

Unclassified

English - Or. French

27 May 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**Competition Compliance Programmes – Note by France**

8 June 2021

This document reproduces a written contribution from France submitted for Item 1 of the 133<sup>rd</sup> 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>.

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

**JT03477158**

## France

### 1. Introduction

1. Compliance programmes are an important part of the competition law enforcement landscape. The specificity of competition compliance is twofold. First of all, the financial stakes can be considerable. Indeed, financial penalties have become much higher and more of a deterrent in recent years, both at national and European level. A company that does not comply with the rules of competition law can receive a substantial fine, in the order of several million and sometimes billion euros<sup>1</sup>. Merger control procedures are also affected by compliance risks, as a company may be exposed to a sanction for early implementation of the transaction (gun-jumping) or another infringement related to the procedure for compliance with the authorisation decision. The stakes are very high because the company risks having its acquisition transaction called into question in the event of a serious breach<sup>2</sup>.

2. Furthermore, competition law is a technical field. An infringement may result from "classic" forms of cartel, but also from the exchange of information or the implementation of algorithms whose compliance is more complex to analyse. It therefore seems important that the company has specifically reflected on its activity in advance, with a view to introducing a prevention policy and appropriate controls.

3. Compliance therefore refers to a policy of risk prevention and management for the company. While this is first and foremost a company's internal process, the competition authorities also have a role to play in compliance. The Autorité de la concurrence (hereinafter "the Autorité") adopts a proactive approach to making competition law increasingly accessible to businesses so that they can implement the appropriate internal tools to comply with competition law.

4. Compliance was a priority for the Autorité in 2020<sup>3</sup> and remains a key issue in 2021<sup>4</sup>. At the request of companies, a compliance working group made up of company managers, lawyers and members of the Autorité was set up in 2020 to collect their needs and take stock of best practices. Following several months of discussions, the group concluded, among other things, that an important action to take would be to draft a new framework document on competition compliance programmes which would, in particular, focus on the conditions for the effectiveness of such programmes.

5. Competition compliance programmes are tools for preventing and managing competition risks and the Autorité encourages their systematic implementation (1). The Autorité also supports operators by developing a range of compliance tools (2).

---

<sup>1</sup> Decision No. 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector, issuing Apple and its wholesalers with a sanction of **1.24 billion** euros.

<sup>2</sup> Decision No. **11-D-12** of **20 September 2011** on the fulfilment of the commitments stated in the decision allowing the acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus Group.

<sup>3</sup> Press Release, [The Autorité de la concurrence announces its priorities for 2020](#), 9 January 2020.

<sup>4</sup> Press release, [After a very active 2020, the Autorité de la concurrence announces its priorities for 2021, which will focus on the digital economy](#), 23 December 2020.

## 2. Competition compliance programmes: key points and development

6. The compliance programmes introduced by businesses are tools for preventing and managing competition risks. Although the cost of implementation can be high, the resulting positive benefits should encourage companies to adopt such programmes.

7. The Autorité strongly supports the compliance approach and encourages the systematic adoption of compliance programmes by as many companies as possible.

### 2.1. Compliance programmes as a risk prevention and management tool

#### 2.1.1. Risk prevention

8. Developing and implementing a compliance programme involves significant resources for companies. The cost of non-compliance can, however, be much higher, as the company is exposed not only to high financial risks but also to significant risks of damage to its image and reputation, as well as to operational difficulties when it has to report its practices following the establishment of an abuse, for example.

9. In financial terms, violations of competition rules, as provided for under French and European Union law, can expose legal entities to significant financial penalties of up to 10% of their total turnover. Public and private persons who are victims of a cartel or abuse of a dominant position are, moreover, entitled to obtain compensation for their loss, exposing the convicted companies to the additional burden of having to pay damages.

10. In addition, Article L. 420-6 of the French code of commerce stipulates fines and imprisonment for natural persons who fraudulently play a personal and decisive role in the design, organisation or implementation of anti-competitive practices.

11. The implementation of a compliance programme, designed specifically for the company's activity, is part of a more global policy to prevent all antitrust risks.

#### 2.1.2. Risk management

12. Compliance programmes are also a risk management tool, in that they must enable companies to detect, report and remedy potential violations.

13. When faced with a notice of breach revealed by a compliance programme, the company may decide to use the leniency procedure provided for in point IV of Article L. 464-2 and Articles R. 464-5 et seq. of the French code of commerce, and detailed in the Autorité's procedural notice on the leniency programme. This procedure allows companies to be granted total or partial exemption from financial penalties when they inform the Autorité of the existence of illegal cartels and cooperate with it to put an end to them.

#### 2.1.3. Key points for an effective compliance programme

14. Beyond the two-fold objective of preventing and dealing with breaches, it is important that the compliance programme is designed by and for the company and includes all the elements necessary for its effectiveness.

15. The compliance programme must, first of all, be a "tailor-made" project in that it must be adapted to the company's markets, activities and products, and its internal organisation and culture.

16. To foster the development of a culture of compliance within the company, and to ensure that it is sustainable, a compliance programme must also include certain key features, including a public commitment by senior management to compliance, internal

relays and experts, information, training and awareness-raising activities, control and alert mechanisms and a tracking system.

17. It is also essential for the company to anticipate any new risks that may arise. To do so, it must conduct regular monitoring to identify and take into account any changes in case law and legislation that may have an impact on the compliance of the company's practices.

## **2.2. An approach encouraged by the Autorité: the systematic implementation of compliance programmes by companies**

### ***2.2.1. Change in the Autorité's approach to the consideration of compliance programmes in its decision-making practice***

18. To encourage the implementation of compliance programmes, in 2012 the Autorité introduced a system of penalty reductions if the company committed to implementing a compliance programme. This penalty reduction system was incorporated in the 10 February 2012 framework document on competition compliance programmes.

19. This approach changed in 2017 with the adoption of the floor coverings decision<sup>5</sup> and new soft law principles with the publication of the 19 October 2017 statement on the settlement procedure and compliance programmes, which led to the withdrawal of the 2012 framework document. While reaffirming the importance it attached to compliance programmes, the Autorité considered that the development and implementation of compliance programmes should become part of companies' day-to-day management.

20. It considered that everyone was now aware of the issues that must lead to the implementation of a compliance policy, especially large companies, and that it was no longer justified to reduce a penalty on the grounds that the company would be putting in place, for the future, tools that it should have implemented in the past. By granting penalty reductions, the Autorité also created a form of negative incentive not to implement a compliance policy.

### ***2.2.2. A renewed approach with a new framework document on compliance programmes***

21. In response to a request from companies, in 2020 the Autorité set up a dedicated compliance working group made up of company managers, lawyers and Autorité representatives.

22. The objective was to take into account the needs of companies as well as the difficulties they might encounter in setting up and monitoring compliance programmes, in order to identify and promote best practices in this area.

23. In particular, the working group concluded that it would be useful for companies to have a reference document of the same type as the former 2012 framework document. The Autorité has therefore decided to adopt a new framework document on competition compliance programmes in 2021. A draft version of this document is currently being finalised. It will be submitted for public consultation so that, on a larger scale, it involves all the stakeholders interested in this subject.

---

<sup>5</sup> [Decision No. 17-D-20 of 18 October 2017 on practices implemented in the resilient floor coverings sector](#) (see in particular point 464).

### 3. Compliance: the Autorité's preventive and educational activity

24. Since its inception, the Autorité has been proactive in promoting competition law and making it more accessible. By offering practical tools to companies, it contributes to the compliance process.

25. The Autorité is also involved in a global reflection on compliance at European and international levels.

#### 3.1. The Autorité's company support policy

26. The Autorité assists economic stakeholders in their compliance efforts in several ways.

##### *3.1.1. Extensive decision-making practice*

27. The Autorité decides on contentious cases. It is thus developing an extensive decision-making practice that serves as a benchmark for the application of competition rules. It also produces opinions and conducts sector-specific inquiries, in which it issues recommendations that provide an interpretation grid of identified problems.

28. In drafting its decisions and opinions, the Autorité endeavours to be as detailed and precise as possible in its legal reasoning so it can provide operators with the necessary understanding for their decision-making.

##### *3.1.2. Active policy of disseminating documents providing companies with practical tools for appropriating competition law*

29. The Autorité is developing an active policy of disseminating content to assist companies in their compliance efforts.

30. The Autorité regularly publishes studies that explain its analyses of competition issues and present its decision-making practice in a structured and comprehensive manner. Over the past three years, it has conducted a loyalty rebate study<sup>6</sup>, a behavioural remedy study<sup>7</sup> and an e-commerce study<sup>8</sup>. These studies detail the Autorité's decision-making practice, including that of the Commission and sometimes other national competition authorities, as well as the case law of the French review courts and European courts. The study on loyalty rebates won the "Best Soft Law" award at Concurrences magazine's 2019 Antitrust Writing Awards.

31. More recently, the Autorité has carried out a study on professional bodies and competition<sup>9</sup>. The choice of this topic was motivated by the entry into force of new legal provisions exposing professional bodies to heavier sanctions. The ECN+ Directive<sup>10</sup> raised the ceiling for fines to 10 % of the turnover of the organisations' member companies; this ceiling had previously been limited to 3 million euros by the French code of commerce.

---

<sup>6</sup> [Loyalty rebates, Collection Les Essentiels, 2018.](#)

<sup>7</sup> [Behavioural Remedies, Collection Les Essentiels, 2019.](#)

<sup>8</sup> [Competition and e-commerce, Collection Les Essentiels, 2020.](#)

<sup>9</sup> [Professional bodies and competition \(2021\).](#)

<sup>10</sup> [Directive \(EU\) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.](#)

The aim was for the Autorité to issue a reminder of the applicable rules in order to encourage compliance by professional bodies and their member companies. The Autorité also considered that professional bodies have an important role to play in relaying information to their members and encouraging them to adopt the right habits.

32. The Autorité also publishes joint studies with other authorities, the latest being the study conducted with the Bundeskartellamt on algorithms and their implications for the enforcement of competition law<sup>11</sup>. The objective of this type of project is to present a common vision on a topic that is more forward-looking, but with which companies may need guidance.

33. In an effort to provide turnkey compliance tools, the Autorité has also devoted significant resources to facilitating the compliance efforts of SMEs by creating a guide specifically designed for their use<sup>12</sup>. This guide includes practical sheets and educational video modules that answer many concrete questions. In view of the sometimes less experienced target audience, the Autorité has opted for an interactive à la carte tool, unlike other publications, which are generally available in a more traditional brochure format.

### ***3.1.3. Enhanced communication to facilitate compliance***

34. The Autorité communicates widely on competition rules and their virtues, as well as on its decisions and opinions. It uses a variety of communication tools to facilitate compliance.

35. The Autorité has recently innovated by including "Compliance" boxes in its press releases, to make operators more aware of the points of concern<sup>13</sup>. In addition, it plans to dedicate a space on its website to compliance, which will include numerous educational resources, such as publications, infographics, podcasts and videos, aimed at different types of audience. In general, videos and infographics are increasingly being used in the Autorité's communication to increase the accessibility of competition law.

36. From now on, the opinions and decisions issued will also contain a summary, as shown in the latest opinion published by the Autorité<sup>14</sup>. While the opinions and decisions are detailed, it is also important to make them easy to understand and accessible to as many people as possible. These summaries provide an overview of the document and help readers retain the key messages it contains.

### ***3.1.4. Informal consultations in the context of the health crisis***

37. The period of the health crisis was also an opportunity for some competition authorities to provide informal consultations that helped support operators in their compliance efforts.

---

<sup>11</sup> [Algorithms and Competition \(2019\)](#).

<sup>12</sup> *Better understanding competition rules: a guide for SMEs* (2020)

<https://media.autoritedelaconcurrence.fr/guide-pme/>

<sup>13</sup> [Press release of Decision No. 20-D-20 of 3 December 2020 on practices in the premium tea sector](#).

<sup>14</sup> See, for example, the latest opinion [No. 21-A-05 of 29 April 2021 on the sector of new technologies applied to payments](#) (*FinTech* opinion).

38. In March 2020, the European Competition Network (ECN) adopted a common approach to the application of competition rules during the Covid-19 health emergency<sup>15</sup>. In April 2020, the International Competition Network (ICN) similarly issued a statement on competition during and after the Covid-19 pandemic<sup>16</sup>.

39. To adapt to the issues involved in this crisis, the Autorité set up a dedicated internal working group to address the problems raised and the question of the compatibility with competition law of certain behaviours implemented in response to the health emergency. It is in this context that one professional entity, for example, approached the Autorité regarding the adjustment of its commercial rents<sup>17</sup>. The Autorité noted in this case that the professional entity only made general recommendations and that its approach to its members could not be considered an anticompetitive intervention.

### 3.2. Compliance in the global age: the European and international environment

40. In terms of compliance, companies must deal with the international environment in which they operate.

41. In Europe, companies enjoy a unified framework for the application of competition law. The European Competition Network is a framework for cooperation that ensures consistency in competition law and decision-making practice, as well as a forum for in-depth dialogue.

42. Also at the global level, ambitious convergence work is being carried out in intergovernmental forums such as the OECD and the ICN. The latter network has the added advantage of including representatives of companies and law firms, as well as economists and academics.

43. The Autorité is playing an active part in this upgrading of competition regulation in a globalised economy. In addition to its involvement in the ECN, the ICN and the OECD, in 2019 for example, it took the unprecedented initiative during the French presidency of the G7 of piloting the drafting of a joint agreement by the authorities of the member countries on the theme of "Competition and the Digital Economy". The Autorité intends to continue to drive this dynamic, which is good for both business and growth.

---

<sup>15</sup> [Joint statement by the European Competition Network on application of competition law during the Corona crisis](#), 23 March 2020.

<sup>16</sup> ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020.

<sup>17</sup> [Press release, The Autorité clarifies the options of a professional association for dealing with its members' rent during the COVID-19 pandemic](#), 22 April 2020.