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Competition Compliance Programmes – Note by Croatia

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

Please contact Ms Sabine ZIGELSKI if you have any questions about this document
[Email: Sabine.Zigelski@oecd.org].

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Croatia

1. Introduction

1. Enforcement of competition law and its effective implementation would be difficult to achieve without constant competition advocacy efforts from competition authorities and without awareness of undertakings about benefits of competition. There are several competition advocacy activities of competition authorities that contribute to this goal such as legal opinions on the conformity of laws and other legislation with competition rules, lectures, cooperation with different stakeholders, awareness raising campaign, communication strategy, market studies, publications on different topics in competition law, regular update of competition law practice on web site and in the newsletter, etc. From the side of undertakings, competition compliance programs present a very good instrument which can help to prevent any competition law infringements by educating internally its staff (management and employees) about competition law. In that respect, compliance programs can be seen as complementary tool for public enforcement of competition law.

2. This contribution describes compliance programs, their relevance for deterrence and for promotion of competition and it explores their characteristics of effective compliance programs. Furthermore, it looks at the practical experience of Croatian Competition Agency (further: CCA) of using compliance programs as measures in commitment cases and it continues with presenting more competition advocacy and compliance efforts undertaken by the CCA. Finally, this contribution looks at some new possible approach in competition compliance.

2. Compliance programs-important element for deterrence and promotion of competition

3. Compliance programs are seen as set of rules and recommendations for doing business with the aim to ensure compliance with competition law. In practice, companies often develop such programs after some past infringements or fines have been imposed. Also, more and more, such programmes are seen as an essential element of good corporate governance, professionalism and good will of the company. Usually the compliance programs of undertakings are defined as formal analysis of procedures and conduct of undertaking with main goals: a) to establish if there are risks of potential infringement of competition law in doing business and if so, to remove those risks; b) to educate and train employees how to conduct business without breaching competition law and in case of doubt to seek advice and apply relevant previously established procedure; c) education of management of the company on all levels to develop personal responsibility for their own conduct and for the conduct of their employees in line with competition law; d) internal code of conduct.

4. Effective compliance programs can be seen as a path to effective competition but only if they are constantly applied by undertakings and not being just another internal document of the undertaking. In other words, the quality of a compliance programme is marked by its effectiveness. The question is then, what is good compliance program and how to assess it? Such compliance program is well elaborated, usually consists of written part and practical part like internal seminars or workshops about doing business in compliance with competition rules.

5. There are some elements which can serve as criteria when assessing quality and effectiveness of compliance programs. First of all, compliance program has to be adapted to this particular undertaking and its size, type of business, position of the undertaking on the market and frequency of contacts with competitors. It has to be formulated with clear and simple language adapted to each employee of the undertaking. The successful compliance program should identify the potential risks, in other words, it should be based on the analysis of areas of business where most danger of breaching competition law can occur.

6. Then, good compliance program should contain main competition law postulates, description of purpose of competition law, its importance and the reasons why it has to be enforced and respected with emphasis on the costs of non-compliance for the undertaking.

7. Furthermore, compliance program should have clear plan of education for employees and management, some form of internal check list to establish if some conduct is aligned with competition rules or not. Internal acts of acknowledgement by staff and consideration of compliance efforts in staff evaluation could be included such as confirmation of the staff that they received the education materials, attendance lists of trainings, tests after trainings to check the knowledge after the training, certificates of compliance after passed exams etc. There should be also system of internal whistleblowing with monitoring in place. The staff of the undertaking need to know whom to contact and in what form when potential situations of conflict occur. To that end it is useful for undertaking to appoint a compliance officer who directly reports to the company's management.

8. Last, but not least, there has to be visible, strong and continuous commitment to the compliance program by senior management of the undertaking as an important element of creating a culture of respect for competition law by the undertaking.¹

9. Another issue is if the competition authorities should assess compliance programs and to which extent?

10. Obviously when compliance programs are used as a commitment measure or as mitigating circumstance for lowering the fine in the competition law proceeding, some assessment from the competition authorities should be in place. In this case, above explained elements can be used. However, it should be left to each undertaking to develop appropriate strategy and adjust its compliance program to its needs for compliance depending of its internal structure, business activities and other elements specific for that undertaking. The competition authorities should give some advice or guidance but it should not be the task to approve or assess the quality of compliance programs due to the explained reason that they have to be company specific.

11. The approach towards compliance programs varies from country to country, in Croatia it is mostly used as a measure in commitment cases of alleged abuse of dominant position or prohibited agreements, but not cartels. The compliance programs are not used as mitigating circumstance which would lower the fine of the undertaking. Namely, the existence of a compliance programme is not enough

¹ Some of mentioned elements are also described in the brochure from European Commission DG Competition "Compliance matters", <https://op.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en>

to counter the finding of an infringement of competition law. Moreover, in this case the undertakings with compliance program should not expect to get reduction in fines because they should have complied with competition rules. The purpose of compliance programme should be to avoid an infringement from the start. Thus, the compliance programs of undertakings should be supported by competition authorities as a preventive tool but not as a guarantee of reduced fine or excuse for an infringement.

3. Practical experience of the CCA in using compliance programs as measures in competition law enforcement

12. There is no direct reference on compliance programs in Croatian Competition Law but the CCA considers compliance with competition rules crucial for effective public enforcement. Having that in mind, it is important that competition authorities also support undertakings in their endeavours to do business in line with competition rules. For that purpose, the CCA published Guide for compliance programs called “*Practical Guide for undertakings to establish a Competition Compliance Programme*”. This Guide is published on the CCA’s website in order to prevent the behaviour of undertakings contrary to the rules of competition and it is modelled on the practices of the European Commission and other national competition authorities. It is a practical guide with simple instructions for creating individual compliance programmes in order to ensure that undertakings behave in accordance with the competition rules. The Guide consists of five parts: Basic principles of competition, Prevention, Identification of risks, Risks management and Recommendations.²

13. Like in some other countries, the trend to increasingly use compliance programs in competition cases is also present in the practice of the CCA. The compliance programs are used mostly as a commitment measure in the alleged cases of prohibited agreements but not for cartels. Cartels as hard-core restriction of competition should be punished with significant fine and some additional benefits of for example, lowering the fine due to existence of compliance program is not appropriate. Especially taken into account that leniency and settlement already enable the cartelists to benefit from reduction of fines. Hence, in practice of the CCA, the compliance programs are applied as commitment measures mostly in non-horizontal agreements where the problematic provisions in the agreements have already been changed and then the compliance programs with education in competition law for employees of the undertaking in question are determined as additional measure in the final decision of the CCA.

14. Examples of some of those cases are shortly presented in the continuation of this contribution.

3.1. CCA vs. Coca cola HBC Croatia

15. The CCA started ex officio proceeding on 20 February 2019 on the basis of both Article 8 (prohibited agreements) and Article 13 (abuse of a dominant position) of the Competition Act.

² Practical Guide for undertakings to make Compliance Program at CCA’s web site: <http://www.aztn.hr/ea/wp-content/uploads/2015/05/compliance-with-competition-law.pdf>

16. The agreements between Coca-Cola and its customers in the HORECA channel contained exclusive purchasing obligations that had as their object or effect the exclusive purchasing of Coca-Cola products.

17. The provisions contained an obligation which made the buyer purchase all his requirements in fruit juices, ice teas, energy drinks and mineral waters exclusively from the brands in Coca-Cola range of products, at the same time imposing the obligation on the buyer to constantly offer the whole product assortment of Coca-Cola carbonated beverages but also all of its new products in this category of soft drinks. In turn, the buyer was entitled to an agreed incentive.

18. The Coca-Cola also concluded agreements with other catering facilities imposing the obligation on the buyer to exclusively stock and offer to its customers the Coca-Cola products (fruit juices, ice-teas, energy drinks and mineral waters) as long as the agreement is in force.

19. At the early stage of the proceeding Coca-Cola voluntarily committed to revise all the business agreements with its buyers in the HORECA channel within set period of time. The CCA adopted decision on 29 November 2019 by which it accepted commitments and closed the infringement proceeding.³

20. One of the commitments offered and accepted by the CCA included the obligation to introduce a separate compliance programme and to carry out the compliance training for its employees in the area of competition rules. In July 2020, Coca Cola submitted evidence on compliance with measures including special compliance program of Coca Cola about doing business in line with competition rules and training program for education in competition law for employees of Coca Cola. This training program will be obligatory for the employees on all levels relevant for doing business in HORECa channels and it will be repeated yearly during five years.

3.2. Other relevant cases

21. In the course of last two years, the CCA opened cases against several companies for establishing prohibited agreements and/or abuses of dominant position. Some of those cases are still ongoing but they are in their final stages where the commitments decisions have been adopted. However, evidence on the implementation of undertaken measures in those cases are still pending so description can be given without the specific references. The common link between those cases is that they all offered and the CCA accepted compliance programs and elaborated training programs as commitments measures.

22. In one case, the undertakings offered to prepare and send to the CCA the Manual on compliance of business with competition rules, the list of employees who participated in the training on compliance with competition rules when doing business, examples of completed exams about competition law by employees, examples of statements on compliance and completed trainings from employees and decision on the nomination of contact person for checking compliance of conduct with competition law.

23. Similarly, in another case, the undertaking committed to adopt very detailed and comprehensive competition compliance program which will include relevant

³ Case CCA vs. Coca Cola HBC Croatia, more details on commitments and on the case can be found on the web site of the CCA: <http://www.aztn.hr/en?s=Coca+Cola> ; <http://www.aztn.hr/en/cca-accepts-committments-offered-by-coca-cola-hrvatska/>. Also, earlier contribution from Croatia “Using market studies for tackling emerging competition issues” for OECD Competition Committee, December 2020 contains description of this case.

competition law topics like goal of competition, forms of competition law infringements, rebates in competition law, exchange of information, public procurement and competition law, surprise inspections, identification of risks, prevention, obligations and responsibilities of staff from the program. In addition, the adoption of separate internal act about importance of competition law is envisaged as well as regular internal training for employees about main principles of competition law and about new changes in the national and EU competition legislation.

24. It should be noted that in those cases the CCA requested not only the text of the compliance programs and training programs but also the evidence that measures are implemented, that employees really attended the trainings and are made aware of competition compliance program, competition law and the behaviours which may jeopardise the compliance with competition rules. Such evidence contains for example, training program plan for couple of years, attendance lists from held trainings, exams took by all employees (in case of smaller undertaking) etc.

4. Compliance advocacy initiatives of the CCA

25. Besides described Guide for compliance program “*Practical Guide for undertakings to establish a Competition Compliance Programme*”, the CCA puts lot of efforts in other competition advocacy initiatives. The CCA promotes competition with the transparency of its activities and decisions, opinions and annual reports published on its website and through the available communication channels based on the CCA Communication Strategy.

26. On its website the CCA continuously publishes relevant articles written by its experts and press releases drafted by its communication officer. Its experts answer inquiries from the media, journalists, organise occasionally press conferences, publish the monthly e-bulletin and other guides and participate in conferences and workshops covering specific matters in the area of competition law and policy.

27. Competition compliance remains the priority of the CCA through its opinions on laws and bye-laws and other activities preventing anti-competitive practices. With regard to this competition advocacy activity, the CCA is very active and it issues a large number of legal opinions every year.

28. The CCA issues a monthly electronic Newsletter called *AZTN INFO* presenting its work and its most important decisions and investigations for the current month together with an overview of interesting news from the European Commission and other EU national competition authorities. The application to receive the E-Newsletter is very simple, by email so broad range of stakeholders can obtain it.

29. One of the good examples of creating an effective dialogue with the business community to encourage them to comply with competition rules and to adjust their behaviour on the market in line with competition rules is the publication of guides and brochures for undertakings available on the web site of the CCA. For instance, a short guide for undertakings in detecting and reporting bid-rigging has been produced providing simplified indicators to help identify potentially prohibited agreements in a bidding process.⁴ Another simple brochure is called “*No to Cartels*” with 10 key questions and

⁴ Short Guide for detecting bid rigging, CCA:

answers about cartels.⁵ Both of these brochures are available also in hard copy so they can also be distributed during some competition law related events (conferences, seminars, roundtables).

30. Role of associations in promoting competition compliance is also very important especially taking into account that exactly within auspices of certain associations of undertakings often prohibited agreements had been concluded. With the aim of educating its members about competition rules, associations should also engage in promotion and education activities. The CCA has very good experience in long term cooperation with chamber of commerce which produced several joint workshops, conferences and seminars about different competition law topics aimed at large scale of stakeholders (undertakings, lawyers, judges, other associations, public administration, general public, academia, journalists). Another good example of competition compliance promotion is cooperation with universities (Faculties of Law and Economy in Zagreb and other Croatian cities) where experts from the CCA often teach students about competition law and professors participate in events about competition law organized by the CCA. Finally, it is very useful to have special association in the form of NGO whose aim is to promote competition law and policy and build the network of competition law specialists. In Croatia, this is Croatian Competition Law and Policy Association (HDPPTN) as an umbrella national association established to promote, develop and promote competition law and policy, as well as to bring together national and international competition law experts.⁶

5. New approach in competition compliance

31. The existing compliance programs and advocacy activities have to follow future developments. Primarily, they will have to be more adapted to digital environment, classical advocacy tools might not be effective anymore. Covid 19 pandemic showed this when suddenly whole business including competition advocacy activities had to move on line. It is thus to be expected that on line webinars on platforms or topical podcasts will remain new applicable competition advocacy tool.

32. Increase in damages claims can also have good impact on compliance behaviour of undertakings because they became aware that besides high fines from competition authorities, they can also face high amount of damages to pay. Although there is solid legal basis in force (Law on damages claims for breach of competition rules), the number of damages claims for competition law infringements is still very low in Croatia and often claims are submitted based on other grounds, such as claims for damages for unfair advertising or consumer protection.

33. In Croatian competition law system, there is no individual sanctions, only legal persons are fined for infringements of competition rules. Personal liability at least from person responsible for the actions of undertakings (directors) and measures like disqualification orders might be useful in relation to increasing compliance with competition law.

http://www.aztn.hr/uploads/documents/brosure/vodic_za_narucitelje.pdf

⁵ No to cartels-10 golden questions:
http://www.aztn.hr/uploads/documents/novosti/ne_kartelima.pdf

⁶ <https://hdpptn.hr/en/>

6. Final remarks/Conclusion

34. Compliance programs have multi-purpose role, as internal compliance strategy by undertakings, as commitment measures and as element for reduction of fines. Whichever role prevails, it is clear that they serve one goal: to promote compliance with competition rules and to increase competition on the market. However, such compliance programs have to be effective and implemented by undertakings with clear training and education plan for employees, compliance officer and monitoring system in place. The role of competition authorities in assessing such compliance programs should remain more advisory or control when compliance programs present measure to be completed based on the decision of the competition authority like in case of Croatia. Certainly, compliance programs are not the only tools, there are many other competition advocacy tools developed by competition authorities and others like legal opinions, cooperation with relevant associations and with some new ones emerging in the digitalization era like podcasts and on-line webinars.