



# CPI Antitrust Chronicle

February 2012 (1)

Enforcers' Consideration of  
Compliance Programs in Europe:  
Are 2011 Initiatives Raising Their  
Profile or Reducing It to the Lowest  
Common Denominator?

Nathalie Jalabert-Doury &  
Gillian Sproul

Mayer Brown

# Enforcers' Consideration of Compliance Programs in Europe: Are 2011 Initiatives Raising Their Profile or Reducing It to the Lowest Common Denominator?

Nathalie Jalabert-Doury &  
Gillian Sproul<sup>1</sup>

## I. INTRODUCTION

In Europe, compliance programs have been implemented by companies for many years. However, few competition authorities had clarified how they viewed these compliance initiatives, nor the impact of having (or not having) compliance programs on enforcement decisions. It took a long time for the European Commission to address the issue in any of its reports or notices.

Then, in 2011, three competition authorities produced new guidance documents, outlining their support for compliance programs: the U.K. Office of Fair Trading (“OFT”), the French Competition Authority (“FCA”), and the European Commission itself.

Are these documents good news for businesses? The documents do show that competition authorities will now at least recognize compliance programs in Europe. However, behind the supportive tone, and the provision of more detailed guidance, the new guidelines in the United Kingdom and France only go as far as maintaining existing compliance reductions with reinforced conditions. Furthermore, the main emphasis of the European Commission’s guidance appears to be on its commitment not to consider compliance programs as an aggravating circumstance.

## II. THE U.K. OFFICE OF FAIR TRADING: A CONTINUED COMMITMENT TO PROVIDE GUIDANCE AND INCENTIVES

Historically, when assessing whether to reduce fines imposed on companies that have infringed competition rules, the OFT has considered whether adequate steps have been taken with a view to ensuring their compliance with competition rules (allowing a discount in penalties of between 5 percent and 10 percent). In 2004, the OFT published its first guidance on how businesses can achieve compliance with competition law and undertook research into the drivers of compliance and non-compliance.<sup>2</sup>

In June 2011, the OFT developed new guidance documents, outlining how companies could achieve compliance. It also published new guidance targeted specifically at directors to help them understand their “key roles” in establishing and maintaining a compliance culture within their company.<sup>3</sup>

---

<sup>1</sup> Nathalie Jalabert-Doury is Partner, Mayer Brown, in the Paris office; Gillian Sproul is Partner, Mayer Brown, in the London office.

<sup>2</sup> [www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft423.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf).

<sup>3</sup> OFT, *How your business can achieve compliance*, and *Company directors and competition law*, June 2011.

These two 2011 OFT guidance documents, together with other materials, are available on the OFT's compliance web page.<sup>4</sup> The documents provide detailed recommendations and practical examples to assist companies and their directors on how to set up effective compliance programs. In particular, the OFT details the various components that an effective compliance program should contain and the steps that should be taken to develop and maintain an effective compliance program—risk identification, risk assessment, risk mitigation, and regular review—and the processes within which that program should operate. It has also included tools for helping companies achieve effective compliance.

The OFT has confirmed that reductions in penalties of up to 10 percent may be considered by the OFT where a company has implemented a compliance process that follows the guidance, either before the infringement has occurred or quickly after an infringement has been identified.

The OFT's decision to take into account, as a mitigating factor, steps taken by a company to reduce the risk of future competition infringement was approved by the U.K.'s Competition Appeals Tribunal ("CAT") in 2011. The CAT went so far as to stress that "the decision-maker should in our view take such a [compliance] programme into account in assessing any deterrent element in the penalty."<sup>5</sup>

Naturally, the commitment to compliance has to be genuine. A compelling incentive to comply exists in the OFT's policy on Company Director Disqualification Orders ('CDO'), which were introduced in 2003. In new guidance that signals a stricter approach to disqualifying directors whose companies have infringed competition law, the OFT categorically states that it expects all directors to be "committed" to competition law compliance, and that compliance will be a consideration when the OFT is deciding whether to pursue director disqualification. Where an infringement has been committed, but directors can demonstrate that they have been genuinely committed to competition law compliance and have taken reasonable steps to ensure that the company has an effective compliance culture, it is unlikely that the OFT will apply for such an order. However, where a director can be shown to have participated in the infringement, the OFT is likely to make an application for a CDO notwithstanding the adoption of a compliance program. The director guidance referred to above<sup>6</sup> is designed to assist directors in developing a sufficient awareness of competition law to enable them to avoid these risks.

The OFT's policy on competition compliance programs deliberately places a high burden on company directors—including those who are not executive directors—to ensure that, as the leaders of their companies, they have at least made every effort to implement an effective competition compliance program. Understandably, the proactive policy of the OFT is designed to filter out sham compliance programs and to credit genuine ones. Taking that logic one step further, it would be relevant to take into consideration genuine attempts by parent companies to ensure compliance on the part of their subsidiaries when assessing parental liability. The role of parent companies is to deliver a very clear message to their group companies regarding effective competition compliance programs. However, those subsidiaries are best placed to ensure day-to-day monitoring within their organizations, and it can be argued that parent companies should not be answerable for the anticompetitive behavior of their subsidiaries in these circumstances.

---

<sup>4</sup> [www.of.gov.uk//OFTwork/competition-act-and-cartels/competition-law-compliance/](http://www.of.gov.uk//OFTwork/competition-act-and-cartels/competition-law-compliance/)

<sup>5</sup> CAT, 11 March 2011, Case numbers 1114/1/1/09 e.a., ¶ 217.

<sup>6</sup> OFT, *supra* note 3.

### III. THE FRENCH COMPETITION AUTHORITY: THE ONE-TIME INCENTIVE IS MAINTAINED BUT WITH INCREASED CONDITIONS

Under article L463-2 III of the French Commerce Code, where a company agrees not to challenge the objections made by the Authority, the maximum fine incurred is 5 percent instead of 10 percent of its worldwide turnover. If, in addition, this company undertakes to amend its behavior in the future, the fine is directly reduced. Such undertakings notably consist in the adoption of compliance programs.

On that basis, the FCA has developed a proactive compliance policy, granting significant reductions in the penalties imposed on companies undertaking to implement such compliance programs. Over the years, the range of penalty reductions has, however, progressively declined and, in recent cases, the maximum reduction was 25 percent for companies: a) not challenging the objections, b) undertaking to set up strong compliance programs, and c) providing a number of additional behavioral commitments (such as limitations on bidding consortia or trade union meetings). In the meantime, the standards that compliance programs have to meet to benefit from the maximum penalty reduction have progressively increased.

In 2008, the FCA commissioned and published a study on compliance programs<sup>7</sup> offering guidance on optimal compliance programs, identifying a number of blocking factors in France, and recommending a number of measures, including the adoption of guidelines and incentives in the form of fine reductions.

Based on this experience, the FCA published two drafts for comment in October 2011: procedural guidelines on the settlement procedure and a framework document on compliance programs.<sup>8</sup> The consultation period is now over and the FCA is expected to adopt and publish final versions in February 2012.<sup>9</sup>

These drafts reinforce the conditions according to which a compliance program will be considered by the FCA to be effective, and propose to limit at 10 percent the maximum reduction available (not challenging the objections counts for a maximum 10 percent reduction; other remedies count for a maximum of 5 percent). If the total reduction available remains in the same range as recent cases (25 percent), the amount dedicated to the compliance program is low compared to the level of commitment now expected by the Authority, i.e. a firm, clear, and public commitment by the entire board and management to comply with competition law; a commitment to put one or more individuals in charge of implementing and overseeing the compliance program, with the necessary authority and means to fulfil this role; a commitment to set up effective training tools; implementation of effective control mechanisms (including alert hotlines and audits); and a commitment to set up effective follow-up mechanisms (including sanctions).

We do not believe the FCA would consider that implementing a compliance program within a group would be considered as evidence of decisive influence of the holding company on its subsidiaries, and there is no such precedent. This is, however, not stated in the drafts.

---

<sup>7</sup> [http://www.autoritedelaconurrence.fr/user/standard.php?id\\_rub=285](http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=285) .

<sup>8</sup> [http://www.autoritedelaconurrence.fr/user/standard.php?id\\_rub=415&id\\_article=1711](http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=415&id_article=1711) .

<sup>9</sup> The FCA published the guidelines on Feb. 10, 2012, and can be viewed at [http://www.autoritedelaconurrence.fr/doc/framework\\_document\\_compliance\\_10february2012.pdf](http://www.autoritedelaconurrence.fr/doc/framework_document_compliance_10february2012.pdf).

In addition, these drafts show the same level of concern as the OFT's—to have adequate safeguards against sham compliance programs. The FCA warns company directors and executives that their participation in an infringement after the adoption of such a compliance program is likely to result in personal criminal prosecution.<sup>10</sup> In addition, where a compliance program is in place and an infringement is discovered, the FCA considers that it is the responsibility of the company concerned to submit a leniency application as quickly as possible.

The FCA also stresses in these drafts that no other reduction is available on compliance program grounds and, notably, that having a compliance program in place or adopting one after the infringement has been committed will not be considered as a mitigating circumstance.

#### **IV. THE EUROPEAN COMMISSION: COMPLIANCE MATTERS... BUT DOES NOT REALLY COUNT**

On November 24, 2011, the European Commission issued a brochure entitled *Compliance matters*, and created a webpage dedicated to compliance materials.<sup>11</sup>

This was unexpected, as Commissioner Joaquín Almunia had stressed in numerous speeches that the main tools for promoting compliance were the deterrent effects of EU penalties and the EU leniency policy. Against that backdrop, the EU Commissioner regularly explains that there should be no reduction in penalties or other preferential treatment for companies adopting compliance programs.<sup>12</sup>

The brochure provides broad and rather general recommendations for developing compliance programs and includes two pages on how the Commission welcomes compliance efforts by companies. Two positive statements may be noted. First, the brochure acknowledges that a compliance program can be effective even if it is not sufficient to prevent all infringements from happening. Second, the brochure states that the existence of a compliance program “will not be considered as an aggravating circumstance” if an infringement is found by the enforcement authorities. This statement contrasts with the *British Sugar* case, in which the Commission increased the fine for a failed compliance program (knowing that the adoption of that compliance program had been considered as a mitigating circumstance in a previous case).<sup>13</sup>

Aside from these two positive statements, the policy is unchanged: The existence of a compliance program at the time of the infringement or the setting-up of a compliance program in the wake of an investigation will not be considered as an attenuating circumstance. The brochure also does not say anything about parental liability issues, nor whether the EU Commission will continue to consider that the adoption of a compliance program at the group level provides evidence of the decisive influence of the group on its subsidiaries, and therefore can

---

<sup>10</sup> Under article L 420-6 of the French Commerce Code, it is also a criminal offense for an individual to take a personal, fraudulent, and decisive part in a serious violation of the prohibition against cartels and abuses of dominance.

<sup>11</sup> [http://ec.europa.eu/competition/antitrust/compliance/index\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/index_en.html).

<sup>12</sup> See, for example, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Compliance and Competition policy, Speech/10/586, given at the BusinessEurope & US Chamber of Commerce Competition Conference Brussels, (October 25, 2010).

<sup>13</sup> Decision IV/30.178 dated July 18, 1998 Napier Brown/British Sugar and decision IV/F-3/33.708 dated October 14, 1998, British Sugar.

contribute to a decision holding the group jointly and severally liable for any infringement committed by the latter.<sup>14</sup>

Interestingly, in its report on the Annual Report on EU Competition Policy,<sup>15</sup> the European Parliament suggested that the Commission reviews its fining guidelines and considers principles such as: “taking into account that the implementation of robust compliance programs should not have negative implications for the infringer beyond what is a proportionate remedy to the infringement;” introducing a distinction in the levels of penalty imposed on undertakings that have acted intentionally or negligently; and specifying conditions under which companies who exercise decisive influence over a subsidiary, but are not directly involved in an infringement, should be made jointly and severally liable.

## V. CONCLUSION

Last year, 2011, has certainly seen more consistency in the approaches of these three authorities,<sup>16</sup> but by approximating positions at an intermediate level, rather than by raising their profile. From a situation where two National Competition Authorities were promoting compliance on totally different grounds, the approaches are becoming more consistent, with reinforced conditions and safeguards, while the European Commission itself has taken a small step towards better supporting compliance initiatives.

However, most competition authorities—and clearly the European Commission—have the tools to increase the profile of compliance programs when determining fines and deciding parental liability issues.

The business community is at the forefront of this issue, and the encouragement of the European Parliament to go further will certainly help. Also helpful are other initiatives such as those by National Competition Authorities or Courts, not to mention positive examples abroad. It is somehow striking that jurisdictions abroad, and notably a number of “younger” competition authorities,<sup>17</sup> are more advanced in that respect than most European Competition Authorities.

---

<sup>14</sup> For a recent example, *see* General Court, July 13, 2011, Schindler Holding, case T-138/07.

<sup>15</sup> Report on the Annual Report on EU Competition Policy, 29.11.2011 (A7-0424/2011), Rapporteur: Andreas Schwab.

<sup>16</sup> The present article only details European Competition Authorities with guidelines on compliance, but a number of other European Competition Authorities support compliance efforts by companies.

<sup>17</sup> *See* the jurisdictions listed in ICC, *Promoting antitrust compliance: the various approaches of national competition authorities*, [http://ec.europa.eu/competition/antitrust/compliance/compliance\\_programmes\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/compliance_programmes_en.html) and on the ICN website, available at <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/business.aspx>.