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Enforcers' Consideration of Compliance Programs in Europe:
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I. INTRODUCTION

It is, by now, established practice for companies throughout Europe to have in place a range of compliance programs designed to ensure that, so far as is possible, the company and its employees conduct their activities lawfully. In 2011, the U.K., French, and EU competition authorities all published guidance on how businesses should approach competition law compliance. Many ideas on what an effective compliance regime should entail were common to all three texts, but there was a marked difference in the extent to which—if any—each regulator might be prepared to take these efforts into consideration in enforcement decisions against offenders.[2]

The European Commission's stance on the issue was clear: Rigorous competition law compliance policies should form part of the normal order, and accordingly it would afford offenders no reward whatsoever for merely having such measures in place.[3] By contrast, the U.K. and French competition authorities adopted a more flexible approach, recognizing that, in some instances, genuine attempts at effective compliance should be rewarded by way of reduced penalties.

This article discusses how various EU Member States have attempted to embed compliance principles within their corporate culture by treating less severely those who have made or commit to make an observable effort to comply with applicable competition laws. This approach remains in contrast to the current position of the European Commission, which, reflecting its belief that such measures should be adopted as a matter of course, has so far been unwilling to grant credit to companies that do so.

How have things evolved since 2011? What is the position three years after the initiatives referred to above, and have companies in the meantime been increasingly incentivized to enter into such programs?

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[2] Nathalie Jalabert-Doury & Gillian Sproul, *Enforcers' Consideration of Compliance Programs in Europe: Are 2011 Initiatives Raising Their Profile or Reducing It to the Lowest Common Denominator*?, 2(2) CPI ANTITRUST CHRON. (February 2012).

[3] Compliance Matters, 24 November 2011.

We outline below the latest initiatives adopted in this context by several of the growing number of Member States that recognize the value of compliance programs in their fining policy; by contrast, the European Commission has so far remained largely silent in response to the calls by business organizations for increased recognition of these programs.

II. THE UNITED KINGDOM: THE CMA, AS IN THE CASE OF ITS PREDECESSOR THE OFT, MAY IMPOSE LESS STRINGENT PENALTIES ON COMPANIES WITH ROBUST COMPLIANCE PROGRAMS

The Competition and Markets Authority ("CMA") recognizes that strong enforcement powers are needed in order to deter breaches of competition law, and encourages companies to take pre-emptive action by adopting robust compliance programs. As part of its efforts to cultivate a culture of compliance among companies operating in the United Kingdom, the CMA, together with the Institute of Risk Management ("IRM"), has published a short guide which advocates the need for an organization's culture, from board room to shop floor, to support ethical and legal behavior.[4] The joint CMA and IRM guidance promotes a top-down approach across the entire organization, to reduce the likelihood of breaches of competition law arising.

Consistent with the policy of its predecessor (the Office of Fair Trading ("OFT")) in determining the penalties to be imposed in respect of a breach of competition law, the CMA may take account of steps that have been taken by a company to ensure compliance with competition law.[5] The CMA's guidance detailing the methods by which it determines penalties for breach of the Competition Act 1998 makes clear that it will take into account evidence of an undertaking's compliance activities in a given case, and assess whether these merit a discounted penalty; such a discount may be of up to 10 percent of the total fine that would otherwise be payable. However, the CMA emphasizes that it is the substance, not the mere existence, of such activities that dictate whether they will be viewed as a mitigating factor.

A company seeking a discounted penalty should submit evidence to the CMA of a clear and unambiguous commitment to competition law compliance, together with examples of the steps it takes to manage competition law risk. The undertaking should also demonstrate that the steps taken are proportionate relative to the size of the business and the overall level of competition risk faced by it. Further, it must produce evidence documenting the steps it has taken to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation.

Corporations that build a risk management process as advocated by the CMA, and follow an intelligent, pro-active, and tailored risk management approach, are more likely to be more successful when seeking a reduced penalty than those that adopt a superficial "tick box" method. To illustrate, in May 2015 the CMA issued a decision following its probe into the advertising of estate agents' fees. In recognition of the compliance activities of two of the estate agents involved, the CMA decreased the penalty imposed on each estate agent by five percent. The decision indicates that the CMA will likely treat as a mitigating factor attempts by an undertaking's senior management to take adequate steps to achieve a clear and unambiguous commitment to

[4] Short guide on competition law risk published jointly by the CMA and the Institute of Risk Management.
[5] CMA Guidance - Appropriate CA98 penalty calculation, OFT 423.

competition law compliance throughout the business. Senior management can display such unambiguous commitment by doing the following things:

1. introducing, or reviewing and changing, compliance activities as appropriate in light of the events that led to the investigation in question;
2. appropriate competition law risk identification, assessment, mitigation, and review; and
3. board-level (or other senior management) commitment to, and accountability for, the resulting compliance program.[6]

The compliance process listed under (2) is part of the CMA's four-step risk-based approach to compliance, which revolves around having the requisite training, policies, and procedures in place to prevent competition law risks from occurring in the first place, but which also enables any issues to be identified and dealt with swiftly should they arise.

In another investigation, this time relating to the supply of prescription medicines to care homes, the OFT found that a company, Hamsard Limited ("Hamsard"), had entered into a market-sharing agreement in flagrant contravention of the competition rules. In spite of this, and in recognition of its other compliance efforts, the OFT initially considered that a reduction of five percent from the penalty that would otherwise have been imposed was appropriate. However, the OFT reconsidered this following the provision by Hamsard of further evidence illustrating its efforts to improve upon its existing compliance program. That evidence showed that: (i) Hamsard's competition law compliance across the whole group would be overseen and regularly assessed by one of its board members; (ii) comprehensive competition law training provided by specialists was being undertaken by all relevant staff; and (iii) all relevant contracts with trading partners and compliance policies were to be reviewed. In the light of these elements, the OFT increased the penalty discount to 10 percent.[7]

It is clear from both decisions that the CMA (like its predecessor the OFT) is inclined to react favorably towards pro-active efforts, led by senior management, to strengthen compliance arrangements. There is evidence to suggest that the CMA is becoming more adept at detecting wrongdoing—over half of new cartel cases opened since 2010 having been "intelligence led."[8] With the risks of infringements being identified therefore arguably higher than ever before, businesses have every reason to heed the guidance on compliance set forth by the CMA.

The CMA has stated that it expects to issue competition disqualification orders ("CDOs") against individual directors where appropriate.[9] However, even in such instances, where a director can show that he has helped to ensure that a company takes practical steps to remedy a breach when brought to his attention, the CMA will treat this as a mitigating factor when assessing whether a CDO is justified.[10]

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[6] Case CE/9827/13 - Property sales and lettings investigation, Decision dated 8 May 2015.

[7] Case CE/9627/12 - Investigation into the supply of healthcare products, Decision dated 20 March 2014.

[8] Speech dated 4 November 2014 by Sonya Branch, Executive Director, CMA to the Westminster Business Forum.

[9] Speech dated 16 May 2014 by CMA Chief Executive Alex Chisholm to the Law Society Competition Section.

III. FRANCE: UPCOMING REFORM OF THE SETTLEMENT PROCEDURE UNDER WHICH COMPLIANCE COMMITMENTS CAN BE REWARDED

Under article L 464-2 III of the French Commerce Code, where an infringing company commits not to challenge objections made by the French competition authority at the end of an investigation, the immediate rewards are clear. The *Autorité de la concurrence* ("AC") is normally empowered to fine an infringing company up to 10 percent of its annual worldwide turnover; however, where the undertaking concerned acquiesces to its objections, the maximum fine that can be imposed is automatically halved, meaning that, at most, the offending company will be subject to a fine totaling five percent of its yearly global revenue. The *Rapporteur Général* may also suggest that the regulator apply a further reduction to the fine in view of such a commitment, and also in recognition of any undertakings proposed by the infringing company to amend its behavior in the future.

The AC can therefore grant fine reductions for *ex-post* adoption or improvement of compliance programs. In cases where leniency rules do not apply (e.g. in non-cartel cases), the Framework Document on Antitrust Compliance Guidelines also makes it possible to treat as a mitigating circumstance instances where a company discovered a violation, but put an early end to it as a result of an existing compliance program.[11]

The AC has published guidelines detailing the conditions and applicable range of penalty reductions. As part of its fine calculation methodology, after verifying that the basic amount does not exceed five percent of the total worldwide turnover of the company, the AC applies a further reduction of 10 percent to companies that do not dispute its statement of objections. If, in addition, a company undertakes to amend its behavior in the future by undertaking to institute satisfactory compliance programs, the fine is further reduced up to a limit of 10 percent, and a possible further five percent for any other relevant undertakings made. [12]

In practice, in France as in the United Kingdom, the highest part of the reduction range is rarely applied. In past years, reductions granted specifically for compliance programs have rarely exceeded eight percent and the overall reduction in view of all undertakings given has not exceeded 12 percent.

However, past cases illustrate that a commitment to improving compliance regimes can result in very significant penalty reductions—indeed, more significant than the reductions awarded to companies that apply for leniency. As a result, many question why the authority appears to treat more kindly those businesses that merely waive their right to challenge the objections, than it does those that come early and actively cooperate in the investigation. Given that the procedural value of the latter is higher due to the speed with which cases can be resolved, it could be said that the most favorable penalty reductions should be reserved for these instances.

This can be illustrated by the example of a company with a total worldwide turnover of EUR 100 million. Assume the basic amount of the fine (duration multiplied by yearly turnover

[11] *Document cadre sur les programmes de conformité* dated 10 February 2012, at ¶ 27.
[12] *Communiqué de procédure relatif à la non contestation des griefs* dated 10 February 2012.

achieved on the market concerned) is higher than five percent of its worldwide turnover and for example reaches EUR 9 million.

If that company applies for leniency, but is not the first, and brings in value added evidence upstream in the procedure and actively cooperates in the investigation, the Authority will ascertain that the theoretical maximum is not met (10 percent of the worldwide turnover) before applying a reduction of, say, 40 percent, resulting in a total fine of EUR 5.4 million.

If, on the other hand, the same company were to try a different tack and wait until the investigation is concluded and the statement of objections is issued, and then simply waive its right to challenge this and, in response, propose a compliance program, then the fine will automatically be brought to the level of the capped amount of five percent—the fine therefore now stands at EUR 5 million. The regulator would then likely apply a further reduction of, say, 18 percent for (a) not challenging the statement of objections, and (b) the company's commitment to introduce a satisfactory compliance program. The final penalty for this company will, therefore, be lower than if it had opted for leniency: EUR 4.1 million.

A draft law recently passed by the French Parliament's Lower Chamber, expected to enter into force this summer, is aimed at tackling this issue by introducing significant changes to the way penalties are determined.[13] The law would put an end to the automatic cap on the amount of the penalty falling from 10 percent to 5 percent of worldwide turnover for those that do not challenge the authority's objections, and would instead grant the authority a wide margin of discretion when negotiating the fine in this settlement context.

Once the law is amended, the AC is likely to review its guidelines accordingly. Given the trend of competition authorities across EU Member States increasingly to reward compliance efforts, the consensus is that this tweak to the French system does not mark a radical departure from the existing approach. Rather, it can be seen as an effort to ensure consistency and fairness in the administration of sanctions, while remaining sensitive to the benefits of rewarding compliance where appropriate.

IV. GERMANY: FIRST (LIMITED) SIGNS OF INTEREST

Unlike the CMA in the United Kingdom and the AC in France, the German Federal Cartel Office ("FCO") does not consider the existence or quality of internal compliance programs to be a mitigating factor in determining penalties. Indeed, it has made clear that this will not make any difference to the fine awarded.

In 2013, the FCO published guidelines on how it calculates fines for infringement of competition law.[14] Among the most decisive factors are (i) the size of the company and (ii) the seriousness and duration of the infringement. Interestingly, compliance programs play no part in its consideration. This is not to say, however, that the FCO does not believe that the implementation of an effective compliance program is an important tool to prevent competition

[13] *Projet de loi n°539 pour la croissance, l'activité et l'égalité des chances économiques* transmitted to the Senate on 19 June 2015.

[14] Bundeskartellamt, Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren, 25 June 2013.

law infringements.[15] It claims that, as well as helping to prevent future infringements, compliance programs may assist a company to uncover competition law infringements more quickly than its competitors, which may in turn enable it to take advantage of the German regime's leniency program.

The German leniency program provides that the first member of a cartel to whistle-blow and apply for leniency prior to a dawn raid may benefit from a 100 percent reduction in any eventual fine.[16] Even after a dawn raid, a good compliance program may make it easier for a company to apply successfully for leniency if its program enables it to gather all necessary information and submit it to the FCO more quickly than its competitors. In such a case, the submission of relevant information might lead to a fine reduction of up to 50 percent. Moreover, the FCO may not initiate a fine procedure at all if, in non-hardcore cartels cases, it holds the view that, as a result of an effective compliance program, the risk of recidivism is sufficiently low. A rigorous compliance program may also prevent the imposition of fines on the companies' managers if there is no violation of their supervisory duties.[17]

However, the FCO is clear in its emphasis that compliance is a legal obligation, which of itself does not merit a reduction in the amount of a fine.[18] Andreas Mundt, President of the FCO, recently reiterated this view, stating that false incentives might be created should companies whose compliance structures might be inefficient or improperly applied be rewarded.[19]

V. ITALY: COMPLIANCE PROGRAMS EXPLICITLY CONSIDERED AS POTENTIALLY MITIGATING FACTORS IN NEW FINING GUIDELINES

On October 31, 2014, the Italian competition authority, the Autorità Garante della Concorrenza e del Mercato ("AGCM") confirmed in its fining guidelines that the adoption and implementation of robust *ex-post* compliance programs can be considered a mitigating circumstance, thereby making it possible for fines to be reduced by up to 15 percent.

The AGCM however stressed that such a reduction will only be granted to

> programs evidencing a real compliance commitment notably through the involvement of the top management, the precise identification of persons in charge, the identification and assessment of risks in the precise context, the organization of training adapted to the size of the company, incentives to comply with the program as well as sanctions, follow-up and audit mechanisms.[20]

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[15] Bundeskartellamt, Tätigkeitsbericht 2011/2012, page 31.

[16] Bundeskartellamt, Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung –, 7 March 2006.

[17] Cf. Oberlandesgericht Düsseldorf of 5 April 2006 – VI-2 Kart 5+6/05 (OWi), ¶ 46.

[18] Bundeskartellamt, Tätigkeitsbericht 2011/2012, page 32.

[19] Andreas Mundt, Die Bedeutung der Wettbewerbs-Compliance, Compliance Praxis, Service Guide 2014; Andreas Mundt, Worüber sprechen die Kartellbehörden und Staatsanwälte in ihrem‚Netzwerk Submissionsabsprachen"?, 18 February 2015.

[20] Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90, 31 October 2014, § 24.

To date, no such reduction has been applied in the decisions of the authority since the publication of the guidelines. However, given that this approach is still in its infancy, it is not yet possible to determine what bearing the guidelines will have on the long-term practice of the AGCM.

It is interesting to note, in relation to Spain below, that this new mitigating circumstance was introduced into Italian law after the adoption of a 2001 criminal law protecting legal entities having compliance programs from criminal liability in the event that an offense is committed by a representative or an employee in violation of a structured and robust compliance program.

VI. SPAIN: EXPECTATIONS BASED ON A CRIMINAL LAW REFORM EFFECTIVELY TAKING INTO CONSIDERATION COMPLIANCE PROGRAMS

Spain introduced a law in March 2015 amending its criminal code to reinforce existing provisions under which exemption from corporate criminal liability may be granted if the offending entity had adopted a compliance program before a crime was committed by any of its directors or employees, and the program in question meets the requirements set out by law, namely that:

a) the crime was committed by company representatives or executives after the company had implemented an effective compliance program;

b) the monitoring of the program is entrusted to a compliance officer(s) with autonomous powers of initiative and control;

c) the directors or employees committed the crime by willfully circumventing the compliance program; and

d) the compliance officer(s) was/were not negligent.[21]

The law now also sets forth the essential components of any successful compliance regime. These are that it should:

a) be based on a risk assessment of possible crimes in the context at hand;

b) establish a decision-making process to limit the risk of violation;

c) include financial management systems to prevent crimes;

d) impose an obligation on all employees to report to the compliance officer any risk of violation;

e) enforce penalties in case of violation; and

f) be subject to periodic review, including whenever a change is made to the company structure.

Naturally, these provisions do not directly apply to the fines set by the Spanish competition authority, which are of a totally different nature.

[21] Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

So far, the Spanish competition authority has not granted reductions in fines in the light of competition compliance programs, but this reform of the criminal regime perhaps illustrates a growing appreciation of the value of such programs. In addition, it is an established principle of administrative law that the sanctioning activity of the Administration is to be inspired by the principles of criminal law. This will surely be a basis on which infringing parties (who have adequately implemented competition compliance programs) will claim before the courts that administrative decisions imposing fines on them are to be annulled.

In any case, this reform would nicely pave the way for the recognition by the Spanish competition authority of a mitigating circumstance in enforcement cases, as was the case in Italy.

VII. EUROPE-WIDE: A MIXED MOOD

Numerous business organizations across the continent have called upon authorities to recognize more fully the value of compliance programs. Perhaps most notably, the International Chamber of Commerce has published an *Antitrust Compliance Toolkit* and an *SME Antitrust Compliance Toolkit*.[22] Although these toolkits are primarily intended to assist companies in structuring their compliance efforts, they provide a valuable starting point for efforts to devise and implement robust compliance measures that may be taken into account in the context of enforcement proceedings by competition authorities.

Although the European Commission's position remains that compliance programs are beneficial in assisting companies to avoid breaches of competition law, the increasing willingness of other competition authorities in Europe to take compliance measures into account in decisions relating to liability provides a further compelling reason to implement rigorous, bespoke compliance arrangements, in case the worst should happen.

[22] ICC Antitrust Compliance Toolkit http://www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/ and ICC SME Toolkit : why complying with competition law is good for your business http://www.iccgermany.de/fileadmin/icc/ICC_2015/SME_Toolkit_Flipbook_online.pdf