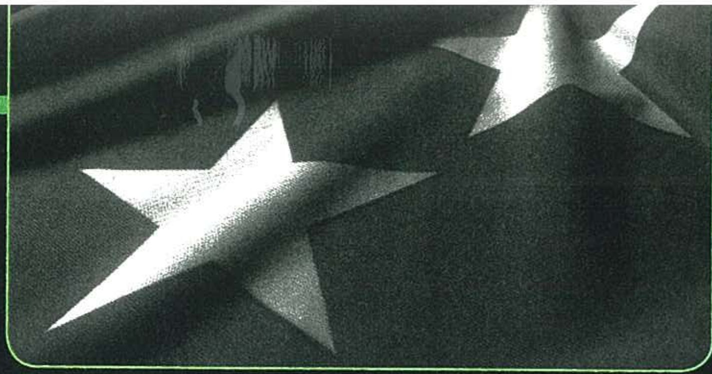

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Competition Law Compliance across Europe: a Multi-jurisdictional Challenge

Frédéric Manin
Partner, De Gaulle Fleurance & Associés, Paris

Rainer Velte
Partner, Heuking Kuhn Luer Wojtek, Dusseldorf

Gustaf Duhs
Head of Competition, Stevens & Bolton LLP, Guildford

Gonçalo Anastácio
Partner, SRS Advogados, Lisbon

Comparative law; Competition law; Compliance; EU law; European Commission; France; Germany; National competition authorities

Introduction

Implementing an effective competition law compliance programme is an important task for businesses, and the risks in relation to competition law increase with the size and spread of any business. However a need to minimise the burden of compliance means that companies that operate in multiple jurisdictions may implement compliance programmes centrally and roll them out across regions and potentially across the world.

In order to maximise effectiveness however, such compliance programmes must have regard to jurisdictional differences. Competition authorities across the European Union adopt different attitudes and approaches to competition law compliance programmes, and within each jurisdiction there are substantive differences in the scope and application of competition law that should be taken into account.

Frédéric Manin of De Gaulle Fleurance & Associés, Rainer Velte of Heuking Kuhn Luer Wojtek, Gustaf Duhs of Stevens & Bolton LLP and Gonçalo Anastácio of SRS Advogados summarise some key differences in relation to competition law compliance in France, Germany, the United Kingdom and at EU level. The aim is to identify the pitfalls and to provide food for thought to companies and their advisers when considering how to assess risk and maximise the effectiveness of such programmes for multi-national or global businesses.

France

In France, compliance programmes have been given a fresh impulse by the French Competition Authority (FCA) through the issuance of the Framework-Document of February 10, 2012.[1]

These guidelines, which were submitted to prior consultation of interested stakeholders, aimed primarily to highlight the benefits of competition law compliance programmes and to identify the main pillars of a sound compliance programme, namely the firm commitment of the management, the existence of a compliance officer, the implementation of information and training measures and of audit and whistle-blowing systems, and the set-up of an effective oversight system, which potentially extends to the application of disciplinary sanctions.

The issue of the legal consequences attached to compliance programmes has been widely discussed with the industry, which criticised the initial draft of the Framework-Document for the absence of any genuine incentive it provided.

It seems, however, that the FCA has, at least partially, taken care of the objections and remarks raised, by removing, in the final version of the Document, any reference to a requirement that a companies' management which has discovered misconducts through compliance programmes should initiate leniency procedures, and by considering, further, that compliance programmes may, under certain conditions, constitute a mitigating circumstance and/or contribute to reducing the amount of the fine which the undertaking would have otherwise incurred. The Framework-Document now expressly provides that the FCA may reduce the financial penalty of the company which is willing to set up a compliance programme or to improve the one which is already in place by up to 10 per cent in the context of a settlement procedure, on top of other discounts available within the framework of the said procedure.

Another concern which was put forward by the stakeholders stemmed from the fact that legal privilege did not cover internal correspondence within companies in France. However, this issue was not addressed at all by the FCA, as it goes far beyond remit and depends ultimately on a legislative reform the prospects of adoption of which seems highly uncertain. In such a legal context, specific mechanisms need to be devised with outside attorneys to ensure the companies' interests are protected.

The Framework-Document did not address the substance of compliance programmes either. The detailed list of recommendations and instructions to be given to the staff is, therefore, left to the companies' own initiative and appraisal. So is the precise format, which may take

[1] See *www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf* [Accessed November 5, 2012].

innovative forms: the recent initiative of the Michelin group to launch an interactive "serious game" designed to catch the attention of the staff on dangerous practices and conducts to be avoided could be followed by other companies.

However, the scope of compliance programmes must be carefully apprehended so as not to miss any crucial items.

The Antitrust area, as defined stricto sensu, is obviously the first section to be considered. No peculiarity would arise, here, from the regulation of anti-competitive agreements and/or of abuses of dominance. French rules and case law on these two essential notions do not differ from EU law. More original, however, is the specific infringement, defined by art.L.420-5 of the French Commercial Code, which targets excessively low prices applied by undertakings irrespective of any agreement with their competitors or of any dominant position. The FCA has effectively used this provision in a number of cases, which implies that new entrants must be very cautious when fixing prices and include special references to the prohibition of excessively low prices in the context of their compliance programmes. Another specificity lies in the prohibition of abuses of economic dependency as anti-competitive practices but this latter rule has proven very difficult to implement as the characterisation of a situation of economic dependency requires the combination of a multiplicity of factors.

Outside Antitrust law, French economic regulations tend to have given an increasing importance to the sphere of practices restrictive of trade.

This area, which has been considerably enriched by the law of August 4, 2008 (the so-called "law modernizing the economy", or "LME"), is composed of a list of obligations and of practices which are automatically prohibited, irrespective of any harmful effects on the market which they may have. The main ideas at the heart of this body of the law are that of transparency and fairness in the context of relationships between commercial partners. To take one example, suppliers and distributors are now obliged to execute "unique annual agreements" which must include certain contractual information expressly provided for by the law. Any failure to do so is potentially subject to criminal prosecution and sanctions, as is the case for other practices restrictive of trade, and the French Competition Directorate (DGCCRF, which is part of the French Ministry of Economy) seems to have been given new impetus lately to investigate and enforce the provisions in question.

In this context, companies would be well advised to include in their compliance programmes a specific section on transparency, invoicing processes and restrictive practices under French law.

As a final point, we would recommend to any company operating in France and willing to establish competition law programmes to take due account of the French labour law regime, which is likely to impact particularly on the way some provisions may be inserted in labour contracts. The FCA has obviously identified this as an issue but has not provided any guidance as to how compliance programmes may be fully compatible with the very detailed rules and regulations of French labour law. The reliance on labour law experts seems, therefore, crucial for the success and complete implementation of compliance programmes in France.

Germany

In Germany, the obligation to implement an effective compliance programme derives from the provisions of German Corporate Law. In conducting business, the company management has to employ the care of a diligent and conscientious manager, see s.93(1) of the German Stock Corporation Act (SCA). Furthermore, s.91(2) SCA stipulates that the management shall take suitable measures to ensure that any developments threatening the survival of the company are detected early.

Members of the management who violate their duties shall be jointly and severally liable to the company for any resulting damage and shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. If the company takes out a Directors & Officers liability insurance, such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member.

In addition, German law provides that not only the undertakings involved in an anti-competitive behaviour but also the employees acting on behalf of the respective company and even the members of the company management can be fined. According to s.130(1) of the German Act on Regulatory Offences (ARO), the owner or management board of an undertaking who intentionally or negligently omits to take the supervisory measures required to prevent cartel infringements shall be deemed to have committed a regulatory offence. The German Federal Cartel Office (FCO) may impose administrative fines against individuals of an amount up to €1 million. In the event of hardcore cartels, the imposed fine usually amounts up to one annual salary.

In a much-noticed decision issued in 2009 [BGH 5 Str 394/08 v. 7.7.2009], the German Federal Court stated that not only the management board but also the supervisory personnel charged with the surveillance of the employees shall be responsible for infringements of law. This decision has caused a lively debate implying that the (Chief) Compliance Officer of an undertaking can be held accountable for infringements and to which extent he is obliged to inquire into internal investigations proactively in order to avoid violations of law.

In the view of these serious consequences, it is in the best interest of the management of any company operating in Germany to establish a (competition) compliance programme. If an effective compliance programme has been set up, a good argument can be made that the management has accomplished its duty to take the supervisory measures required to prevent violations of the law and, thereby, employed the care of a diligent and conscientious manager.

Different from the FCA and the OFT, the FCO does not play an active role in the public debate on compliance requirements. The FCO has not to date issued any guidelines in relation to compliance. Nevertheless, the FCO strongly encourages the management of companies to implement and to strengthen effective compliance programmes and is prepared to discuss compliance-related matters on an informal basis.

Principally, the FCO does not consider the implementation of an effective compliance programme as a mitigating factor in determining the fines. In its Guidelines on the setting of fines, compliance programmes are not mentioned at all. Officially, the FCO states that, as a rule, compliance programmes do not have an impact on the calculation of fines. However, there have been cases where the commitment of an undertaking to implement an effective compliance programme led to a minor reduction of the fine.

Quite rightly, the FCO has pointed out that the main benefits of competition compliance programmes do not lie in a significant reduction of the fine but in enabling companies to prevent and discover law infringements and, thereby, to avoid fines, civil damages and a loss of reputation. Competition compliance programmes put the management in the position to approach the competition authorities at an early stage and to benefit from their Leniency Programmes to the full extent.

Although the appropriate content and scope of compliance programmes will depend on different factors such as the size, specific activities and risks of the company, certain key elements can be identified. First of all, the compliance programme should be implemented "tone from the top" and include a mission statement of the management. Furthermore, the management should appoint qualified and well-respected compliance officers and allocate clear competences and responsibilities to them. In addition, appropriate face-to-face and, where practical, online antitrust training sessions should be provided as well as written guidelines and rules ("Do's and Don'ts"). The management is required to monitor the compliance with competition law and to conduct regular audits. The installation of an anonymous whistleblower hotline may also be recommended. Finally, a clear and explicit statement has to be addressed to the employees stating that any infringement of law will result in severe sanctions including the termination of the employment relationship.

Finally, it should be mentioned that German competition law and the practice of the FCO have some specific characteristics to be considered when designing a compliance programme. First, the German ARC (Act Against Restraints of Competition) stipulates that provisions on the prohibition of discrimination and unfair hindrance shall also apply to (non-dominant) undertakings insofar as small or medium-sized enterprises as suppliers or purchasers depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. Undertakings with superior market power shall not hinder small and medium-sized competitors by offering goods and services "*not merely occasionally*" below cost price, unless there is an objective justification for this. It should be also noted that the FCO has a very critical approach on fixed and minimum resale and price maintenance. Last but not least, the FCO has installed an anonymous whistleblowing system as of June 1, 2012 which should provide an additional incentive to establish an effective compliance system that prevents infringements of competition law from the outset.

The United Kingdom

Although it is not a formal legal requirement to have a competition compliance programme in place, the UK regulator, the Office of Fair Trading (OFT) has taken a number of steps to encourage the use of competition compliance programmes by businesses.

The OFT has issued guidelines in relation to compliance for example in May 2010 the OFT released guidance entitled "Drivers of compliance". Subsequently in June 2011, the OFT released two documents in relation to compliance "How your business can achieve compliance" and "Company Directors and competition law" a short film in relation to competition law compliance entitled "Understanding Competition Law". The latter is perhaps a better indicator of imaginative ways to deliver competition law training than a useful blueprint of how to act.

There are clear incentives provided by the OFT to having an effective compliance programme in place, aside from the natural incentive to avoid breaching competition law. First, the OFT makes it clear in its "Guidance as to the appropriate amount of a penalty" (OFT Guideline 423) that the implementation of an effective compliance programme will be considered a mitigating factor for the purposes of calculating the financial penalty in the event of an infringement of competition law leading to fines. Having or putting in place an effective competition compliance programme can lead to a reduction in the penalty of between 5 and 10 per cent. A revised guidance is currently under consultation which retains a reduction of up to 10 per cent for implementation of an effective compliance programme.

Furthermore in the OFT's guidance document in respect of *Company Directors and competition law*, the OFT makes it clear that in deciding whether to prosecute a Director for breach of competition law pursuant to the Company Director Disqualification Orders (CDO) a key issue will be whether there is a genuine commitment to competition law compliance.

The courts in the United Kingdom have placed even greater emphasis than the OFT on the importance of compliance in assessing fines. In the leading UK case on fining policy, namely *(1) Kier Group plc (2) Kier Regional Ltd v Office of Fair Trading* [2011] CAT 3, the Competition Appeal Tribunal (CAT) stated that

> "the witness statement of Mr John Dodds, the Chief Executive of Kier Group, described how, within days of being informed of the alleged infringement, Kier implemented at the highest level within the company a comprehensive compliance programme, with memoranda being sent to all 91 directors of the various Kier boards and a letter explaining the compliance programme being sent to some 6,000 staff."

The CAT found that while

> "the OFT is correct in saying that a compliance programme is not a substitute for a general or specific deterrent, the decision-maker should in our view take such a programme into account in assessing any deterrent element in the penalty. For it may well have a bearing on specific deterrence."

In light of that:

> "Kier should be given credit for its early and extensive post-infringement compliance programme, and also for the extent to which it cooperated by acquiescing (albeit in somewhat equivocal terms) in the allegations contained in the Statement of Objections. In recognition of these two factors we propose to reduce the global penalty by 15% to £1,700,000."

The CAT therefore reduced the penalty by £300,000 for extensive compliance related actions that had been taken after the infringement had been found.

An additional factor which might incentivise compliance is the impact of competition law compliance on the availability or otherwise of exemplary damages. In awarding exemplary damages for the first time in a competition case in the United Kingdom in *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19, a key consideration of the CAT was the failure of the Managing Director to seek appropriate advice to ensure competition law was complied with. There must therefore be an argument that an appropriate competition law compliance programme can reduce the likelihood of exemplary damages being awarded for failure to comply with competition law.

As in other EU jurisdictions post-modernisation of the competition regime there should not be a significant distinction between the application of competition law within the jurisdiction and competition law as enforced across the European Union. The OFT has stressed in its documentation that there is no single formula to implementing a successful competition law compliance programme in the United Kingdom, and the nature of the programme will depend on the specific activities and risks of the company in question. The OFT suggests a compliance programme that focuses on risk identification (i.e. what are the risks?), risk assessment (i.e. how serious are the risks?) risk mitigation (i.e. what can be done to minimise the risks?) and review (ensuring regular updates and reviews of any training).

In terms of specific substantive features of the UK regime as compared to other jurisdictions it is worth bearing in mind the following features.

There are changes to the UK competition regime that are currently being implemented. These changes might be anticipated to result in an increase in activities under the new UK regulator Competition and Markets Authority from 2014 onwards. Bearing in mind that current business conduct is likely to lead to future investigations and decisions now is a very good time for businesses to implement an effective compliance programme.

A significant change in relation to the criminal cartel offence, namely the removal of the requirement of "dishonesty" on the part of the cartelist is currently being discussed. It is highly advisable that the new law is considered carefully and robust procedures to mitigate risks and deal with the additional risks of sanctions are put in place.

Developments in relation to competition litigation in the United Kingdom may make competition law litigation more likely and more expensive for any party that is subject to a damages award- for example there may be more collective actions, there may be a presumption of loss in cartel cases and it is clear now that exemplary damages will be available in certain circumstances. While this may not form an appropriate subject for competition compliance training it may change the risk profile in terms of the consequences to businesses of engaging in infringements impacting the United Kingdom.

In the UK legal professional privilege generally covers internal company communication with and between in-house lawyers. The EU commission however in conducting any investigation in the United Kingdom will abide by its own rules in relation to privilege so internal correspondence between and with in-house lawyers is not covered. In practice this means that UK lawyers and business people must be educated about risks associated with different privilege standards. It also means that ideally businesses should take into account the stricter EU requirements in relation to privilege when dealing with matters that may be subject to competition law scrutiny by the European Commission.

The European Commission

Compliance with EU competition law and the implementation of compliance programmes is an approach encouraged by the European Commission (the Commission), due to its obvious benefits, including but not limited to the avoidance of high fines, damage to corporate reputation, hostile reactions from clients, consumers and shareholders, hefty legal costs and civil liability (including private enforcement actions). In this respect, the Commission's overall perspective is that undertakings should be both aware of the applicable competition law and encouraged to comply with it, creating a culture of compliance whereby the end result is to minimize potential sanctions for anti-competitive behaviour.

To assist undertakings in avoiding the application of sanctions while allowing companies to develop a proactive risk-based compliance strategy, the Commission published, on November 23, 2011, a brochure on compliance matters,[2] summarising rules and methods which companies should follow to ensure compliance with EU competition law. This communication aims for transparency in the application of competition law, making undertakings aware of its practical application and enforcement. The Commission's publication, in itself a broader guidance document, is yet another attempt by the Commission to promote ex ante self-assessment by the undertakings on their actions in the market through risk identification, evaluation and review.

Though compliance with EU competition law through the implementation of compliance programmes is in all respects praised by the Commission, there is by no means an obligation of the companies to implement such programmes. Furthermore, and most importantly, the Commission's policy is not to reward an undertaking for the existence of compliance programmes since these are excluded as a mitigating factor in the calculation of fines/sanctions. In fact, Commissioner Joaquín Almunia (SPEECH/10/586 of October 25, 2010) has clearly stated that undertakings should not be compensated for simply implementing compliance programmes, as the benefit in such programmes is simply to decrease risk of anti-competitive behaviour.

To this effect, the Commission in its July 18, 2001 *Graphite Electrodes* decision stated that although it welcomes the implementation of a compliance programme, "this initiative however cannot dispense the Commission from its duty to sanction the very serious infringement of competition" (§ 194). Other well-known cases in which the Commission did not consider the existence of compliance programmes as a mitigating circumstance include the *Vitamin's* decision dated November 21, 2001, *Citric Acid* cartel decision from December 5, 2001, *Zinc Phosphates* decision dated December 11, 2001 and the *Power Transformers* decision of October 7, 2009, in which the Commission stated once again that though it

> "welcomes measures such as compliance programmes to avoid the recurrence of cartel infringements (...) the mere existence of a compliance programme cannot change the reality and significance of the infringement and the need to sanction it (...) (§ 261)".

Moreover, the Commission's current compliance policy departs from that of other authorities such as the UK's OFT and the FCA, both of which take the existence of compliance programmes into consideration when establishing the appropriate sanction.

However, the Commission's current decisional practice contrasts with its previous position in relation to which sanctions were both reduced or increased as per the undertakings effort at complying with competition law. A clear, and perhaps first example of the reduction of sanctions due to the existence of a compliance programme is the *National Panasonic* decision dated December 7, 1982, whereby the Commission refrained itself from setting a higher fine due to the fact that:

> "The undertakings concerned have adopted a comprehensive practical detailed and carefully considered antitrust compliance programme, with appropriate legal advice. Such action must be considered a positive step as it contributed to awareness at all levels of the group of the daily impact of competition policy. It tends to ensure that senior management is in a position to control the behaviour of the whole group in the market place and thereby establish effective internal rules for the compliance with EEC competition law (§§ 68–69)."

Other decisions in which the Commission found the existence of compliance programmes to be a mitigating factor include, amongst others, the *Fisher-Price/Quaker Oats Ltd - Toyco* decision of December 18, 1987, the *Eurofix - Bauco/Hilti* decision of December 22, 1987, and the *British Sugar* decision of July 18, 1988.

The current position of the Commission has been consistently confirmed by the European courts as a result of which the existence of compliance programmes does not constitute a factor for the reduction or increase of sanctions on appeal. Examples of such an understanding by the European courts are rulings on cases as *Strintzis Lines SA v Commission* (T-65/99) and *Archer Daniels Midland v Commission* (T-224/00) in which the court stated that

> "(...) whilst it is important that an undertaking should take steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, that does not alter the fact that an infringement has been committed. Thus, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in any given case (...) (§ 280)."

Though the Commission has not considered as a decisive factor the existence of compliance programmes, it has nevertheless set out to support compliance by: (i) spreading competition law information; (ii) discussing ideas with companies; and (iii) encouraging the implementation of compliance and training programmes. In addition the Commission has also listed some features it considers to be important in a successful compliance programme: a clearly defined strategy (adapted to market

[2] Available at: *http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf* [Accessed November 5, 2012].

characteristics and business activity); an overall but also tailor-made risk assessment; formal acknowledgement of the company's policy by directors and employees; a continuous update and training; and a constant monitoring/auditing of compliance.

Consequently, though undertakings are advised to implement compliance programmes so as to minimise the risk of anti-competitive behaviour, its existence will likely have little to no impact on the Commission and court's decision in relation to the reduction of a fine.

Conclusion

It is clear that all jurisdictions covered in the article take steps to encourage compliance with competition laws. How they do that varies somewhat from jurisdiction to jurisdiction. The United Kingdom clearly places great weight on compliance programmes and reduces penalties as a matter of course if there is any evidence of competition law compliance. Likewise the FCA is moving in that direction. The FCO in Germany provides less direct positive incentivisation for companies, but there are nonetheless clear incentives for individuals to actively engage in competition law compliance initiatives. In the case of the European Commission, they expressly do not consider compliance with competition law as a mitigating factor.

The amount of guidance also varies as between competition authorities, with the Unitied Kingdom having been very active in issuing guidance, the FCA having made progress in this direction and the German FCO more reticent in issuing guidance.

Whether formally set out or not, the hallmarks of an effective compliance policy appear to be broadly similar across the jurisdictions. Here the emphasis is on the appreciation of and tailoring of the programme to the actual risks to the business, endorsement by senior management of compliance initiatives, and an emphasis on keeping compliance policies up to date.

Although (post-modernisation) competition law is under a common framework across the European Union there are clearly both substantive and procedural differences as between the jurisdictions for example in relation to specific competition and business related statutory offences, the impact of related corporate laws, and the issue of whether privilege applies to in-house communications with and between lawyers.

In light of the above we would encourage companies with pan-European operations as well as practitioners advising in this area not to forget jurisdictional differences when implementing competition compliance programmes. Indeed, competition compliance in those circumstances is a multi-national task that ideally requires the cooperation between (internal and/or external) laywers in different jurisdictions.