

Framework-Document of 10 February 2012 on Antitrust Compliance Programmes

Compliance programmes are instruments that enable economic players to increase their chances of avoiding breaches of all kinds of rules that are applicable to their activity, including competition rules. These programmes rely not only on informational measures intended to create a compliance culture (training, awareness), but also on operational initiatives (such as whistle-blowing and advice and audit systems) that are indispensable in helping companies to prevent, detect and solve cases of potential misconduct. The *Autorité* encourages companies to set up antitrust compliance programmes, either on a standalone basis or within the framework of their overall compliance policy, and to allocate sufficient resources to these programmes to ensure they are successful. A list of “best practices” that can contribute to the efficiency of antitrust compliance programmes is laid out in the current framework-document.

Companies committing to set up or to upgrade an existing compliance programme according to the aforementioned best practices, in the context of a settlement with the *Autorité*, may expect a reduction of their fine of up to 10%, under the conditions provided by the current framework-document. This reduction will be added to the 10% reduction corresponding to the settlement proper, and to the further 5% reduction that may be awarded in return of other commitments undertaken in accordance with the procedural notice of the *Autorité* of 10 February 2012.

I. Objectives and tools of competition law enforcement

1. Under Article L. 461-1 of the Commercial Code, the *Autorité de la concurrence* (hereinafter the “*Autorité*”) is responsible for ensuring the competitive functioning of the economy. This mandate consists of making sure that economic players are free to innovate, produce and distribute quality goods and services at the best possible price without being impeded by anticompetitive practices or abuses that harm the general economy or other companies, consumers and, ultimately, the growth and well-being of society as a whole. This mission requires a policy of market monitoring, but also efforts aimed at preventing, detecting, correcting and punishing antitrust infringements.
2. The Commercial Code provides the *Autorité* with various resources to implement this policy. They are not all of the same type, although their common purpose is to encourage economic players to conduct their businesses in accordance with the objectives founding competition rules as laid down by French law and the Treaty on the Functioning of the European Union (hereinafter, the “TFEU”), as well as to dissuade them from infringing these rules. Some of

these instruments are essentially punitive or corrective. Others take into account, under the conditions they specify, certain initiatives taken by economic players to prevent infringements to antitrust law, remedy them and assist the *Autorité* in detecting and punishing them.

3. The second paragraph of Section I of Article L. 464-2 of the Commercial Code thus empowers the *Autorité* to order companies and organisations that implement anticompetitive practices prohibited by Articles L. 420-1, L. 420-2 and L. 420-5 of the Commercial Code, as well as by Articles 101 and 102 of the TFEU, to cease such practices and to impose financial penalties on them¹. Section IV of the same article enables the *Autorité*, under its leniency programme, to grant total or partial immunity from financial penalties to an organisation or company that chooses to unveil information about an anticompetitive agreement in which it was involved and to cooperate with the *Autorité* during the entire investigation process². Section III of the same provision empowers the *Autorité* to reduce financial penalties in order to take into account the fact that a company or an organisation has waived its right to challenge a statement of objections, and to grant an additional reduction if this person also undertakes to change its future behaviour³.
4. This latter provision, which was introduced by Article 73 of Law No. 2001-420 of 15 May 2001 relating to New Economic Regulations (NER) and amended by Article 2 of Ordinance No. 2008-1161 of 13 November 2008 for the Modernization of Competition Regulation, authorizes the *Autorité* to take into account the fact that a company or organisation that waives its right to challenge a statement of objections also undertakes to set up measures intended to ensure that its business activities comply with competition law, in particular compliance programmes. Since the adoption of this provision, the *Conseil de la concurrence*, replaced by the *Autorité*, has gradually developed a practice whereby it accepts such commitments, renders them mandatory and takes them into account by granting a reduction in financial penalties, after having determined in each case if such commitments are relevant, credible and verifiable.
5. The notice issued by the *Autorité* on 16 May 2011 on the method relating to the setting of financial penalties states in this respect that: *“The Autorité encourages companies to set up antitrust compliance programmes. It will soon provide guidance on its general approach to compliance, in order to assist business on in this matter. In parallel, the conditions in which it may take into account proposals of commitments to set up antitrust compliance programs, in the context of the settlement procedure provided by Section III of Article L. 464-2 of the Commercial Code, by granting a reduction of the financial penalty if it deems those programs to be relevant, trustworthy and verifiable, will be explained in a forthcoming procedural notice on that procedure.”*
6. In accordance with this commitment, the current framework-document describes the *Autorité’s* approach to compliance programmes. It summarizes key elements originating from its case law

¹ The practical conditions relevant to the setting of financial penalties are described in the notice issued by the *Autorité de la concurrence* on the method relating to the setting of financial penalties on 16 May 2011. That document is available on the *Autorité’s* website.

² The practical conditions relevant to this procedure are described in the procedural notice issued by the *Autorité de la concurrence* relating to the French leniency programme on 2 March 2009. That document is available on the *Autorité’s* website.

³ The practical conditions relevant to this procedure are described in the procedural notice issued by the *Autorité de la concurrence* on the antitrust settlement procedure on 10 February 2012. That document is available on the *Autorité’s* website.

in that regard and incorporates the outcome of its ongoing study of the subject. The framework-document also takes into account existing international standards and practices, as well as current foreign experience concerning compliance programmes⁴ and ongoing exchanges between the *Autorité* and various stakeholders on this subject. The *Autorité* is bound by the specifications of the current document. However, the *Autorité* reserves the right to diverge from these specifications if it is justified by specific circumstances of the case or general policy considerations.

7. The framework-document explains the reasons that have led the *Autorité* to encourage companies, organisations and other interested parties to set up competition law compliance programmes (II), the requirements it considers such programmes should meet in order to be effective and (III) the operational results it expects therefrom (IV).

II. The benefits of competition law compliance programmes

8. Corporate compliance programmes are programmes whereby companies or organisations express their commitment to certain rules and to the values or objectives on which they are based. Those programs generally also include a set of actions intended to assist companies in building a genuine culture of compliance with those rules, but also in detecting likely misconducts, in remedying them and in preventing recidivism.
9. Such programmes are a tangible illustration of proactive strategies of governance whereby economic players express their determination not only to ensure that their behaviour complies with the law, which they are subject to regardless, but also to avoid the risks they could face in the event of non-compliance and to deal promptly with any infringement that they would uncover.
10. Compliance programmes may deal with a number of issues, such as corruption, securities and tax law, consumer health and safety, environmental protection or antitrust law. Disregarding certain of these rule exposes economic players to financial or criminal penalties as well as to adverse effects on their reputation and to risks of private litigation. This is particularly true in the antitrust field: infringing the rules laid down by the French Commercial Code and/or the TFEU may expose companies to financial penalties, without prejudice to the right granted to the victims of an anticompetitive agreement or an abuse of a dominant position to seek damages. Furthermore, Article L. 420-6 of the Commercial Code provides for imprisonment and fines for individuals who fraudulently play a personal and significant role in designing, organising or implementing anticompetitive practices. Compliance programmes are an important tool for anticipating, controlling and managing these different risks.
11. The *Autorité* considers that compliance programmes, in order to be effective, must seek two objectives: firstly, prevent the risk of committing infringements and, secondly, provide the means of detecting and handling misconducts that have not been avoided in the first place. Therefore, these programmes cannot be limited to measures that aim at teaching the company's

⁴ See, for example, the Good Practice Guidance on Internal Controls, Ethics and Compliance of 18 February 2010, appended to the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009, adopted with the support of the 38 countries, including France, that are signatories of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997. That document is available on the OECD's website.

corporate officers, managers, supervisors and other employees or agents about existing rules and making them aware of the need to comply with such rules. Creating and maintaining a culture of compliance is, of course, a fundamental part of compliance programmes. However, a set of concrete measures must complement this dimension of compliance programmes so that a company can display that it is effectively committed, at every level, to develop and maintain a culture of compliance with antitrust rules. Such an effort should lead to the detection of potential situations of non-compliance, for example through legal audits, and to take the necessary responses. Without such measures, the internal incentives for the company's staff to act in accordance with the law would remain weak and the compliance programme would end up being considered ineffective, if not artificial. Therefore, compliance programmes' value added is contingent on the combination of both the aforementioned preventive and corrective components.

12. Thus, the reasons for setting up antitrust compliance programmes go well beyond the mere hope of obtaining a reduction in the financial penalties that may be imposed if an anticompetitive agreement or an abuse of a dominant position is committed and challenged by the *Autorité*. Although such a reduction is possible under certain conditions and within certain limits (see section IV below), a company or an organisation that would set up a compliance programme solely for this purpose would deprive itself of the primary benefits of such a programme: focusing on a merit-based strategy on the marketplace and reducing its exposure to the risk of breaching antitrust law in the first place.
13. The *Autorité* considers that it is the duty of economic players themselves, as well as in their best interest, to take all possible measures to conduct their business in compliance with antitrust law and to prevent potential breaches of these rules. The *Autorité* considers that setting up an effective compliance programme can play a key role in this respect, while at the same time providing added guarantees of responsible behaviour and security to shareholders and to the general public, particularly if the company or the group it belongs to is quoted on the stock exchange or is a government-owned company. Lastly, the *Autorité* is convinced that the advantages of compliance programmes far offset their costs if they are designed and implemented properly. Section III below describes the various features the *Autorité* considers essential to the efficiency of these programs.
14. In this context, the *Autorité*, which places a great deal of importance on the educational and preventive aspects of its competition law enforcement mandate, invites economic players that already have a compliance programme in place to ensure that it includes a complete set of measures regarding antitrust compliance. The *Autorité* encourages economic players that do not yet have compliance programmes in place to set up such programmes, while stressing that antitrust is but one aspect of compliance and that it could, as such, call for an integrated approach within the company's broader compliance policy.
15. Compliance programmes can help undertakings to reduce the risk induced by taking part in anticompetitive conducts. Such conducts include secret horizontal agreements, called "cartels", which consist in price fixing, coordinated restrictions of production, or allocation of market segments or customers. Anticompetitive behaviours also include other types of agreements, such as the exchange of sensitive information between competitors or retail price management. Abuses of a dominant position, i.e. strategies of eviction or abuses of the weaker position of business partners or customers are also prohibited.

III. Requirements for effective competition law compliance programmes

16. Adopting measures to provide information and training and to increase awareness with respect to antitrust rules may help companies to reduce the risk of infringements attributable to the inadequate awareness or understanding of those rules by their managers, supervisors and other employees or agents. Combining learning measures with supervisory, control and punishment systems may increase the effectiveness of these efforts and may as well facilitate the discovery of potential infringements. However, in all likelihood, all of these initiatives combined may not entirely prevent infringements from being committed.
17. The fact that, as a result of its compliance programme, a company or organisation itself discovers that it has committed an infringement is a first after-the-fact indicator of the programme's effectiveness. However, this indicator is insufficient in itself. The follow-up by the company or organisation on this discovery is a second after-the-fact, and more decisive, indicator of the effectiveness of its programme.
18. For this reason, the *Autorité* considers that, in addition to measures taken to inform and train corporate officers, managers, supervisors and other employees or agents of the company or organisation with respect to antitrust rules, programmes intended to promote compliance with such rules must include a certain number of other features.
19. The way these features are implemented may vary from one compliance programme to another. There is no "one size fits all" programme. On the contrary, compliance programmes benefit from being tailored to suit each company's particular situation in terms of risks and individual characteristics, depending on:
 - its size;
 - its activity and markets;
 - its organization, governance and culture.
20. In particular, the *Autorité* considers that the fact that a company is a small- or medium-sized enterprise (SME) may allow several features of its compliance programme to be significantly adapted.
21. However, the conjunction of the features described hereinafter is necessary in all cases, from the *Autorité*'s point of view, to ensure the programme's effectiveness.
22. These features, which should be recalled in a readily available and understandable documentation, on paper or as electronic documents, are as follows:
 - 1) the existence of a clear, firm and public position adopted by the company's management bodies and, more broadly, by all managers and corporate officers:
 - a) stressing that compliance with antitrust rules is not only a legal obligation, but also a key element of the company's corporate liability, in light of the negatives consequences that antitrust infringements may have on the economy and on consumers;
 - b) making a general and permanent commitment to comply with antitrust rules and to support the programme set up for the purpose of encouraging all managers, supervisors and other employees or agents to comply with these rules, to prevent infringements, to detect them and to remedy them as quickly as possible, in light of the legal, financial, commercial and reputational risks they could generate;

- 2) the commitment to appoint one or more persons empowered, within the company or organisation, to develop and monitor all aspects of the compliance programme. Such persons must in all cases:
 - a) be appointed by the company's management bodies and chosen for his/her/their unquestionable skills and authority within the company;
 - b) effectively devote themselves to the supervision of the programme's implementation;
 - c) have the ability to directly access the company's supervisory bodies (board of directors or supervisory board, etc.), when justified by a question or issue relating to the company's compliance programme or policy (for instance, discovery of an infringement);
 - d) have the necessary powers to ensure the effective implementation of the compliance programme;
 - e) be provided with sufficient human and financial resources to design and implement the programme, in light of the size of the company or organisation;

- 3) the commitment to put in place effective information, training and awareness measures, in ways compatible with labour legislation, including:
 - a) drafting documents or other materials and regularly distributing them to all corporate officers, managers, supervisors and other relevant employees or agent of the company or organisation, in order to:
 - explain the meaning and practical scope of antitrust law;
 - make them aware of the importance and benefits to the company or organisation, as well as to each one of them personally, of compliance with these rules in connection with their business activities;
 - inform them of the internal systems that enable them to obtain advice or report the existence of proven or possible infringements of such rules;
 - b) general internal communication measures regarding the existence of and reasons for the compliance programme;
 - c) regular mandatory training sessions on antitrust rules and the concrete implications thereof for the company or organisation for managers, supervisors and other employees or agents with specific antitrust risk profiles (for example, persons responsible for pricing or sales, persons who take part in the work of professional associations); as well as, when needed, one-off training sessions in case of specific events (for example, when a new employee is hired at a position where compliance to antitrust rules matters, or if an infringement is discovered);
 - d) providing information regarding the existence of and reasons for the compliance programme, shortly after it is set up, to the major regular commercial partners of the company or organisation (for example, its suppliers or distributors, in particular in the case of small- and medium-sized companies), as well as to its shareholders, may also be considered;

- 4) the commitment to set up effective control, audit and whistle-blowing systems, including:
 - a) adopting measures to ensure and evaluate individual conformity with the compliance policy of the company or organisation (for example, such measures could take the form of provisions added to the company's internal rules and regulations, clauses inserted in employment contracts, issuance of regular certificates of compliance for staff members);
 - b) setting up a system enabling all employees or agents of the company or organisation who do not wish to be put in the position of infringing antitrust rules:
 - to request advice, even in the case of an emergency, from the person(s) in charge of the compliance programme or its/their local representative(s) regarding appropriate action in a matter that raises an issue of compliance with antitrust rules;

- to report in good faith⁵ a proven or possible infringement of antitrust rules of which they are aware, if possible confidentially, and with the assurance of being protected against retaliatory measures. If such whistle-blowing system requires electronic processing of personal data, it must be set up in accordance with the requirements laid down by the *Commission nationale de l'informatique et des libertés* (the French authority in charge of data protection and privacy, known as “CNIL”)⁶;
- c) carrying out regular evaluations of the various aspects of the compliance programme, as well as legal and commercial audits (due diligence), in particular during events that may create new risks for the company or organisation (for example, the acquisition of a new company or the development of a new business line). These evaluations and audits, which should be documented, are indispensable to assist the company or organisation in assessing the effectiveness and efficacy of its compliance programme and to improve it, if required. Appointing independent third parties may be necessary to ensure objectivity;

5) the commitment to set up an effective oversight system, including:

- a) a procedure for handling requests for advice, reviewing reports of infringements and studying subsequent action to be taken;
- b) a set of penalties, in particular disciplinary sanctions, for serious infringements of the policy of the company or organisation with respect to compliance with antitrust rules. Implementation of such penalties should be effective and proportionate to the individual situation and conduct of the concerned person.

IV. The consequences attached to competition law compliance programmes

- 23. The existence of an effective compliance programme is beneficial because it enables infringements to be avoided in the first place, but also because it makes it possible to discover infringements that have not been avoided and allows the concerned company or organisation to tackle the consequences thereof.
- 24. That said, when an infringement has indeed been committed, the *Autorité* considers that it is not appropriate to take the mere existence of a compliance programme into account when determining the company or organisation’s financial penalty.
- 25. In particular, there is no reason to treat a compliance programme, *per se*, as a mitigating circumstance. If an infringement is committed despite the existence of a compliance programme, this very circumstance does not affect the objective reality of the infringement⁷. In particular, the fact that the company has set up a compliance program has no bearing on the seriousness of the facts or on the importance of the economic harm they may have caused to the economy. Furthermore, although it is true that the existence of a compliance programme may be an element that differentiates the relevant company or organisation from other participants to the infringement, the *Autorité* considers that this fact should not be taken into consideration

⁵ Article 226-10 of the Criminal Code provides that false accusations are punishable by five years’ imprisonment and a fine of €45,000.

⁶ CNIL Decision No. 2005-305 of 8 December 2005 involving the single authorization for electronic processing of personal data in connection with whistleblowing systems (single authorisation decision No. AU-004), amended by Decision No. 2010-369 of 14 October 2010 amending single authorization No. 2005-305 of 8 December 2005, No. AU-004, on electronic processing of personal data in connection with whistleblowing systems.

⁷ Court of Justice of the European Union, 28 June 2005, *Danske Rørindustri e.a. / European Commission* (joined cases C-189/02 P *et al.*), paragraph 373.

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.

26. Similarly, the *Autorité* will not treat the existence of a compliance programme as an aggravating factor, even if it turns out that corporate officials or managers took part in the infringement despite their commitment to comply with competition law and support the company or organisation's programme. The *Autorité* considers that this type of situation would be better served by holding the persons concerned criminally liable if the conditions for applying Article L. 420-6 of the Commercial Code are met, without prejudice to the possibility of imposing a financial penalty on the relevant company or organisation, pursuant to Article L. 464-3 of the same Code, if the compliance programme was set up pursuant to commitments made under the antitrust settlement procedure provided for in Section III of Article L. 464-2 of the same Code.
27. However, in the event that companies or organisations that have set such a compliance programme discover, thanks to this programme, the existence of a cartel between competitors, the *Autorité* considers that it is their responsibility, not only to cease their participation in this misconduct, but also to submit an application for leniency pursuant to Section IV of Article L. 464-2 of the Commercial Code as quickly as possible, after seeking appropriate counselling. Given the secret nature of those infringements and their extreme severity – they are considered as “*the most egregious violations of competition law*”⁸ by the OECD – such an application is the action that is the most consistent with an ethical commitment with respect to compliance. Furthermore, such a procedural choice may provide the company or the organisation with total or partial immunity from financial penalties, in accordance with the requirements of the Commercial Code and the conditions described in the procedural notice of the *Autorité* on that subject⁹. If no such request is made by the undertaking, it may choose to settle, upon receiving the statement of objections, pursuant to Section III of article L. 464-2 of the Commercial Code. The complete or partial immunity that can be granted when an undertaking chooses one or the other of these procedures is exclusive of any other fine reduction that may be granted on the grounds of the existence of its compliance programme.
28. In the event that a company that has implemented a compliance programme fitting the good practices laid out above comes to discover on its own a misconduct that is not eligible to the leniency programme, before any inspection or investigation is conducted by a competition authority, the *Autorité* considers it is the undertaking's responsibility to cease and redress this misconduct immediately (e.g. by amending a strategy or contracts that could be considered an abuse of dominance or a anticompetitive vertical agreement). If the undertaking can prove, based on objective and verifiable evidence, that it has ceased and redressed the practice on its own volition before any inspection or investigation is conducted by a competition authority, such a circumstance may considered a mitigating circumstance in the event that the *Autorité* comes to handle the case and impose a penalty.
29. If an organisation or company that does not have a compliance programme in place is issued with a statement of objections, it may waive its right to challenge the objections in accordance with the requirements of the Commercial Code and in accordance with the conditions described

⁸ Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels, n° C(98)35/Final, 25th of March 1998. This document is available on the OECD's website.

⁹ See footnote 2 above.

in the procedural notice of the *Autorité* on that subject¹⁰. In addition, it may commit to change its future behaviour, in particular by setting up a compliance programme¹¹. In such a case and provided the General Rapporteur deems it relevant to recommend that the *Autorité* goes ahead with the settlement and with the commitments proposed by the undertaking, the *Autorité* will consider that the commitment is relevant, credible and verifiable if it meets the best practices mentioned in the present framework-document. The commitments will be assessed on a case by case basis.

30. If, before the statement of objections was issued, the organisation or company involved had already set up a compliance programme, but that did not meet the best practices mentioned above, if it offers to improve this programme to the extent necessary to meet them, and if the Rapporteur General deems it relevant to recommend that the *Autorité* take such a commitment into account within the framework of the settlement procedure, the *Autorité* will consider that the commitment is relevant, credible and verifiable, subject to the same reservation.
31. If the *Autorité* accepts a commitment to set up a compliance programme that meets the best practices set forth in the present framework-document or to improve an existing programme to the extent necessary to that effect, the *Autorité* will reduce the financial penalty of the concerned company or organisation by up to 10%. To this reduction may be added other discounts available in the framework of the settlement procedure, for a total of up to 25 %, as mentioned by the *Autorité*'s procedural notice on that matter.
32. If the *Autorité* accepts a commitment to set up a compliance programme and renders it mandatory, it will subsequently check that it is actually implemented. At the *Autorité*'s request, the relevant company or organisation must therefore be ready to provide it with a complete and precise report enabling it to check compliance with the commitment, and to respond to all requests or questions in this regard.

¹⁰ See footnote 3 above.

¹¹ The *Autorité* has no legal basis for rendering mandatory a commitment to set up such a programme, after a statement of objections has been issued, other than pursuant to the antitrust settlement procedure.