NORTON ROSE FULBRIGHT

Credit for compliance

Achieving the benefits of a robust antitrust compliance program

Antitrust/competition compliance has never been more important.

The global proliferation of antitrust regimes in recent years – over 140 jurisdictions now have antitrust/competition laws – means businesses that fail to adopt robust compliance measures face a real risk of infringing those laws and, consequently, considerable fines and other serious adverse consequences.

The increased prevalence of follow-on damages litigation further amplifies this risk.

Introduction

An effective compliance program has many benefits – most obviously avoiding infringements by educating employees on what is/is not permitted. It also allows a business to implement procedures to detect potential antitrust concerns and take appropriate steps to mitigate risks before they occur or at an early stage.

A significant additional benefit is that many jurisdictions give "credit" to businesses that, despite committing an infringement, demonstrate robust compliance efforts – which can carry serious weight, reducing the level of penalty imposed. This crucial benefit is often overlooked, but a recent shift in policy by the US Department of Justice (DOJ) has refocused attention on the credit available.

Below we compare antitrust regimes around the world by reference to the new US approach and give guidance on how to create an effective compliance program. While the rules and specific requirements across different jurisdictions can be complex, our extensive experience dealing with authorities around the globe allows us to identify a number of consistent themes. Common points across all regimes are:

The key to effective compliance is a culture of compliance. Antitrust authorities expect compliance to be endorsed by the company's board and senior management ("tone-from-the-top") and demonstrated at all levels of the business. Merely having a compliance program is not sufficient – it needs to be effectively implemented.

Whether a jurisdiction gives credit for a compliance program when setting fines should not drive a company's decision about whether to implement a compliance program – having a compliance program should itself be the default position. However, a company can shape its program using any requirements or guidance about the features needed for a program to receive credit.

There is no one-size-fits-all approach to compliance – companies should undertake a risk assessment and ensure their approach is tailored to the risks they face.

Compliance with antitrust laws should be part of a business' broader approach to compliance with other laws, including anti-bribery and corruption laws and other white collar crime. Not only is this important to establish an effective compliance culture, but certain conduct could potentially be found to infringe more than one set of laws depending on which authority or regulator takes forward any investigation.

As well as ensuring a culture of compliance and adopting a risk-based approach, implementing procedures to detect and address breaches and regular monitoring and review of compliance are important to achieve an effective compliance program.

Any business operating across borders should familiarize itself with the antitrust rules in different regimes and adapt its compliance program as appropriate.

*An online compliance program – such as our award-winning **ecomply training tool** – is an effective way to achieve a tailored, risk-based approach, educating employees on what they can/cannot do.*

*Further information about the new US approach to granting credit for an effective compliance program, as adopted by the DOJ's antitrust division, can be found in **our separate briefing.***

*See also our **recent video** where Shaha El-Sheemy, a Senior Associate in London, discusses how the new US approach compares to approaches in other jurisdictions and how to achieve effective antitrust compliance with leading academic, Richard Whish QC.*

Our Antitrust and Competition group includes more than 150 lawyers globally, 10 per cent of whom have first-hand experience working at a senior level within the authorities.

We are ranked in Global Competition Review's Global Elite for 2020 at number 10 in the world.

Where is credit given, where is it not and what is the credit?

Just as there is no one-size-fits-all approach when it comes to achieving effective compliance, there is no uniform approach taken by antitrust authorities on whether (and how) to take into account a company's compliance program when sanctioning an infringement. Approaches differ according to regulators' local policy and enforcement objectives, and the legal systems in which they operate.

Compliance program

Cartel agreement/ investigation

How this impacts sanctions

While the antitrust division of the US DOJ is the most recent authority to have indicated its willingness to take into account the existence of a robust compliance program, many jurisdictions were already taking this approach. Authorities across the globe – including in Australia, Brazil, Canada, Italy, Russia and the UK – already do this, having published official guidance, given public statements and/or established precedents to this effect.

In some jurisdictions, such as Germany, Poland and South Africa, there is not an official or express position but in practice there are cases in which a compliance program has been taken into account in reducing fines. In Hong Kong, there is no established precedent yet, although the published enforcement policy of its Competition Commission indicates that credit could be given.

In terms of the "credit", this generally means a reduction in penalty for the relevant infringement, as opposed to avoiding liability altogether. Under the DOJ's new approach, an effective antitrust compliance program will mean a three point reduction in a company's culpability score at the sentencing stage, but will not result in non-prosecution for cartel conduct, and neither will it involve reducing a criminal prosecution to civil action. The DOJ's antitrust division has also indicated that a compliance program may cause it to consider a deferred prosecution agreement (or DPA).

In the UK, a company's fine can be reduced by up to 10 per cent if the Competition and Markets Authority (CMA) is satisfied that the company has taken "adequate steps" to achieve a clear and unambiguous commitment to competition compliance – including appropriate changes as a result of the CMA's investigation. Similarly, in other jurisdictions that give credit, a compliance program generally qualifies a company to receive a discount when the authority is setting the level of fine. Italy's procedure, for example, provides for reductions in fine of up to 5, 10 or 15 per cent depending on the circumstances.

In contrast, a number of authorities do not provide any credit for having a compliance program. It is significant that the European Commission – given its status as one of the leading global authorities – has adopted a robust position that it will not provide such credit when setting fines for an infringement of the EU competition rules. The Commission is not alone – for example, France's national competition authority takes the same approach, having announced a change in policy in 2017 that having a compliance program would no longer give rise to any reduction in fine. In China – an increasingly important jurisdiction for antitrust enforcement – there is no clear-cut position either way.

Why the differences in approach?

The European Commission's rationale for its position essentially comes down to a belief that the purpose of a compliance program is to achieve compliance – it is not a mechanism to reduce the level of fine if a company is caught committing an infringement. The EU's former Competition Commissioner, Joaquín Almunia, summed up the Commission's stance in 2010: "if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?"

In the US, an unwillingness to reward a compliance program that failed to prevent an infringement was also why the DOJ previously refused to grant any credit, but Assistant Attorney General Makan Delrahim suggested this position reflected "an outdated view of the real world" when announcing the DOJ's recent shift in policy.

The argument in favour of offering credit for antitrust compliance programs is that this creates an extra incentive for companies to invest in implementing a compliance program before an infringement takes place or is discovered. With a compliance program in place, a company is less likely to infringe antitrust laws and is better able to identify and address any concerns in a timely manner.

"Why should I reward a compliance programme that has failed?"

Joaquín Almunia
October 2010

However, simply having a compliance program is typically not sufficient of itself to reduce any fine for an infringement even in jurisdictions that give credit for having a compliance program – instead authorities usually look at whether the compliance program meets certain criteria, how it is implemented etc, to determine whether it is deserving of credit. This reflects an important message – compliance must be effective and is not a box-ticking exercise, even if not every infringement can be avoided.

Arguably the greatest threat to compliance is the so-called rogue employee – someone who knows what they are doing is wrong and does it anyway. The maritime car carriers cartel – investigated by a number of authorities globally over recent years – is a high profile example where problematic conduct was identified by the internal compliance function of one of the parties (a global shipping company), but the executives involved deliberately continued the cartel in a way that aimed to conceal this.

Building behavioural economics into compliance efforts to understand the psychology of why employees do or do not comply is helpful, but ultimately one or more rogue employees may slip through the net and involve the company in an infringement. In that context a blanket refusal to grant any credit for having a compliance program seems harsh. Poland is at least one jurisdiction where, albeit in a leniency case, its competition authority has used the existence of a robust compliance program to satisfy itself that a company's infringement was unintentional and the act of a rogue employee.

Is the devil in the detail?

As mentioned, even where a jurisdiction is willing to give credit for a compliance program, certain requirements must be met for this to apply – meaning companies need to be aware of the relevant criteria when designing and implementing their compliance programs to maximize their chances of receiving credit if ever implicated in an infringement.

The challenge for global and other multinational companies is that amongst those jurisdictions that give credit for a compliance program there is no standard set of requirements that applies everywhere.

By way of example regarding the differing approaches, under the new US approach, DOJ prosecutors will ask themselves three preliminary questions, and then evaluate the company's compliance program against nine factors at the charging stage. In comparison, Canada's Competition Bureau has identified seven basic elements that any credible and effective compliance program must have, whereas Brazil's Conselho Administrativo de Defesa Econômica (CADE) identifies ten factors in its guidance, and authorities elsewhere also adopt their own approaches in this regard.

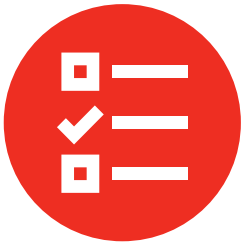
However, we deal regularly with authorities in multiple jurisdictions across the globe and consistent themes emerge as to what constitutes an effective compliance program. We set these out below.

Despite the approaches differing in detail, there are a number of common features across most jurisdictions that companies would be well advised to incorporate into their antitrust compliance programs. In particular, the key messages are:

Establish an effective culture of compliance
supported by the company's board and senior management and all levels of business

Adopt a risk-based approach
conduct a risk assessment, identify high risk areas and provide appropriate training to employees

Put in place procedures
to detect and address breaches



Monitor and regularly review compliance
recognising that risks can change over time

Even if a company does not strictly meet the requirements to receive credit for its compliance program in every jurisdiction where credit is given, incorporating these features into its compliance efforts will significantly reduce its risk of being implicated in an infringement in the first place – and that is the main goal after all.

Requirement to self-report?

Perhaps the most controversial aspect of the DOJ's new approach is that it appears credit will not be given for a compliance program unless the company promptly self-reports a potential cartel infringement after it is detected through its internal compliance measures.

Similarly, involvement of senior management will prevent any credit being given – although this is perhaps more understandable given involvement of senior management indicates significant failure of the compliance program.

The DOJ is not alone in requiring self-reporting. For example, in Australia, a compliance program that adheres to guidance published by the Australian Competition and Consumer Commission (ACCC) can qualify for a reduced penalty – but the relevant guidance for large corporations includes an expectation that they report compliance issues to the ACCC.

Any requirement to self-report creates a potential tension with formal leniency programs whereby businesses implicated in an infringement may apply for full or partial immunity from fines (and, where relevant, personal sanctions for relevant individuals) by bringing an infringement to an authority's attention, cooperating and providing all relevant evidence. Under Italy's procedure, for example, a company must apply for leniency to benefit from the full 15 per cent reduction in fine available for having an effective compliance program if the case is eligible for leniency. But such a reduction in fine would seem irrelevant if a company secured full immunity from fines.

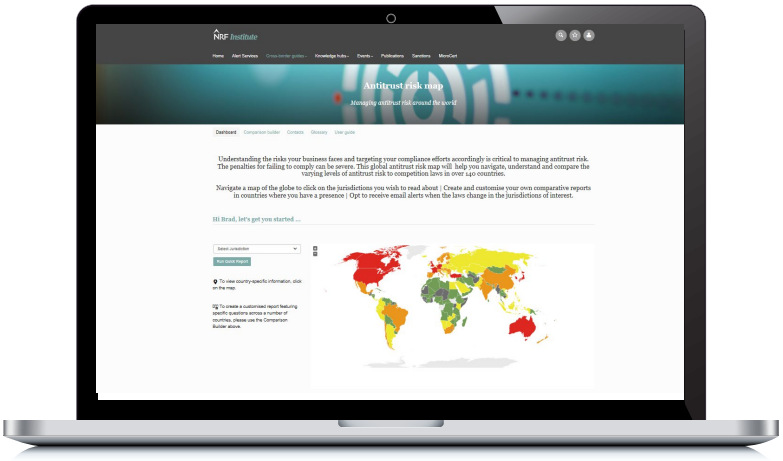
This is also particularly relevant given many authorities and commentators are reporting a downward trend in leniency applications – with the perception that the benefits of self-reporting are becoming less attractive. Whereas leniency provides full or partial protection from fines, it does not typically provide equivalent protection from damages actions (although, in the US for example, a leniency applicant may be protected from treble damages in certain circumstances) – and, in any case, amounts claimed in damages often far exceed the level of fines avoided.

The global expansion of antitrust regimes also means that an investigation in one jurisdiction can quickly snowball into multiple investigations across the globe where conduct is international in scope – as authorities cooperate and monitor each other's investigations or other parties seek leniency in new jurisdictions. And it is usually difficult for any single party to secure full immunity in every relevant jurisdiction for global cartels.

However, it is also generally better to be in a position of knowledge and able to take proactive steps to deal with a potential problem rather than being in the dark about it – even if after considering the options and different pros and cons it is decided that seeking leniency is not appropriate in a particular case. The alternative is potentially first learning about a concern when an authority arrives to conduct a dawn raid or with a subpoena or other information request.

To help you manage your risk around the world we have developed a global antitrust risk map – a comparative guide to antitrust risk in over 140 countries. For more details, see:

https://www.nortonrosefulbright.com/en/knowledge/publications/4bf90533/global-antitrust-risk-map



Are there any downsides to having a compliance program?

It is clear there are a number of significant benefits to having an antitrust compliance program – in addition to those already mentioned there is also the reputational benefit of being a good corporate citizen that values and engages in ethical behaviour. But are there any disadvantages?

In the UK, in particular, if a compliance program is used to conceal or facilitate an infringement or to mislead the CMA, then rather than receiving credit for having a compliance program, this can be viewed as an aggravating factor increasing the fine imposed. However, this is likely only in exceptional cases, and does not mean that companies must always contact the CMA when they identify problematic conduct affecting competition in the UK – there is no obligation to seek leniency but companies should take care that they do not cross the line into concealment. The position in Italy is similar to the UK. Poland and Germany are other examples of jurisdictions where a compliance program could potentially be an aggravating factor if it is not designed or implemented effectively.

In undertaking monitoring and auditing activities, it is also important to heed the risk of creating potentially unhelpful documents that might be disclosable to an authority or to claimants in possible future damages litigation. Companies should seek to limit such documents or ensure they are protected by legal privilege to the extent possible – while being aware that legal privilege rules are complex and differ between jurisdictions. Implementing a compliance program also unavoidably involves a financial cost, but it is generally recognized that compliance efforts need to be tailored to a company's size and resources and the risks it faces – and compared to the size of potential fines and damages for engaging in an infringement this cost is likely to be minimal. Overall, it is strongly advisable for companies to implement effective compliance programs – even if there are certain risks or costs, these are outweighed by the significant benefits to be gained.

Concluding remarks

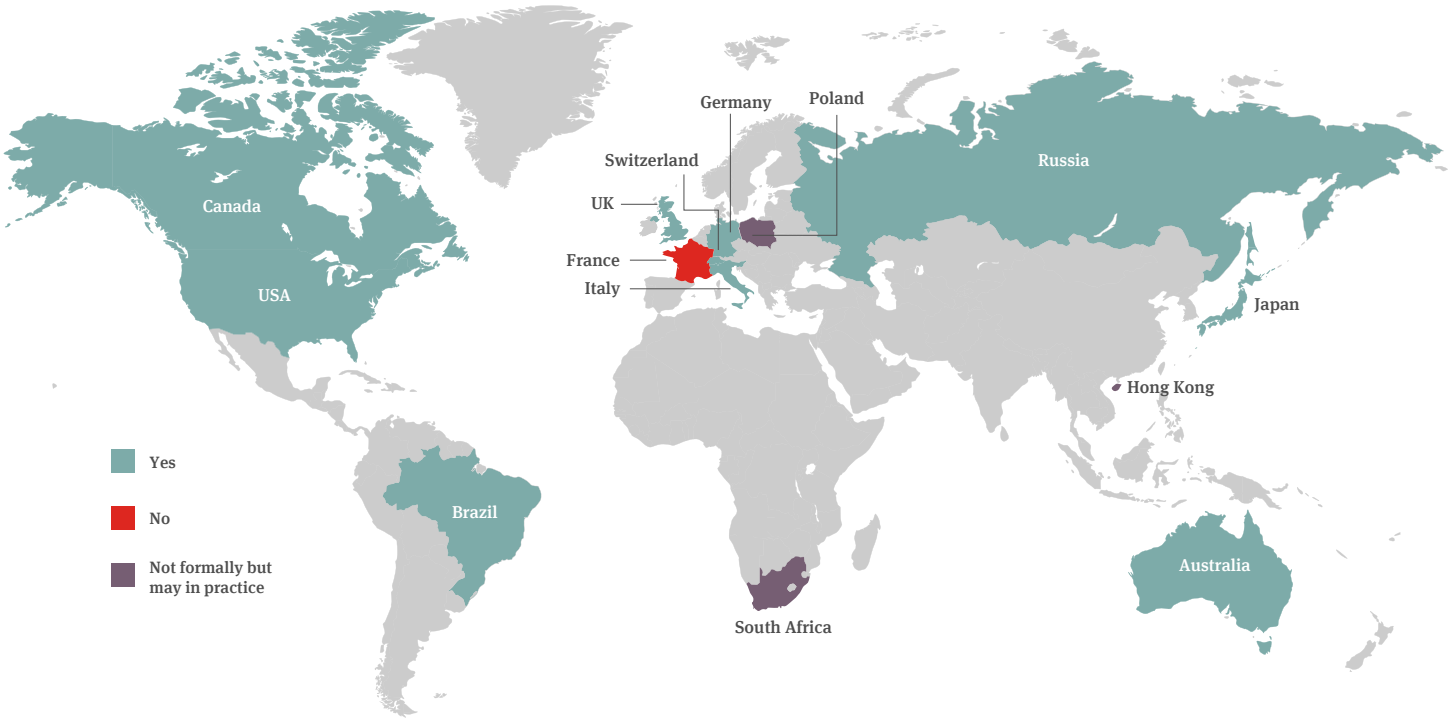
Despite the different approaches adopted by antitrust authorities worldwide, there is no doubt that implementing an effective compliance program is advantageous. If an authority grants credit for such a program when imposing penalties this can be a significant bonus – but this should not drive a company's decision about whether to implement a compliance program given the primary goal is to avoid any infringement.

Companies should utilize any relevant guidance or requirements of authorities that give credit for compliance programs to shape how they design and implement their program. This will maximize the prospects of achieving effective compliance, minimizing the risk of an infringement – and also increases the likelihood of receiving credit for compliance efforts in the event of any future infringement finding. Key in this regard will be establishing an effective culture of compliance and a risk-based approach, with appropriate procedures to identify potential concerns and keep compliance under review.

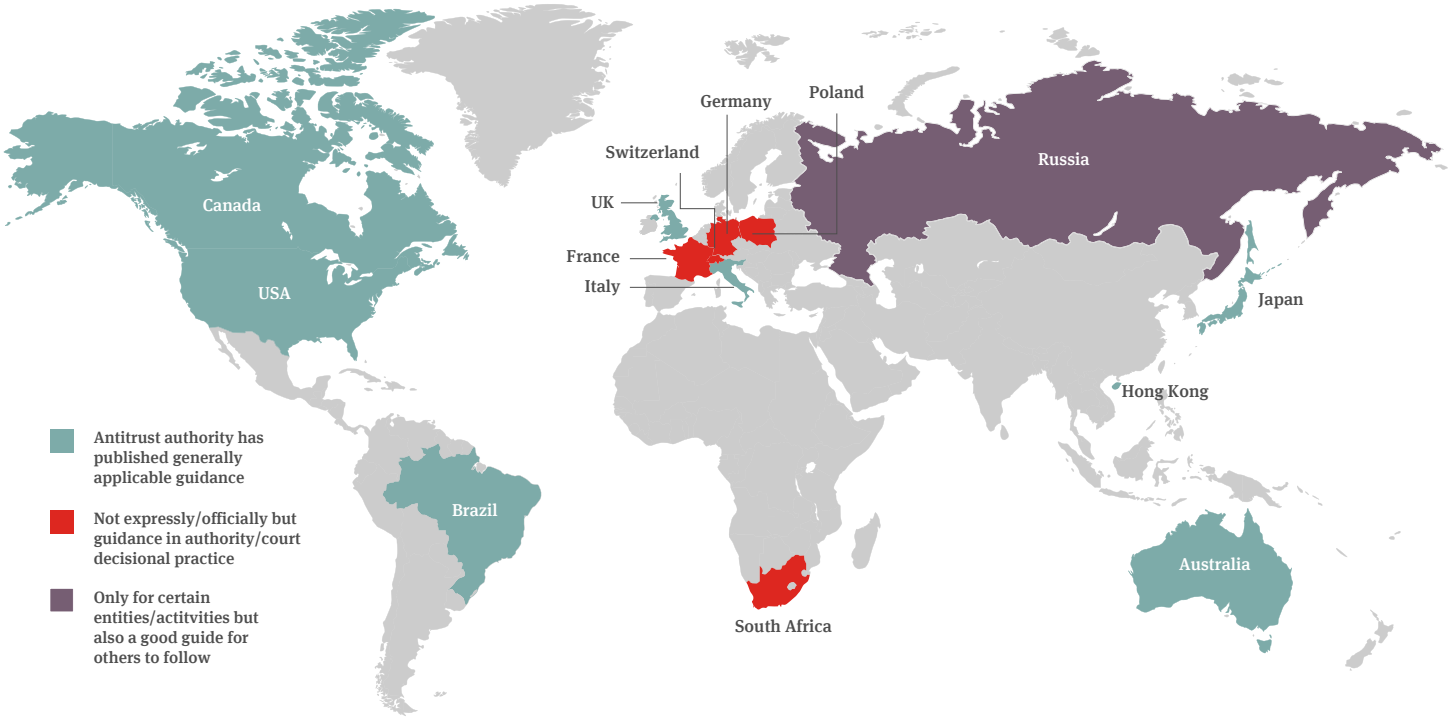
See pages 9-13 to learn more about key jurisdictions, including those that do/do not offer credit for compliance programs, how this may impact on sanctions for an infringement, and local guidance on achieving an effective compliance program.

We also provide examples of our recent global experience on page 14.

Q1: Do authorities/courts offer credit for companies with compliance programs?



Q2: Is there official guidance on how to achieve an effective antitrust compliance program?



Q3: How may an antitrust compliance program impact on sanctions for an infringement?

Australia

Compliance program that adheres to ACCC's guidelines can have the effect of reducing the penalty imposed.

Brazil

CADE's tribunal must consider a defendant's "good faith" when determining sanctions.

CADE's compliance program guidelines state that a program complying with the guidelines may be considered evidence of good faith and deemed a mitigating factor.

Canada

Competition Bureau may consider a compliance program it deems credible and effective when determining how to proceed, including as to the level of fine it recommends to the Public Prosecution Service.

Benefits greater for having a credible and effective pre-existing program than implementing or enhancing a program after investigation starts.

EU (European Commission)

Does not offer credit for compliance programs.

France

Used to offer credit for compliance programs until October 2017, when a change in policy announced.

Germany

In recent decisions the Federal Cartel Office (Bundeskartellamt) has assessed any existing compliance program's effectiveness and been willing to consider a reduction in fine accordingly.

When assessing fines the Federal Supreme Court (Bundesgerichtshof) also takes into account whether an effective compliance system is in place or improvements have at least been made to prevent comparable future infringements. The absence of a compliance system (or improvements) is usually an aggravating factor.

Italy

Compliance program can be a mitigating factor and may lead to a reduction in fine of up to 5, 10 or 15 per cent.

Can also be an aggravating factor in exceptional cases if used to conceal or facilitate an infringement, to mislead, or to prevent, hinder or delay an investigation.

Japan

Compliance program will be considered only in the case of Japan Fair Trade Commission's (JFTC) cease-and-desist order and in sentencing by court, but not in calculating amount of fine imposed by the JFTC.

Hong Kong

No clear practice yet – but Competition Commission's enforcement policy indicates it could take into account compliance efforts if a "genuine effort" to comply with the Competition Ordinance is demonstrated.

Poland

No official position – but case-law shows that compliance programs can be used as a mitigating or aggravating factor.

Russia

Compliance program can be taken into account as a mitigating circumstance when determining liability, but does not relieve a company from liability.

South Africa

Compliance program not formally listed as a mitigating factor in the Competition Commission's penalties guidelines, and may or may not be taken into account by the court at sentencing stage.

Switzerland

Compliance program not formally a mitigating factor in Ordinance on Sanctions, but Federal Administrative Court has held it may be a mitigating factor.

UK

CMA considers a compliance program a mitigating factor, which may lead to a reduction in fine of up to 10 per cent.

Can also be an aggravating factor in exceptional cases if used to conceal or facilitate an infringement, or to mislead the CMA during an investigation.

US

Compliance program will be considered by the DOJ at both the charging and sentencing stages. For eligible candidates, compliance also may be considered in conjunction with the US leniency program.

Q4: What is required for an effective compliance program?

Australia

The ACCC has published guidance on compliance programs for businesses, and has indicated that any program should be specifically tailored to a company's individual needs depending on its size and risk profile.

To assist businesses which do not have the resource to develop their own individual tailored compliance programs, the ACCC has produced a series of templates that businesses can use. The templates reflect what the ACCC considers appropriate depending on the size of the business. For large corporations the compliance program should address:

- commitment to a compliance policy;
- whistleblower protection;
- regular staff training;
- regular reporting requirements to the board and senior management;
- annual compliance review;
- annual compliance reporting; and
- reporting of compliance issues to the ACCC.

More specifically, the compliance policy should contain:

- a statement of commitment to compliance with the Competition and Consumer Act 2010 (CCA);
- an outline of how commitment to CCA compliance will be realized within the company;
- a requirement for reporting of any compliance program issues and compliance concerns to an appointed compliance officer;
- a guarantee that whistleblowers will not be prosecuted or disadvantaged and that their reports will remain confidential and secure; and
- a clear statement that the company will take internal action against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings.

Brazil

CADE has published guidelines on competition compliance programs. CADE recognizes that compliance programs must consider the features of each organization, but there are some general characteristics which are essential for a program to be deemed effective. According to CADE's guidelines, the following elements are considered when evaluating the effectiveness of a compliance program:

- involvement of senior management;
- compliance as part of the company culture;
- whether resources directed towards the compliance program are sufficient, taking into account the characteristics of the organization and its exposure to competition risk;
- existence of an independent compliance officer and/or team;
- risk assessment and classification;
- compliance training of employees and collaborators;
- existence of internal sanctions for antitrust infringements;
- existence of a confidential internal hotline for questions, complaints and whistleblowing;
- monitoring of the implementation and effectiveness of the compliance program; and
- periodic review and updating of the compliance program.

Canada

The Competition Bureau's "Bulletin on Corporate Compliance Programs" identifies the essential elements of a credible and effective compliance program. The Bulletin states that:

- to be credible, a program must demonstrate the company's commitment to conducting business in conformity with the law; and
- to be effective, it needs to inform employees about their legal duties, the need for compliance with internal policies and procedures as well as the potential costs, actual and opportunity (i.e. the cost of not complying with the law) of contravening the law and the harm it may cause to the Canadian economy.

There are seven basic elements that any credible and effective compliance program must have:

- management commitment and support;
- risk based corporate compliance assessment;
- corporate compliance policies and procedures;
- compliance training and communication;
- monitoring, verification and reporting mechanisms;
- consistent disciplinary procedures and incentives for compliance; and
- compliance program evaluation.

European Commission

The Commission has published "Compliance Matters" to help companies develop a proactive strategy for competition compliance. The Commission recommends the following:

- a clear strategy – companies should think ahead, develop a tailor-made approach for their situation (based on the risks they face) and set this out in writing, rather than react to problems only when they occur;
- formal acts of acknowledgement by staff and consideration of compliance efforts in staff evaluation – this might include asking staff for written acknowledgement of receipt of relevant information, having positive incentives for employees to consider the objective with seriousness (e.g. as part of job descriptions or evaluation criteria) and penalties for breach of internal compliance rules;
- constant update, contact points for advice and training – a manual should be made available to staff and updated regularly, with clearly identified contacts for advice and appropriate training provided;
- monitoring and auditing – these are effective tools to prevent and detect anti-competitive behaviour inside the company (monitoring, by verifying behaviour, helps prevent anti-competitive conduct occurring, whereas auditing tends to discover such conduct only after it occurs); and
- limit exposure if an infringement occurs despite compliance efforts – where an infringement takes place, stop it at the earliest possible stage and cooperate under the Commission's leniency program and settlement procedure.

France

No longer any formal guidance since change in policy in 2017, but five key factors under previous guidance (and case-law applying it):

- establish a clear, firm and public position on competition compliance;
- empower someone to implement and oversee the compliance program;
- effective information, training and awareness for employees;
- effective monitoring (audits and whistleblowing); and
- effective internal reporting and disciplinary measures.

Germany

There is no express official guidance on competition compliance policies. However, the following points are relevant based on decisional practice in Germany:

- Germany's Act against Restraints of Competition applies a principle of "self-cleansing" to companies that commit an infringement. This recommends the taking of concrete technical, organizational and personnel measures to prevent further infringements, and is appropriate guidance for establishing competition compliance measures more generally.
- CMSs (or compliance management systems) are intended to prevent companies from infringing a number of laws. Many companies have a CMS and establishing a functioning CMS part of the overall responsibility of the company's management board. Germany's Federal Cartel Office (Bundeskartellamt) has evaluated the effectiveness of CMSs in recent cartel decisions on the following grounds – which, while not an exhaustive list, provides guidance for compliance programs:
  - Is the CMS designed to be effective?
  - Are individuals involved in the compliance system neutral persons?
  - Does the CMS have active preventive measures in place and are employees actively trained?
  - Is there an effective whistleblowing policy for employees?
- Germany's Federal Supreme Court (Bundesgerichtshof) is also explicitly taking into account when assessing fines whether an effective compliance system is in place or improvements have at least been made to prevent comparable infringements in future. The absence of any compliance system (or improvements) is usually considered an aggravating factor in the assessment.

The draft of the 10th amendment of the German Act against Restraints of Competition suggests including a provision clarifying that post-offence behaviour of an undertaking infringing competition law is to be taken into account for the purpose of setting fines.

Hong Kong

Hong Kong's Competition Commission has published a practical toolkit called "How to comply with the Competition Ordinance" to assist businesses, especially SMEs, review their business practices and develop a suitable compliance strategy. The toolkit identifies three basic steps:

- identify risks – companies should review their business practices to identify their competition law risks (if any) and whether these are high, medium or low risks;
- mitigate risks – companies should develop and adopt appropriate controls (protocols, training etc) to mitigate and manage the identified risks and tackle the risks in order of priority (i.e. high to low); and
- regular review – businesses do not operate in a vacuum, market conditions change and compliance is therefore an ongoing task, so companies should be proactive in reviewing their business practices and compliance strategy.

The toolkit includes checklists for identifying and classifying risks when dealing with competitors, suppliers and customers, as well as practical measures to consider when formulating a tailored compliance strategy, such as:

- appoint a compliance officer;
- develop a competition law compliance policy – compliance is the responsibility of all employees, and the CEO, senior management or board should lead by example and set out in writing their personal commitment to compliance;
- provide training to staff;
- consider whether targeted training is necessary for higher risk staff (e.g. front line sales staff, or staff who participate in higher risk events, such as industry conferences with competitors);
- prepare guidelines and protocols to manage risks (e.g. guidelines for staff attending trade association or industry meetings, how to handle commercially sensitive information and how to deal with competition law complaints); and
- businesses with a higher risk profile may consider additional measures to encourage staff to comply with the Competition Ordinance (e.g. developing appropriate protections for whistleblowers or sanctions for staff who engage in infringements).

Italy

Guidelines published by Italy's competition authority, the Autorità Garante della Concorrenza e del Mercato (AGCM), emphasize that for a compliance program to be considered appropriate and potentially effective it must be tailored to an undertaking's characteristics and the market environment in which it operates. The AGCM identifies the following elements for compliance programs, deemed in line with international best practice:

- antitrust compliance as an integral part of corporate culture and policy;
- identification and assessment of antitrust risks specific to the undertaking;
- training and know-how;
- systems to manage processes exposed to antitrust risk;
- incentive scheme/disciplinary measures; and
- review and continuous improvement of the program.

Japan

The JFTC has identified the "3Ds" for ensuring effective compliance:

- deterrence – developing a compliance manual and other measures, such as internal training and rules for contacts with competitors, to prevent violations;
- detection – using audits and internal reporting systems to enable early identification of concerns; and
- damage control – responding promptly and appropriately to concerns, and having a contingency manual.

Russia

In 2017, Russia's Government adopted "Competition Law Compliance Guidelines for Entities Engaged in Public Procurement and Procurement for State Defense" (the 2017 Guidelines). While not officially applicable to other types of entities, the 2017 Guidelines can be a good guide to follow for other entities as well. Russia's Government has also adopted specific compliance guidelines for State authorities and agencies.

Under the 2017 Guidelines, the following compliance elements are mandatory:

- availability of internal compliance policy;
- internal compliance control authority;
- risk identification and assessment;
- compliance procedures;
- control mechanisms (arbitration and audit);
- employee training and control of employee knowledge;
- monitoring, analysis and improvement of compliance;
- document management; and
- infrastructure development.

Russia's antitrust authority, the Federal Antimonopoly Service, has also proposed amendments to Russia's antimonopoly legislation that would require all businesses to adopt antitrust compliance programs and allow for a reduction in fines in the case of pre-existing compliance programs. However, it is currently uncertain whether these proposals will be implemented.

South Africa

There is no official guidance on how to achieve an effective competition compliance program. However, all consent orders by South Africa's Competition Tribunal contain an undertaking to develop and implement a compliance program. The clause usually provides for the following:

- the development, implementation and monitoring of a competition compliance program as part of the company's corporate governance policy;
- the compliance program must be designed to ensure that all employees, members and management do not engage in future contraventions of South Africa's Competition Act; and
- the compliance program must include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Competition Act.

UK

The CMA – in its 2017 "Competition Law Risk – A Short Guide" (jointly published with the Institute of Risk Management) – indicates that an effective compliance culture requires a "top down" commitment whereby management demonstrate an unequivocal commitment to competition law compliance. The CMA recommends a four-step approach to competition law compliance, as follows:

- identify the key competition law risks faced by the business;
- analyze and evaluate the risks and categorize them by how serious they are (e.g. identify employees in high risk areas, such as those that have contact with competitors and undertake sales and marketing roles);
- manage the risks by setting up policies, procedures and training to detect and address breaches if they occur, depending on how serious the risk is and how likely it is to occur; and
- monitor and review the competition compliance program regularly or when a significant business change takes place (e.g. after acquiring a new business or following a competition law investigation).

US

In 2019, the DOJ's antitrust division published guidance – "Evaluation of Corporate Compliance Programs" – which identifies nine factors considered when evaluating a compliance program's effectiveness at the charging stage for criminal cartel conduct. This guidance should be read in conjunction with the "Principles of Federal Prosecution of Business Organizations", set out in the Justice Manual, which requires consideration of corporate compliance programs when deciding whether to prosecute a corporation for criminal conduct.

The antitrust division has acknowledged that, while it has no formulaic requirements regarding the evaluation of a compliance program, prosecutors should ask three preliminary questions about a company's compliance efforts to focus their analysis on a case-by-case basis:

- Does the company's compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company's senior management involved?

The nine factors that the antitrust division should consider when evaluating a compliance program at the charging stage are:

- design and comprehensiveness;
- culture of compliance;
- responsibility for the compliance program;
- risk assessment;
- training and communication;
- review, monitoring and auditing;
- reporting;
- incentives and discipline; and
- remediation and role of the compliance program in the discovery of the violation.

2019 review

Cartels and investigations

As well as assisting clients to develop and implement effective compliance programs, we continue to be involved in the most high profile global cartel investigations including a number of cases in the financial services sector, such as FOREX and Euribor.

Our international cartels and investigations team delivered some notable results for clients over the past year. In several cases we secured case closures without penalties and obtained significant reductions in fines through negotiations, legal submissions and appeals.

Our holistic approach to managing investigations, combined with our ability to advance complex legal arguments and our tactical skill, help to drive our success in protecting and defending our clients' interests.

A key strength is our considerable experience in dawn raids and digital forensic investigations. We assisted on multiple confidential cases across all regions in 2019, attending a number of dawn raids.

Notable in recent years is the decreased number of leniency applications we have made. This is mainly due to the increased threat of private litigation with the size of potential damages claims often exhausting any possible reduction in fines.

In contrast, there is growing demand from clients for assistance in circumstances where individuals are exposed to allegations of having engaged in anti-competitive conduct. Working closely with our white collar crime practice, we help clients develop and implement crisis management response plans, and internal investigation protocols.

Highlights

Retail

We are advising a major grocery retail chain in response to the Canadian Competition Bureau's investigation of alleged price fixing of packaged bread and in response to related follow-on class actions in multiple Canadian provinces.

Agribusiness

We are acting for a leading Asian agri-business group on an investigation in South Africa. This includes complex and ground-breaking litigation regarding access to documents and validity of warrants.

Information technology

Our Asia team successfully defended a client in the IT sector in the first enforcement action and litigation before Hong Kong's Competition Tribunal, relying on the (very difficult to prove) rogue employee defence.

Benchmarks

We continue to advise a large financial institution on the European Commission's investigation into the alleged manipulation of Euribor, successfully overturning a fine before the EU General Court for insufficient reasoning by the Commission.

Our South Africa team is advising a large investment bank in connection with a highly complex FOREX price fixing investigation, helping them to achieve immunity through cooperation with regulators.

Complaints

We are acting for clients as third parties on a number of investigations, including as lead complainants successfully persuading the relevant authorities to take forward investigations.

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