a system whereby employees who report a
breach of competition rules in which they were involved and who contribute towards the investigations carried out and the action subsequently taken could be totally or partially exempted from disciplinary action.

The program finally implemented must be adapted to the nature, size, organization, culture, and business sectors of the company. The Autorité de la Concurrence considers that the conjunction of the actions above described is necessary in all cases to ensure the compliance program's effectiveness. It recommends formatting these features in readily available and understandable documents either on paper or in electronic format.

The Autorité highlights that Compliance programs are a valuable tool for preventing and reducing risks. Many companies have already set up such a program. It considers that the existence of an appropriate compliance program is beneficial because it would allow any company or organization to tackle the consequences of any infringement.

The French Competition Authority adds: “that said, when an infringement has indeed been committed, the Autorité considers it is not appropriate to take the mere existence of a compliance program into account when determining the company or organization's financial penalty.” It is also stated that there is no reason to treat a compliance program either as a mitigating circumstance or as an aggravating factor.

For companies having not set up such a program (or having set up an ineffective compliance program) and having breached competition rules, a settlement procedure does exists. In this context, providing that the concerned company commits to set up a compliance program or to upgrade the existing one, it may expect a reduction of its fine of up to 10%. This could be added to the 10% reduction corresponding to the settlement proper and to other reductions that may be awarded as counterpart of other commitments undertaken such as waiving the right to challenge the statement of objections.

This is the reason why the Autorité strongly encourages companies to report the existence of an anti-competitive agreement discovered through their compliance program (where such a program has been set up) before any statement of objections is issued against them by the Authority, and to file a leniency application to obtain total or partial exemption from the penalty.

In conclusion, to prevent or minimize the risk of breaching competition law, it is strongly recommended that a company pay significant attention to its compliance program, which, to be successful, would have to be designed by and for the company. It must be a tailor-made project.

Nixon Peabody's Paris office can provide help and advice on the implementation of effective competition law compliance programs as well as comprehensive training for officers for the day-to-day management of the program.

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