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POLICY BRIEF

Antitrust Compliance Programs in Europe: Status Quo and Challenges Ahead

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Abstract

The Policy Brief summarizes the discussion which took place on 26th – 27th June 2015 at the European University Institute (EUI) in Florence in the context of the first workshop of ENTraNCE for Executives. The workshop focused on the application of antitrust compliance programs in Europe. The workshop gathered representatives of National Competition Authorities (NCAs), international organizations, academia, industry, as well as law firms and economics consultancies. During the workshop, participants agreed that private firms should introduce compliance programs in order to discourage internally antitrust violations; different models of compliance programs were compared and analyzed during the workshop. On the other hand, different positions emerged in relation to the role played by NCAs in designing antitrust compliance programs, and whether the existence of a compliance program would justify a reduction of the fine imposed by a NCA.

On 26th and 27th June 2015, ENTraNCE for Executives kicked-off its activities with a workshop dealing with the application of antitrust compliance programs in Europe. The event was divided into 4 panels over two half-days. The workshop gathered different stakeholders, who exchanged ideas concerning the challenges facing private firms in the implementation of compliance programs. The participants included representatives of the National Competition Authorities (NCAs), international organizations, academia, industry, as well as law and consulting firms. The workshop generated a lively debate. While there was a general consensus among the attendees on some issues, divergent positions emerged among the participants on others. This policy-brief aims at summarizing the main points of agreement and disagreement that came from the discussion.Moreover, the brief aims at stimulating further discussion and defining the premises for a possible second workshop on the same topic.

1.Objectives of antitrust compliance programs

- Workshop participants agreed that antitrust compliance programs may have different, but not necessarily conflicting objectives. First of all, they may aim at strengthening the development of a common antitrust culture. Secondly, they should prevent competition law infringements. Thirdly, they increase the cases of infringement that undertakings are spontaneously reporting to the NCAs. Finally, compliance programs also increase legal certainty for the undertakings; insofar as they become more aware of what kind of behavior breaches antitrust rules and can thus better assess both internal behaviors and the activities of their competitors.

- Workshop attendees agreed that undertakings breaching competition law are increasingly exposed to a "stigma" from the side of the public opinion. Therefore, undertakings should focus more of their effort on preventing antitrust infringements via compliance programs. Furthermore, increased antitrust compliance might provide advantages to companies in terms of corporate social responsibility and could make it easier for them to obtain positive legal rating that favor access to financing and so forth.

2. Challenges faced by companies in establishing an effective compliance program

- While there seems to be a wide and increasing consensus among public and private stakeholders around the benefits of compliance programs, such benefits are identified and present only in cases of "good" programs. Thus, the main challenge lays in the identification of what is a "good" compliance program, in order to elaborate best practices for its implementation.

- Workshop attendees agreed that for a compliance program to be effective, it requires serious support from the top management of the company. This appears to be an absolute key factor for building a culture of legality within the company. By contrast, mixed signals from the senior managers concerning the company´s actual willingness to implement a compliance program often creates a "shield" for infringing behavior within the firm.

- The participants agreed that there is no "one size fits all" model for compliance programs in every company. The particular characteristics of each industry, the market dynamics and relevant national regulations might play a key role in designing an effective and efficient program. Therefore, companies have to make a real effort when designing compliance programs in a way that could be tailored to their specific needs and structure. Likewise, NCAs have to make a real effort in understanding whether a compliance program is tailored to the company's specific needs and structure, especially those NCAs that consider effective compliance programs to be a mitigating factor.

- Participants further agreed that it is more difficult to establish a compliance program that prevents Article 102 TFEU infringements rather than cartel violations. In fact, the assessment of the cases of abuse of dominance requires a rather complex analysis by the firm. Such analysis can be challenging and costly. In designing a compliance program, companies should balance costs and the expected results. Therefore, undertakings - on the basis of a risk-based approach -should initially prioritize the prevention of more "evident" competition law infringements (i.e. cartels) via the compliance program.

- A general consensus emerged on the need to speak the language of business-people when introducing a compliance program within a company. In designing the program, it is important to identify the staff at risk, to personalise the trainings and to make them interesting (for example through networking and case studies), in order to incentivize active participation of the employees. Introducing internal sanctions for breaches of the compliance program seems to be another possible and effective instrument to

gain employees' attention of the compliance program. Monitoring the implementation of the compliance program appeared to be essential as well. Finally, a "due diligence" analysis when hiring new employees and acquiring new subsidiaries was also recommended as a tool for establishing an effective compliance program; the same could be done with the trade associations before joining them.

- Antitrust compliance programs should not only concern large corporations, but Small and Medium-size Enterprises (SMEs) as well. However, high costs of implementation might discourage SMEs from implementing compliance programs. In addition to this, SMEs tend to believe that competition law does not apply to them due to the negligible market shares they obtain, which constitutes a further disincentive for compliance. When costs are the most important element, it is important for SMEs to be aware of a number of resources available online free of charge to start their antitrust compliance journey or to further improve the efforts already made.

3. Reporting competition law infringements to the NCA

Compliance programs aim at preventing, detecting and stopping the infringement of antitrust rules. However, it can be disputed whether reporting to the NCA should be considered a fundamental component of the program. On the one hand, companies could decide that stopping the infringement is a sufficient result; on the other hand, leniency programs could be seen as the natural outcome in cases where an infringement has been detected. Moreover, it should be reminded that internal reporting, which creates accounts of infringement, might be extremely risky in cases of antitrust investigations, as well as in terms of discovery obligations in the context of damages claims. In a similar line, another factor that might discourage the internal reporting of antitrust violations is the general absence under EU law of the legal privilege for in-house lawyers.

4. The role of NCAs and public bodies in compliance programs

- The workshop attendees debated the role that NCAs should play in promoting or even designing best practices at the national and international level. While some participants argued that NCAs should provide more guidance to companies to this regard, others argued that receiving detailed guidelines from the NCAs might incentivize the implementation of "fake" compliance programs: any company could formally introduce a compliance program in line with the NCA´s best practices, despite the lack of willingness to actually implement the program. In any case, participants agreed that, notwithstanding or in addition to the existence of guidelines issued by the NCAs, an important role will be played by the latter's approach.

- During the workshop, there was no agreement on whether the active involvement of NCAs in designing compliance programs could lead to beneficial outcomes. In particular, those denying that an active involvement of NCAs in compliance programs could be beneficial put forward the several reasons. First of all, they underlined the risk that guidance could lead to "cosmetic" compliance programs, without achieving any meaningful outcome in terms of effectiveness. Secondly, the assumption that agencies know better than firms how to shape a "good" compliance remains unproven. Thirdly, an active involvement of NCAs definitely implies costs for public bodies with limited resources; therefore, the opportunity of such choice should be assessed in terms of its effectiveness in comparison with other likely lines of action.

- An additional related point is that a beneficial outcome, for all stakeholders and especially businesses, could indeed derive from a (at least to some extent) converging framework on the design and treatment of CPs in the EU and internationally. Here legal certainty for businesses is at stake, especially those active at European/international levels. A globalized business may generally benefit from converging regulatory approaches. That is why international organizations and networks (in particular ICN, ECN, OECD) include more and more often in their agendas an item on antitrust CPs as a tool to diffuse competition culture in businesses, and therefore in the market at large.

5. Compliance programs and the design of antitrust fines

- A topic of intense debate during the workshop was whether NCAs should consider the existence of a compliance program to be an attenuating factor in the calculation of a fine. Those advocating for it, argued that compliance programs complement the public enforcement of competition law, by supporting the deterrence vis a vis further infringements. Secondly, NCAs can detect "fake" compliance programs. The NCAs should recognize the compliance program as an attenuating factor only where the infringement proves to be "faultless"; where the company proves to have carried out all possible measures to seriously implement a compliance program and thus avoiding the antitrust infringement to take place. Furthermore, the NCAs should assess the "intent" of the infringer in assessing the possibility to qualify for the fine reduction in the presence of a compliance program. The supporters of the attenuating approach finally underline the different treatment of antitrust compared to other fields of law, e.g. anti-bribery (or, in Italy, the Law n. 231 of 2001 on the administrative responsibility of companies) in relation to which, in a number of jurisdiction a mitigation is provided for and does not appear to be disputed.
- On the contrary, other participants argued that the existence of a compliance program should never be considered to be an attenuating factor, since undertakings are simply shaping their organization in their preferred way to fulfil their legal obligations to respect the antitrust law.
- A further subject of intense debate concerned the opportunity to consider as an aggravating factor the fact that a compliance policy is in place and the company still infringes antitrust rules. The case for making an aggravating circumstance appears to be particularly strong when the compliance program becomes an instrument of the infringement. The general consensus was that this option might go too far, also raising fundamental rights issues in those jurisdictions where antitrust infringements are subject to criminal or quasi-criminal sanctions.

6. The diverging approaches followed by NCAs in Europe

- At present, there is no common approach among the NCAs in Europe concerning antitrust compliance programs. While some NCAs have adopted guidelines recognizing the possibility to grant a fine reduction to the companies, which have established a compliance program (i.e. UK, France and Italy), other authorities are against providing any guidelines (i.e. Germany) arguing that compliance is a legal obligation of the undertakings and thus there can be no additional reward for not observing the law.

- Economists have traditionally designed models of deterrence based on the probability of the sanctions times the predictable amount of the sanctions. A reduction of fines for companies that apply compliance programs may somehow alter these estimations in ways that are difficult to predict. However, most participants agreed that the limited amount of prospected percentage reductions of the fines (from 5% to 15%), together with the uncertainty about the exact policy applied to fines by each NCA in specific cases, may ultimately limit the practical relevance of the issue.

To conclude, most participants of the workshop would agree that compliance programs today are an

important complementary instrument in combatting antitrust infringements, that their present role is primarily cultural, that they should not necessarily be used as a reporting instrument to NCA's and that NCA's should not be actively involved in their elaboration. The debate about the relation between compliance programs and policy of the fines is still very open but its practical relevance may be limited. All participants agreed that several of the points raised in the workshop certainly deserve further consideration and discussion.

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The ENTraNCE Project

ENTraNCE for Executives aims to provide training to a variety of enforcers of competition rules, to carry out research and to promote informed discussion on key policy issues in competition law and economics. ENTraNCE for Executives is part of ENTraNCE at the European University Institute and builds upon and complements the experience gained during the past five years in organising ENTraNCE for Judges, a training programme co-financed by the European Commission and addressed to EU national judges dealing with competition cases. ENTraNCE for Executives and ENTraNCE for Judges constitute the two pillars of ENTraNCE.

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