Unclassified English - Or. English

31 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Competition Compliance Programmes – Note by BIAC

8 June 2021

This document reproduces a written contribution from Business at OECD (BIAC) submitted for Item 1 of the 133rd OECD Working Party 3 meeting on 8 June 2021.

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

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JT03477357

Business at OECD (BIAC)

1. *Business at OECD* (BIAC) appreciates the opportunity to submit these comments to the OECD in connection with the OECD's Roundtable on competition compliance programmes.

1. Introduction

2. Competition compliance programmes have been discussed by the OECD Competition Committee in the past. BIAC presented a comprehensive analysis of the subject for the June 2011 roundtable.[1] This submission builds on the points made in that document.

3. While the remarks made then are still valid, the present discussion is most timely, as the world has moved on significantly in the intervening period since the last roundtable on this topic. Over the past decade, compliance programmes have become more sophisticated and costly. They have had to evolve to cater for the proliferation of compliance requirements in other areas (anti-bribery and corruption, as well as trade, tax evasion, data protection and privacy compliance requirements, to name but a few), in addition to the often-heightened expectations of compliance programmes that come in their wake. Increasingly, antitrust authorities have introduced guidance for compliance programmes as well as policies that recognise robust corporate compliance programmes in calculating the fine or even at the charging stage.[2] BIAC is keen to ensure that we collectively continue to build on that momentum.

4. Section II of this paper considers the shared objectives of the antitrust community, encompassing both enforcers and business, to promote robust corporate compliance programmes. Sections III to VI then articulate four key ways in which antitrust agencies, and others, can assist with compliance efforts, by creating a climate that supports antitrust compliance programmes, before some concluding remarks in section VII.

2. A Common Cause

5. As former EU Commissioner Joaquín Almunia correctly observed once, the purpose of antitrust enforcement is not, in and of itself, to impose high fines and other penalties. Rather, the ultimate policy goal of antitrust enforcement is to have no need to impose penalties at all.[3] Thus, the focus of antitrust enforcement agencies should focus

[1] *See* OECD, Promoting Compliance with Competition Law—Note by BIAC, DAF/COMP(2011)20, 243-249 (Aug. 30, 2012), *available at* https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

[2] *See* U.S. Dep't of Justice, Crim, Div., Evaluation of Corporate Compliance Programs (June 2020), *available at* https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter DOJ Crim. Div. Guidelines].

[3] *See* Joaquín Almunia, Compliance and Competition Policy, Address Before the BusinessEurope & US Chamber of Commerce Competition Conference (Oct. 25, 2010), *available at* https://europa.eu/rapid/press-release_SPEECH-10-586_en.htm.

on the key questions: "How can antitrust violations be prevented most effectively? How can companies be encouraged and incentivised to comply?"

6. While monetary sanctions for violations, high costs of litigation and legal defence, and reputational damage due to a finding of infringement create a real incentive for genuine compliance efforts, most companies inherently want to conduct their businesses ethically, with integrity and in compliance with the law. For this reason, the main role of compliance programmes—both antitrust compliance and compliance in many other areas of law—is to instil a culture of doing business ethically and in compliance with all applicable laws. Compliance programmes empower management and employees within the company by enabling them to have a greater knowledge and understanding of the laws applying to them.

7. A second key role is to facilitate the early detection of misconduct (ideally even before the misconduct occurs) thus allowing for termination of such conduct and the prevention of the negative consequences associated with non-compliance both for the company and for the market as a whole. A well-designed antitrust compliance programme should enable a company to avoid violations or—in the unfortunate circumstance that a violation does occur—detect it swiftly and terminate it appropriately, with a leniency application where applicable.

8. The old adage "prevention is better than the cure" holds true in this regard. It is this very notion that binds the antitrust community together in a shared objective, a common cause. Competition authorities have every interest in promoting a climate where robust compliance is perceived, simply, as the right thing to do. Such a climate will allow for a multiplier effect, bearing in mind that the effects of a single company's compliance efforts are not necessarily or exclusively limited to its behaviour—as it interacts with other third parties, whether as customer, supplier, joint venture partner, fellow trade association member or in other multiple forms, the seeds of robust compliance are spread. The more efforts companies invest in robust compliance programmes, the more likely we are to see a compliance climate that benefits society as a whole.

9. Many of the remarks made in this paper arise out of discussions in multiple legal and business fora. One of these, the In-House Competition Lawyers Association (ICLA), whose membership comprises more than 450 members across Europe,[4] recently (in 2020) carried out a comprehensive survey of the activities of in-house lawyers in relation to compliance. We include a summary of the key results of the survey in an annex to this paper. Whilst only a snapshot, the survey results demonstrate a concerted effort by business to promote compliance (including focused recruitment into legal and compliance teams, particularly of antitrust specialists; senior management endorsement; tailored training; regular risk assessments and compliance audits), although clearly improvements can and should always be pursued.

10. While agency enforcement has an important role to play, experience shows that antitrust enforcement based on deterrence and punishment alone has not been successful in stamping out unacceptable anticompetitive behaviour. This is because no compliance programme, however well designed, maintained and enforced, can stop all possible infringements. Sometimes infringements of the law will occur. This is true beyond antitrust law—in every aspect of life. Unfortunately, even "good" people break the law—often unintentionally, especially in the area of antitrust law, which often requires

[4] *See* IN HOUSE COMPETITION LAWYERS' ASS'N, *available at* www.inhousecompetitionlawyers.com.

specific expertise and careful nuance. However, despite the best, more robust and most sincere compliance programmes, there can be bad faith stakeholders who knowingly violate the law.

11. Can, and should, competition agencies—and others—do more to promote compliance, beyond brandishing the enforcement "stick?" BIAC believes this is definitely the case and invites competition authorities across the world to work with business in pursuit of that common cause, along four broad themes: (i) enhancing the standing of in-house lawyers; (ii) creating better incentives for compliance efforts; (iii) increasing agency compliance guidance and advocacy efforts; and (iv) improving legal certainty on substantive issues. We believe collaboration on these work streams with corporate compliance policy makers outside the competition arena would be helpful.

3. Enhancing the Standing of In-House Lawyers

12. Whilst compliance culture is a matter for everyone within a business, with a clear "tone from the top," there can be little doubt of the essential role played by in-house lawyers in any business organisation, including specialist antitrust experts who are, as noted, increasingly recruited into in-house roles. The role of in-house lawyers is to assist with an understanding of the law and to propagate compliance best practice. This is achieved by designing and implementing a compliance programme through guidelines, internal policies, training, and the spreading of awareness regarding competition law. They also update internal stakeholders on competition law and policy developments at home and abroad.

13. In-house legal teams therefore form the backbone of compliance efforts within organisations. In many ways, they are "allies" to competition enforcers. At the end of the day, their job is the same—to do their best to prevent antitrust violations.

14. In addition, in-house counsel address questions and requests raised by the business, reviewing business proposals, proactively counselling on competition implications, and ensuring that the business operates within the boundaries of the law. Their role is, amongst other things, to protect the company from antitrust risk—first and foremost they translate and explain complex legal concepts and principles in language that the business can understand. They are often the first—and only—port of call for the business when new initiatives, relationships or strategies are being considered. The higher costs of outside counsel, as compared to those of in-house counsel, lead companies to utilise them sparingly, if at all.

15. In-house counsel rely on having the trust and respect of the business, a "standing" that allows them to advise on the most complex and sensitive of matters whilst being perceived as the final voice on issues of compliance. This is severely undermined in those jurisdictions that do not recognise legal privilege for in-house counsel. For example, the European Courts in Luxembourg have stated that they do not consider in-house lawyers to be independent from their employers and—as a consequence—their advice cannot be privileged.

16. This position seriously hampers compliance efforts. In many ways, in-house counsel can—and do—regularly and promptly act to prevent or avert potential violations that external counsel (or agencies) may have no idea are about to take place. It also fosters a candid relationship between the in-house counsel and the business teams, which increases detection, prevention and mitigation. In other words, in-house counsel is best placed to "nip things in the bud." Denying legal privilege to in-house lawyers is an impediment to effective compliance programmes, given the primary role of in-house

lawyers in driving such programmes. Businesspeople need to be able to rely on their in-house lawyers' advice, and they should not be discouraged from consulting internal lawyers; they also need to respect their views and not be encouraged to doubt or second-guess the advice internal lawyers provide.

17. BIAC strongly urges moves to enhance the standing of in-house counsel, including through recognition of the legally privileged status of their advice, as a central plank of improving compliance more widely.

4. Creating Better Incentives For Compliance Efforts

18. BIAC notes, from experience, that building, implementing, maintaining and continuously improving an effective antitrust law compliance programme across any organisation, regardless of its size, is a costly and complex task. Hence, the effort required for such programmes should not be underestimated either by the companies—or by the authorities.[5]

19. In an ideal world, companies' C-suite executives would all be antitrust lawyers with a good understanding of the importance of antitrust compliance. Regrettably, that is not the case in reality. As a result, in-house antitrust lawyers face great difficulties in convincing leadership to allocate adequate resources and headcount for antitrust compliance. This is especially the case where a company has never been caught in an antitrust violation, which makes it hard for leadership to fully appreciate the need to invest resources in antitrust compliance.

20. A key development in recent years has been the consideration of genuine and robust antitrust compliance programmes as a mitigating factor in the sanctioning and/or the charging stage after a violation has been uncovered. A growing number of jurisdictions now take the existence of a robust compliance programme into consideration when assessing violations.

21. In the U.S., the existence of a robust compliance programme (i.e., a program that detects, addresses and mitigates antitrust issues), as well as early cooperation with a cartel investigation, have long been associated with recommended reductions in penalties.[6] In 2019, the Department of Justice (DOJ) Antitrust Division announced a broader policy that takes antitrust compliance programmes into account already at the charging stage, i.e., in considering whether to file criminal antitrust charges against a company.[7] These guidelines are complimentary to a similar set of DOJ guidelines

[5] This is before we factor in the next likely wave of revolutionary change in the compliance field—the fulsome and meaningful deployment of technology to assist with and enable compliance practices.

[6] *See* OECD, Promoting Compliance with Competition Law—Note by U.S., DAF/COMP(2011)20, 193-200, 199 (Aug. 30, 2012), *available at* https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

[7] *See* Press Release, U.S. Dep't of Justice, Antitrust Div., Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), *available at* https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance; and U.S. Dep't of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), *available at* https://www.justice.gov/atr/page/file/1182001/download.

relating more broadly to corporate compliance programmes.[8] The 2019 U.S. antitrust compliance guidelines are a welcome development and bring the Antitrust Division's practice more in line with the rest of the DOJ prosecutors and indeed closer to other antitrust agencies.[9]

22. An alternative, or complement, to "compliance credits," applied only after a violation has been detected, could be a system of tax credits that recognises investment in compliance programmes as a business expense, thus effectively lowering the cost to companies. We appreciate that this may pose a number of logistical challenges, but it could have a number of advantages, namely: (i) it could be more "holistic," encouraging compliance initiatives across areas beyond simply antitrust; (ii) it could help SMEs, which may be particularly challenged in terms of resources, by setting a ceiling or cap on the credit, so that they benefit more than larger companies; and (iii) the tax benefit could be denied to/recouped from companies that have been found to have infringed the law, thus eliminating the benefit for companies whose compliance programmes have supposedly "failed."

23. BIAC believes credit for compliance programmes, both before or after a violation has been detected, is also beneficial in non-criminal antitrust violations (such as in civil or administrative enforcement regimes). In fact, one may argue that it would be even easier to give credit to compliance programmes in such regimes because there could be no question of such credit interfering with prosecutorial discretion or the powers of criminal courts.

24. Such credit follows the example of the anti-bribery and anti-corruption enforcement agencies.[10] It is clear that incentivising genuine compliance efforts results in more investment in compliance, and therefore greater efforts towards compliance. In the ICLA survey mentioned above, a majority of respondents (69%) did not expect their

[8] *See* DOJ Crim. Div. Guidelines, *supra* note 2.

[9] *See, e.g.*, Competition Bureau Canada, Bulletin: Corporate Compliance Programs (June 2015), *available at* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html [hereinafter Canadian Compliance Guide]; Italian Competition Auth., Guidelines on Antitrust Compliance, *available at* https://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines_compliance.pdf; Comisión Nacional de los Mercados y la Competencia, CNMC Proposal For a Guide to Compliance Programs Concerning the Defense of Competition, *available at* https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/20200221_Compliance Guidelines_Draft_Public Consultation EN.pdf; Australian Competition & Consumer Comm'n, Guidelines for the Use of Enforceable Undertakings (Apr. 2014), *available at* https://www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf; Fiscalía Nacional Económica, Programas de Cumplimiento de la Normativa de Libre Competencia (June 2012), *available at* https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf; Competition & Mkts. Auth., CMA's Guidance as to the Appropriate Amount of a Penalty (Apr. 18, 2018), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf.

[10] *See* DOJ Crim. Div. Guidelines, *supra* note 2. *See also* Press Release, Dep't of Justice, Criminal Div., Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required (a matter in which the U.S. DOJ did not prosecute Morgan Stanley because the culprit executive deliberately evaded the company's compliance requirements).

antitrust compliance budgets to change materially, but 82% of in-house respondents believed that if having an actively implemented formal compliance programme increased the likelihood of a reduced sanction from authorities for non-compliance, higher investments would be made.

25. The recognition that many antitrust agencies give to robust compliance programmes is therefore welcomed by the business community. Regrettably, some authorities still consider that if a violation of the law has occurred, the compliance programme has "failed" and therefore a discount would not be appropriate.[11] Since companies must comply with the law and that role is fulfilled by a compliance programme, so the argument goes, that should be a sufficient incentive.

26. Companies establish and maintain compliance programmes (for antitrust, but also in many other areas of law) to conduct business ethically and with integrity and to comply with the law. While competition lawyers might view compliance with competition as key, businesses in all sectors nowadays have to comply with a large set of rules in different areas of the law, each of them with their own compliance pressures and priorities. BIAC firmly believes that giving appropriate recognition to good efforts will encourage greater investment, more dedicated resources, and further efforts to enhance real compliance efforts in practice. Many in-house lawyers, the backbone of compliance efforts, argue from experience that taking into account a compliance programme for the purpose of a fine would allow them to show why the business should invest in the programme and resist budget limitations.

27. Greater soft convergence between antitrust authorities around guidance that considers compliance programmes during the charging on sentencing stage would be helpful, because the more jurisdictions that are willing to consider credit for compliance programmes, the easier it is for antitrust counsel to obtain the needed resources for more robust compliance programmes and the more efforts will be put in place to encourage compliance in practice.

5. Increasing Agency Compliance Guidance and Advocacy Efforts

28. In addition to the recognition of compliance programmes during the sentencing or charging stage, and financial incentives for compliance programmes, agency guidance, covering both criminal and civil enforcement, for robust compliance programmes is another valuable tool assisting in-house counsel to persuade C-suite leadership of the importance of robust compliance programmes and how such programmes should be tailored. This is because the enforcement agencies' imprimatur over such a guidance document greatly amplifies the message.

29. Such guidance has often been developed by competition agencies in the context of moves to provide compliance credit, as highlighted above. One line of argument that has been deployed against granting compliance credit is that if a competition authority were to consider the existence of a compliance programme as a mitigating factor, companies might set up "sham" compliance programmes just to take advantage of the possibility of a discount. Another argument has been that competition agencies are ill-equipped to "assess" the robustness or adequacy of compliance programmes (it being

[11] As recently articulated by Olivier Guersent, Director General DG COMP, at the Concurrences Fireside Chat: Why Antitrust Compliance? Competition Agencies' Points of View, on January 12, 2021.

easier to conclude that a compliance programme is a failure as soon as any infringement occurs).

30. The experience of the last decade has demonstrated that these arguments are, at best, short-sighted, and at worst, entirely misguided. Companies do not invest in sham programmes—in antitrust or in other areas of law. The real question is whether the programme is sufficiently robust, whether adequate resources have been provided internally and how the compliance programme is perceived within the company.

31. In many areas of compliance, bolstered by increasing requirements of corporate social responsibility that mandate compliance with laws and encourage ethical corporate behaviour, enforcers appear to have had no problem assuming the role of assessing the effectiveness/adequacy of programmes and have produced extensive guidance on best practice.[12] And the more agencies get involved in assessing and evaluating compliance programmes, the more they will improve.

32. We are all familiar with the key elements of a compliance programme:

- Tone from the top: sincere commitment and active involvement of senior management, which leads to a culture of compliance across the company.
- Risk based assessment (focus of the programme on the key risks of that company in that industry).
- Having corporate compliance policies and procedures as well as guidance and training tailored to the business.
- Controls to verify that the process is working well including internal reporting and allowing employee to seek advice when needed.
- Constant monitoring and improvements in line with internal expertise or changes in the law.
- The possibility of sanctions for individuals (such as dismissal).

33. The International Chamber of Commerce (ICC) has created excellent documents, including a toolkit,[13] highlighting the key elements of a compliance programme and how to design and implement them. Many antitrust authorities have recognised the efforts of the ICC, and given helpful guidance to assist companies. The Canadian Competition Bureau's Bulletin on (antitrust) compliance[14] is one of the few publications from a national competition authority that includes information that companies can use to assess the credibility and robustness of compliance programme. A compliance programme will be considered credible when the company can demonstrate that it was reasonably designed, implemented, and enforced in the circumstances.

[12] *See* U.S. DOJ, *supra* note 7; *see also* UK Ministry of Justice, The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (Mar. 2011), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (includes six principles that should inform an assessment of whether "adequate procedures" have been put in place).

[13] *See* INT'L CHAMBER OF COMMERCE, ICC ANTITRUST COMPLIANCE TOOLKIT (2013), *available at* https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/.

[14] *See* Canadian Compliance Guide, *supra* note 9.

34. As the Canadian Competition Bureau states in its guidance, a credible corporate compliance programme has three broad benefits for businesses:

- It signals an entity's efforts in tackling and addressing seriously the legal obligations and ethical considerations facing businesses today;
- It reduces costs of compliance by helping to clarify, for business managers and officers, the boundaries of permissible conduct as well as situations that could put their business at risk of violating the act; and
- Should there be any violation of (Canadian) competition law, it provides a possibility of the business to mitigate the cost of non-compliance.[15]

35. Given its clout and the convergence synergies, BIAC strongly urges the OECD to work with BIAC members and draft and develop broad multilateral compliance programme guidance. Since competition compliance is part of broader compliance themes, the competition committee may want to collaborate with the OECD Anti-Corruption Division in this regard.

36. BIAC also commends any and all initiatives that competition agencies engage in, beyond guidance on robust compliance programmes, to advocate and explain the importance of competition, especially where it involves clear and practical explanations aimed directly at business and at society at large. The more the benefits of competition are embedded within the moral fabric of society generally, the easier it will be for businesses to instil a compliance culture within their organisations.

6. Improving Legal Certainty on Substantive Issues

37. Good compliance is predicated on a good understanding of the law, which in turn requires clarity and certainty from the enforcers. For companies to comply with competition law and for compliance programmes to fulfil their roles, the rules must be clear and comprehensible. Lack of clarity will lead to companies either not taking legitimate and lawful business decisions (thus having a "chilling effect" on what would otherwise be fair competition on the merits) or else acting in good faith, but at the risk of engaging in conduct that is later deemed to be an infringement.

38. BIAC believes this requires a three-pronged commitment from antitrust agencies:

- A clear commitment to publication of fully-reasoned enforcement decisions.[16] We note, in this regard, a clear trend in some jurisdictions towards dispensing with many cases on the basis of shortened and expedited procedures (e.g. settlements) or negotiated outcomes (e.g. commitment or remedy cases). Whilst there may be very good reasons (not least of which for the party(ies) under investigation) for expedited processes to be deployed, such procedures tend to culminate in less than fulsome and clear decisions. This is particularly worrying in respect of novel theories of harm, where industry as a whole would benefit from the detail and nuances of the arguments. It is also detrimental to compliance efforts generally if enforcement is expedited to such an extent

[15] *Id.*, at Preface.

[16] Clearly allowing for redaction of confidential information.

(where it becomes the norm, rather than the exception) that legal developments become opaque and the result of compromises thrashed out behind closed doors.

- Clear and user-friendly guidelines on the interpretation of the law,[17] focused on the practical impact on business practices and suitably updated to reflect market changes and legal developments.[18] Such guidelines often follow a track record of enforcement experience, a compendium of practices of sorts, but need not be limited to such situations.[19] Every now and again, antitrust agencies will be called upon to become "thought leaders" (without the luxury of a well-established precedent base) on novel issues or approaches that require urgent guidance. In light of the COVID-19 pandemic, we have seen prompt reactions and effective guidance being developed and published in short spaces of time by a number of agencies. It can be done.[20] One such area calling for urgent leadership and guidance from the antitrust agencies is that of the pursuit of climate and sustainability objectives through competitor collaborations.[21] If there is one area where we cannot, collectively, wait for good precedent cases to be decided, it is in respect of the climate emergency.
- A systematic effort of reinforcing the key messages of the law and significant enforcement activities, not only through symposia and legal conferences, but also articulated in clear and practical language directly to the business community and society at large, as indicated above.

7. Conclusion

39. Enforcement agencies and in-house lawyers share an interest in ensuring compliance with competition law. Robust competition compliance programmes are key

[17] Guidelines should ideally translate legal principles into practical commercial scenarios, ideally using case studies to illustrate the impact of the rules. They should also avoid guidance that is so heavily caveated, or subject to so many conditions, that it is rendered meaningless in any realistic practical scenario.

[18] The current and on-going consultations being conducted by DG COMP in respect of the updates to its legislation and guidelines on both vertical and horizontal agreements are good illustrations of a conscientious and broad-based approach to guidance setting. Where businesses have been involved in the detail of the policy discussions and decisions, they are far more likely to be able to translate the law into practical and effective internal guidelines for the company's compliance programme.

[19] There are many areas of competition law where compliance principles are not necessarily clear-cut. For example, in respect of the exchange of competitively sensitive information in entirely legitimate situations (e.g. M&A deals) or in respect of information flows between customers and suppliers.

[20] To an extent, competition agencies have also readily accepted the mantle of thought leaders in respect of digital markets, where they are developing or contributing to proposed legislation, guidance and policy initiatives almost in tandem with their enforcement activities.

[21] Without prejudice to the notable and most welcome contributions to the debate from the Dutch and Greek competition authorities. *See* Auth. for Consumers & Mkts., Draft Guidelines: Sustainability Agreements, *available at* https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf; Hellenic Competition Comm'n, Competition Law Sustainability, *available at* https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.

for preventing and ceasing competition violations. Due to their high costs, and the fact that C-suite executives typically lack a full understanding of competition law, it is difficult for in-house lawyers to obtain sufficient resources needed for robust compliance programmes. Hence, policies that support their efforts to fund and design robust competition compliance programmes are key. These can and should include credit for compliance programmes at the charging and/or sentencing stage.

40. Genuine efforts by companies to promote compliance should be acknowledged as far as possible. Authorities should also acknowledge that, to assist companies in their compliance efforts, far more helpful ("user friendly") guidance, on both robust compliance programmes and on the substance of the law, is required. At the end of the day, both companies and agencies seek the same goal: to try to ensure there are no infringements. Both companies and agencies have a duty to do whatever they reasonably can to achieve this goal for the benefit of society.

41. The OECD can be hugely beneficial in developing policies and guidance that nurture and promote competition compliance programmes.

Annex A.

Date of the Questionnaire: November 2020

Who Responded to the Questionnaire

- 102 responses (95 complete responses)
- 60% from Antitrust in-house lawyers
- 60% belong to companies with over 50,000 employees
- 66% have worldwide operations
- 44% have 21-100 lawyers in the legal teams in Europe
- 44% have more than 10 members in their compliance teams in Europe
- 53% have 1-5 full time Antitrust lawyers

Antitrust Compliance Policy & Antitrust Compliance Programme

- 65% stated they have a general Compliance Policy
- 80% reported to have both an Antitrust Policy and an Antitrust Compliance Programme
- Of the 20% that do not have an Antitrust Policy and/or Programme, 6% do have other forms of documents such as code of conduct and ad-hoc guidelines
- The vast majority of respondents reported that their Antitrust Compliance Policy / Programme is run centrally (86%). Around 20% reported they also have regional and/or local Antitrust Compliance Policy / Programmes.

Implementation of the Policy / Programme

- 53% reported 1-5 lawyers are in charge of the implementation of the Antitrust Compliance Policy / Programme
- 19% reported having 6-15 lawyers
- 18% reported having 16-50 lawyers
- 11% reported having more than 50 lawyers
- In relation to who holds the ultimate responsibility for implementation, 56% reported the legal department, 12% reported the Compliance department, 11% reported the CEO, and 9% the Board. 13% reported to have other functions holding the ultimate responsibility such as the Chief Risk and Compliance Officer and the Business

- Review of the Policy / Programme: 63% reported that the Antitrust Compliance Policy / Programme is reviewed at least annually with the others reporting a variety of frequency ranging between a continuous review approach to a review every three years.

Antitrust Compliance Policy & Antitrust Compliance Programme – Best Practices

- Communication:
  - 92% reported they make the Antitrust Compliance Policy / Programmes available via the internal website and internal training.
  - 21% reported having a Compliance app
  - Other forms of communication included Compliance ambassadors, FAQs, open door policy of Antitrust lawyers, internal communications programme, letters of undertakings.
  - 48% reported that senior management communicates its support to the Antitrust Compliance Policy / Programme to staff at least annually. 31% reported other, which included more often than on a yearly basis, CEO intro-video ahead of face-to-face trainings, quarterly compliance town halls, in every CEO communication to staff, in connection with the launch of code of conducts, policies etc.
- Incentives for Compliance:
  - 77% consequences on employment
    - 25% responsible business unit has to bear legal costs of non-compliance
    - 23% impact on performance / bonus
    - 19% annual appraisal
    - 5% reported other, such as badges in the HR reward system
- Whistleblowing:
  - 93% reported having whistleblowing hotlines with a slight majority being internal only

Training

- Frequency
  - 54% reported they do training at least yearly
  - 53% reported they do training upon joining of all new employees
  - 46% reported a combination of frequencies using a risk based approach
- Delivery
  - 90% have e-learning capabilities
  - 73% do face-to-face in small groups (up to 20 people)
  - 57% do face-to-face in large groups (more than 20 people)
  - 44% hold video conferences
  - 75% reported that training is delivered by dedicated Antitrust in-house lawyers

  - 45% reported that training is delivered by a general in-house lawyer
  - 20% reported that training is delivered by a compliance officer
  - 16% reported that training is delivered by external counsel
- 93% uses tailor made trainings
- 83% reported that the Antitrust Compliance module is delivered as a standalone training
- Audience
  - 82% reported they use a risk-based approach
  - 49% reported actively training senior management
  - Others responded that their approach includes everyone (30%), train the trainer sessions for the legal team (33%), the Board / Executive team (28%), salesforce was noted as being specifically targeted
- Records
  - 90% reported tracking attendance systematically / partially.
- Test
  - 81% stated they test the knowledge of the training.
  - 44% stated that there are consequences for staff who fail the test, notably repetition of module until successfully passed.

Risk & Audit

- Risk
  - 92% reported conducting Antitrust Compliance risk assessments of which:
    - 57% are on an ad hoc basis and
    - 21% at least annually
    - 14% with a frequency ranging from quarterly to every three years
- Audit
  - 86% confirmed that they perform proactive audits of which:
    - 35% on an occasional basis
    - 32% linked to a specific issue
    - 20% on a regular basis
    - Topics covered by audit include amongst others: compliance with policies, training completion, business activities, interaction with competitors, vertical and horizontal relationships, strategic alliances, marketing and sales activities, M&A, R&D, pricing, exclusive agreements, loyalty programmes, email / WhatsApp behaviour, procurement, use of advanced analytics / big data, industry association membership, awareness

Other Interesting Outcomes

- 69% of respondents stated that the General Counsel reports to the CEO
- It was noted that certain companies have a specific Antitrust Compliance department
- 69% of respondents do not foresee any changes to their Antitrust Compliance budget, compared to 19% which expect an increase and 12% to decrease (snapshot in July 2020).
- 82% of respondents believe that if having an actively implemented formal Compliance Programme increased the likelihood of a reduced sanction from authorities for non-compliance, higher investments would be made.
- 74% of respondents have reported that certain controls are in place in relation to contacts with competitors.
- 85% of respondents confirmed having Antitrust Compliance related clauses in their contracts with suppliers, contractors etc.
- Compared to the last survey, there was a higher percentage of time spent on civil litigation related to Antitrust.