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Should companies design and implement a compliance program (Part II)?

On February 10, 2012, the Autorité de la concurrence (French Competition Authority, hereinafter the "FCA") published its Framework-Document on antitrust compliance programs.

As underlined by the FCA, "compliance programs are instruments that enable economic players to increase their chances to avoid breaches of all kinds of rules that are applicable to their activity, including competition rules".

Compliance programs are based both on measures aimed at creating within the company a culture oriented towards compliance with competition and antitrust rules (training and awareness of corporate officers and employees) and on internal control, audit and whistle-blowing systems designed to minimize the risk of infringements (prevention, detection and punishment).

After having underlined in our March 2012 e-newsletter the burdensome nature of the FCA's recommendations with respect to compliance programs and the deficiencies of its Framework-Document, it is now necessary to analyze the effective benefits derived from the adoption of a compliance program and to compare, quite objectively, such benefits with those that a company should legitimately expect therefrom (given notably the financial and human resources investments required for the implementation of such a program).

It is on the basis of this pros / cons assessment that should be measured the (relative) interest for a company to adopt a compliance program.

II Adoption of a compliance program: assessment of the pros and cons

A : The main benefit expected by companies: a reduction of the financial penalty

1. The adoption of a compliance program guarantees a 10% reduction in fines

The FCA specifies in its Framework-Document that "companies or organizations that commit to set up or to upgrade an existing compliance program according to the aforementioned best practices, in the context of a settlement with the Authority, may expect a reduction of their fine up to 10% (...) ".

This is primarily on this issue that lies the difference of opinion between the FCA and the European Commission, the latter having rejected the possibility to "bargain" the adoption of a compliance program . In this respect, the system established by the FCA provides more incentive than that of the European Commission.

Yet, the scope of the fine reduction benefit should be watered down a bit since only companies that have priorily opted for the antitrust settlement procedure (i.e. the no defense against objections procedure) set forth in Article L.464-2 III of the French Commercial Code shall be entitled to a fine reduction.

For the record, under the settlement procedure, the infringing company waives its rights to challenge (i) the regularity of the procedure and (ii) the reality of the charges notified by the FCA (it may only discuss the seriousness of the reported infringement(s)).

It is only at this price that the company can be eligible for the aforementioned 10% fine reduction. Companies could decide not to opt for the settlement procedure only because they consider that one of the charges brought against them is ill-founded – which undermines the efficiency of the system set up by the FCA.

2. Possible combination of fine reductions

The draft Framework-Document submitted to public consultation has been substantially amended with respect to the conditions in which compliance programs should be taken into account by the FCA. In its initial draft, the Framework-Document established an automatic link between the discovery of infringements through compliance programs and the obligation to file an application for leniency. Following the outcry from competition law practitioners claiming that the conditions in which companies could derive benefits from compliance programs were far too restrictive – and thereby little attractive – the FCA decided to amend its Framework-Document accordingly.

- Combination of the benefits derived from the settlement procedure: as explained, opting for the settlement procedure is a prerequisite for benefiting from the 10% reduction that may be granted in return for the adoption of a compliance program. To this can be added a further 10% reduction (granted in return for opting for the settlement procedure) and an additional 5% reduction in return for the commitments made by the infringing company to remedy the infringing practices, the combination of these reductions being in any case limited to 25%.
- Combination of the benefits derived from leniency and those derived from the settlement procedure: taking into account its recent decision in the so-called detergent cartel the FCA finally opened up the possibility for companies to seek the combination of the fine reductions available under the two

procedures, insofar as the charges brought against the infringing company relate to facts that are different from those disclosed to the FCA by the infringing company in its leniency application. Obviously, this is about a reduction that can apply to a company seeking "second-rank leniency" (i.e. a maximum reduction of 50%), as opposed to the party seeking "first-rank" leniency and which benefits de facto from a total fine exemption.

Regarding leniency, it should be noted that, following the public consultation process, the FCA deleted from its Framework-Document the automatic link between compliance and leniency. In the initial draft, the FCA considered that a company having discovered the existence of a cartel via its compliance program was required to submit an application for leniency, such a step being considered by the FCA as the "only action that is consistent with their ethical commitment with respect to compliance".

Because of the severe criticism rightfully conveyed at the time of the public consultation process (stressing notably that the submission of a leniency application remains an option for companies), the FCA moderated its position and deleted the automatic link between "compliance program" and "leniency", the submission of a leniency application being now "the action that is the most consistent" and no longer "the only action that is consistent". Leniency is therefore no longer considered as the only way to enhance the use of compliance programs.

B. A system that remains insufficiently incentive

1. A compliance program should be viewed as a "mitigating circumstance"

While the FCA considers that the adoption of a compliance program can justify a reduction of 10% of the imposed fine (which, let us recall, is applicable only in the framework of a settlement procedure), it refuses to take into account this factor as any kind of "mitigating circumstances" when assessing the amount of the financial penalty to be imposed.

It is unfortunate that the FCA's position is not closer to that of other national competition authorities such as the British Office of Fair Trading (OFT) that sometimes considers the adoption by an infringing company of adequate measures to make its practices compliant as a mitigating factor.

Yet, it should be pointed out that, following the public consultation process, the FCA acknowledged in its Framework-Document that a company is entitled to claim that its compliance program can be considered as mitigating circumstance if such program has enabled to detect and redress antitrust infringements (except in case of cartels) before the launch of an inspection or investigation by the FCA.

2. The fine reductions likely to be granted have little incentive effects (even when such reductions are combined)

- Concerning the reduction up to 10% granted in relation to the compliance program: this fixed invariable percentage does not take into account the quality of certain compliance programs nor serves as a

reward for the creative efforts and strong involvement of companies in setting up such programs.

- Concerning the combination of reductions capped at 25%:

By capping the combined reductions at 25%, the ADLC tries not to generate competition with the fine reduction that can be granted in the framework of "second-rank" leniency (50%). This concern seems little justified and adversely affects the attractiveness of the system.

Indeed, it should be recalled that the 50% reduction only applies when a company reports the existence of a cartel. There remain all other infringements (i.e. the majority of infringements) for which it is not possible to submit a leniency application and for which it is therefore not legitimate to cap the potentially applicable fine reductions.

To justify this cap, the FCA makes reference to its procedural notice of February 10, 2012 concerning antitrust settlements that, however, specifies that the commitments made by the infringing company can lead to a further reduction of 5% to 10 %. Consequently, the cap – in case of the adoption of a compliance program and commitments made in the framework of the settlement procedure – should reach 35%, not 25%.

3. Compliance programs should enable to seek only the liability of the persons (legal entities or natural persons) that committed the infringements

The existence of a Group compliance program should not result in rendering irrebuttable the so-called parental liability presumption (according to which a parent company owning – directly or indirectly – 100% of its subsidiary's capital is presumed to be liable for any infringement of competition rules by the latter).

On the contrary, not only should the presumption remain rebuttable but the adoption of a compliance program notified to the employees/subsidiaries through adequate training sessions should also serve as a factor exonerating parent companies in case of obvious and isolated infringements of the Group compliance program by their subsidiaries / employees.

As a conclusion, everyone welcomes the initiative of the FCA and, through its Framework-Document, the FCA's commendable desire to provide companies with a tool helping them to draft or improve their compliance program.

It is, however, unanimously agreed that the FCA could have gone further to better take into account the legitimate expectations and needs of companies. In fact, the deficiencies of the Framework-Document directly undermine the attractiveness of compliance programs. Indeed, what is the point for a company to incur substantial expenses to set up a compliance program (e.g. costs associated with the conduct of due diligences and audits, appointment of a compliance officer, internal training sessions, etc.) when the benefits that can be derived therefrom are finally fairly limited (10%) and in any event highly relative (since opting for settlement procedure is prerequisite to benefit from the reduction)?

Yet, it remains true that the mobilization of energies within a company towards the preparation of a

compliance program prompts in itself a collective awareness of the risks of antitrust infringements and thereby constitutes the best tool to detect and prevent such infringements.

While the adoption of a compliance program is not considered as a "mitigating circumstance" when determining the to-be-imposed financial penalty, the absence of such program, in an era where its implementation is increasingly encouraged, could very well be eventually regarded as an "aggravating circumstance" in case of established antitrust infringements. And what if companies would soon be left with no other choice but to implement a compliance program…