10 February 2012: Corporate compliance programmes and antitrust settlements

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The Autorité de la concurrence releases two key documents:
a framework document aiming at encouraging corporate compliance programmes
and guidelines about the settlement procedure in antitrust cases.

By making these two tools more transparent, and providing practical advice for using them, the Autorité hopes companies will go further in taking on board competition law

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The Autorité de la concurrence publishes a Framework Document on Competition Compliance Programmes and a Notice regarding its Antitrust Settlement Procedure. Both documents aim at easing the process of setting up a compliance program.

A broad public consultation of economic and legal players

The Autorité de la concurrence held a broad public consultation on both draft guidelines, as it has done in the past before adopting previous guidance documents[1]. Stakeholders were given two months between October and December 2011 to provide input and contributions to the discussion launched by the Autorité de la concurrence. This dialogue was prolonged during a public roundtable held in Paris on 20 December 2011 ("les Rendez-Vous de l'Autorité"). The comments and suggestions made by various stakeholders in the course of the public consultation have enabled the Autorité to fine-tune both guidelines[2].

Corporate compliance programmes: the Autorité de la concurrence supports companies in their efforts to develop a competition culture

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. Such programmes should not only rely on measures set up to create a culture of compliance with regulations in place (training, awareness actions for senior corporate executives and all staff in general) but also on internal alert, advice, audit and accountability mechanisms (for preventing, detecting and processing possible wrongdoings).

The Autorité considers that advocacy is a major part of its competition law enforcement mandate. It encourages companies and organisations which already have a compliance programme to ensure that the programme has a "competition dimension" whilst inciting other companies to implement one.

Practical guidance at all levels

The framework document explains how to create a credible and effective compliance programme, and how the Autorité de la concurrence will take them into account when dealing with individual cases of anticompetitive agreements or abuses of dominance.

Although there is no 'one size fits all' compliance programme, the Autorité recommends the inclusion of five key features for the development of an efficient programme:

- The existence of a clear, form and public position of support adopted by the company's management bodies;

- The commitment to appoint one or more persons responsible(s) for the programme's development and operation;

- Developing information, awareness raising measures and staff training;

- Setting up control, audit and whistle blowing mechanisms;

- Establishing a system for reviewing reports of misconduct and taking relevant actions.

The Autorité is aware that a compliance programmes have to be tailored according to the means and resources at the company's disposal. Yet, the Autorité believes that it is important for all companies to be able to set up such a programme, regardless of their size and resources, and stresses that the five aforementioned key features can be adapted to the means and resources of small or medium-sized companies (SMEs).

Clear benefits

Compliance programmes are risk prevention and reduction tools. Many companies have already set up such a programme. Those that have not, but which would like to set up a compliance programme or improve an existing programme by implementing the good practices recommended by the Autorité, within the framework of the settlement procedure, can see their fines reduced by up to 10%. This reduction cumulates with the reduction granted for the settlement procedure (10%).

The public consultation enabled the Autorité to enrich its thinking and refine its documents as compared to its initial drafts. The Autorité will take the fact that companies with compliance programmes discover and put an end to anticompetitive practices, other than a cartel[3], on their own initiative, before any investigation or procedure is brought by a competition authority, into account as a mitigating factor in any subsequent investigation into this infringement.

The settlement procedure, a win-win settlement tool

This procedure, which was inserted into the Commercial Code in 2001, enables companies to waive their right to challenge the charges notified by the Autorité's Investigation Services in return for a reduced fine if the Autorité's General Rapporteur considers that the case is fit for a settlement. Companies can also undertake to modify their future behaviour and receive, subject to the same

condition, an additional reduction in fine in return. A settlement can lead to reductions in fines of 10%.

This procedure will speed up the processing of anticompetitive agreement and unilateral practice cases, in the interests of companies which will reduce their financial exposure, as well as of the Autorité which will be able to devote its resources to other cases.

Taking commitments can lead to a further reduction in fine

The notice explains how to implement this procedure and its practical aspects for increasing transparency to the benefit of companies. It explains how the Autorité takes the settlement procedure and any commitments they make to change their behaviour in the future into account.

These commitments can be either structural (separate accounts, spinning off, etc.), behavioural (modifications to contractual clauses, general terms of sale and price scales, etc.) or take the form of compliance programs, and can result in the Autorité reducing the fine by a further 5 to 15%, in addition to the 10% reduction for the settlement procedure.

The benefits of leniency and the settlement procedure can be combined in certain cases

Another major addition was made to the final text of the procedural notice. Following the Autorité's recent decision regarding the detergent cartel (11-D-17), the notice gives companies the capacity – if the General Rapporteur deems it appropriate – to combine the benefits of leniency[4] with the settlement procedure. This may apply, in particular, if the objections notified on the company in question differ on one or more significant aspects from the content of its leniency application.

[1]See the notice of 16 May 2011 on the method relating to the setting of financial penalties, the Autorité de la concurrence's merger control guidelines,the procedural notice of 2 March 2009 on the French leniency programme and the procedural notice of 2 March 2009 on competition commitments.
[2]The contributions made for both drafts can be consulted on the website of the Autorité de la concurrence (for compliance, for settlement procedure.

[3]The Autorité considers that the best response to these secret infringements is to submit an application for leniency.
[4]Leniency is a procedure which in certain circumstances, enables a company which denounces anticompetitive practices it may have been a party to, to totally or partially escape a fine, depending on the request's rank of arrival at the Autorité. For more details, consult the section on the Autorité's web site.

For further details, please see:

- the complete text of the framework document on competition law compliance programmes and the leaflet on the compliance
- the complete text of the notice relating to the antitrust settlement procedure
- the sections on the Web Site on compliance and the settlement procedure

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