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Practical guidelines for designing and implementing a successful compliance program

In the last few years, the ever-increasing fines imposed by the French Competition Council^[1] (renamed Competition Authority as from January 1, 2009) on economic operators for non-compliance with competition and antitrust laws have led companies to spontaneously design and implement internal detection tools to prevent such violations and, as the case may be, obtain a reduction of the penalties imposed.

These internal procedures are referred to as “compliance programs”. Most of the time, economic operators set up such programs only after a violation is established, thereby trying to benefit from the leniency of the competent Competition Authorities and obtain a reduction of the fine (generally between 10% and 25%) in return for specific commitments taking the form of a compliance program.

More and more companies, however, become aware that their best interest is to set up such programs upstream to minimize the risk of complaints, disputes and litigation. It is true that companies are strongly encouraged to go down this path by the French Competition Authority itself as the latter has been praising the benefits of compliance programs very actively (see “*Compliance, éloge de la conformité*” in the *Competition Council’s* 2007 annual report; see also the report entitled “*The state of affairs and perspectives of compliance programs*” recently released by Europe Economics at the request of the *Competition Council*).

Compliance programs refer both to the instruments set up within companies to ensure compliance with applicable competition and antitrust laws, to the specific mechanisms put in place to detect possible competition law violations and to the measures taken to remedy non-compliance.

In its last report, the Competition Council considered that a compliance program with every guarantee of preventive and curative effects must contain 5 key elements:

- *“management’s proclaimed concern with integrating, in all aspects of its general policy and of the company’s objectives, compliance with laws and regulations”*; there must be a permanent effort on raising awareness on applicable competition rules and, therefore, a strong investment on the part of the management;
- *“the implementation of control and monitoring mechanisms”*;
- *“the introduction of policies and procedures aimed at preventing and detecting unlawful or unacceptable behavior, of which all the company’s staff should have knowledge”*; among all the reporting procedures that exist and must be made available to all staff members, the most spread is indisputably the “whistleblowing” system. This system enables employees to report in full confidentiality their colleagues’ allegedly law- or corporate policy-breaching behavior to human resources managers, to an internal audit committee, to a mediator especially appointed for this purpose or to an external company. The information can be reported through a toll-free phone number, by post or to a dedicated Internet portal available 24/7.
- *“the introduction of regular training adapted to the context in which the company and its employees operate”*;
- *“the existence and implementation of disciplinary actions in case of non-compliance with the program”*.

As an illustration of what can be concretely implemented in terms of compliance programs, the chart hereafter sets forth - on the basis of the last decisions of the French Competition Council/Authority - the different types of commitments included in compliance programs that companies operating in different sectors of activity have proposed in the framework of the infringement procedure initiated against them.

Whether they are rather standard or innovative, compliance programs do not always require heavy investments. It is indeed often possible to optimize resources (both material and human) as well as internal mechanisms and pre-existing procedures in order to prevent and detect violations of competition and antitrust laws.

French Competition Council/Authority’s decision	Control and monitoring mechanisms	Reporting and Detection procedures	In-house training	Disciplinary actions
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<p>Decision 07-D-21 dated June 26, 2007 Elis, Initial BTB & others (sector of laundry cleaning and renting)</p>	<p>10 companies fined for a global amount of 18.25 M€ for customer sharing and concerted practices on prices</p>	<ul style="list-style-type: none"> • Formal instructions to employees not to participate in any meeting with competitors' representatives • Appointment of a mediator in charge of checking the respect of commitments and in case of a violation required to alert executives 	<ul style="list-style-type: none"> • Setting up a whistleblowing system with possibility for any employee - in a fully confidential communication - to report to the Human resources manager or internal audit manager any anticompetitive practice 	<ul style="list-style-type: none"> • Setting up training sessions for employees on competition and antitrust laws (sales managers' training, written notes prepared by specialized advisor sent to employees) 	<ul style="list-style-type: none"> • Notification to employees informing them that in case of a competition law infringement, they may be disciplinary sanctioned or even laid off
<p>Decision 07-D-02 dated January 23, 2007 Veolia Propreté & Sita France</p>	<p>Fine of 1.4 M€ for cartel in the sector for the collection and the treatment of waste in Seine-Maritime</p>	<ul style="list-style-type: none"> • Audit performed by the General Counsel and an external advisor on compliance with competition law principles within the Group (every year, audit of three subsidiaries performed) • Compliance letter demanded to the chief executive officers of each subsidiary of SITA France • Formal and reiterated oral and written instructions to the management and employees of the group and its subsidiaries (subsidiaries' management must inform their own employees) 	<ul style="list-style-type: none"> • Training plan to ensure compliance with competition law principles (seminars set up by specialized legal advisors, in-house training sessions, "e-learning" self-training tool) • Reminder of applicable competition law provisions on SITA France's intranet completed by practical examples • Systematic training sessions and awareness programs to the workforce (also for new employees) • Widespread and regular distribution of a booklet entitled "Ethics, convictions and responsibility" 		

Decision 07-D-33 dated October 15, 2007 France Telecom	Fine of 45 M€ for abuse of dominant position and restraint of competition through France Telecom's subsidiary called Wanadoo	<ul style="list-style-type: none">• Detection instrument set up in the consumers' complaints management system of any complaint that might be linked to competition contentious acts or practices• Statistic and qualitative follow-up of the information collected via this detection instrument in order to identify sales units with an abnormally high level of complaints• Integration into the order management system of a tool enabling to identify sales origin in order to spot infringing sellers	<ul style="list-style-type: none">• For individuals: interview, training, sanction• On the collective level: widespread instructions, reminders applicable rules• Training and information sessions for sales people including<ul style="list-style-type: none">(i) the diffusion of a booklet describing the good and bad competition law practices• (ii) integration in the in-house training programs designed for sales people of a specific unit on competition rules• Diffusion of the Authority's decision to every employee in order to enhance their awareness and obtain their support on the compliance program	Information provided to staff members on sanctions that may be imposed in case of non-compliance with applicable competition rules
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Decision 08-D-32 dated December 16, 2008
Arcelor Mittal Group, KDI, Descours & Cabaud, FFDM

11 Steel Trading Companies and 1 Professional Union fined for a global amount of 575.4 M€ for cartel in the steel industry

- Setting up a hotline (mail, e-mail, telephone) managed by legal advisors specialized in competition law
- Strict supervision of meetings between competitors (express agreement needed, retention of records for a 5-year period)
- Commitment to withdraw from union meetings where competition law violations are committed
- Sound recording of some particularly sensitive meetings
- Attendance of a lawyer to the meetings of the Board of Directors and steering committee of the FFDM

- The existing confidential whistleblowing system initially set up for accountancy and corruption issues extended to competition law matters, available 24/7 by mail, or through Internet

- Increased diffusion of a code of ethics.
- Widespread diffusion of online "Antitrust" guidelines to a broader group of employees (other than sales managers)
- Numerous information and explanation sessions with legal advisors, lectures by specialized advisors
- Competition law "e-learning" self-training
- Extensive internal communications to all employees about instruments set up pursuant to the compliance program
- Creation of an Ethic Charter annexed to the Company's internal rules and policies (Intranet)
- Legal training sessions by lawyers
- Incorporation of the "Whistleblowing" system into the Company's internal rules and policies
- Distribution of a "Compliance Guide" setting forth applicable rules and sanctions

- Introduction in the newly concluded employment contracts of a specific clause requiring compliance with competition and antitrust laws
- Introduction in the Compliance Guide of a warning concerning disciplinary sanctions in case of participation in any anticompetitive practice

<p>Decision 09-D-05 dated February 2, 2009 - Adecco France, Vediorbis, Adia, Manpower France Holding, Manpower France</p>	<p>Fine: 94.4 M€ for anticompetitive market sharing in the temporary employment sector</p>	<ul style="list-style-type: none"> • Retention of all the documents relating to the application of the compliance program for a 5-year period; creation of a register listing the details of the training sessions performed and the executed individual commitment letters • Retention of all the documents relating to national and international invitations to tender for a 5-year period • Appointment of a consultant responsible for auditing processed invitations to tender and drafting an annual report in relation thereto • Specific procedure when two companies of the same Group make a joint bid to respond to an invitation to tender • follow-up of the participation of the employees to professional meetings (list of participants), ensuring that the legal organization of every professional association complies with applicable competition laws • Appointment of a General Counsel exclusively in charge of competition and antitrust matters 	<ul style="list-style-type: none"> • The reporting system existing within Adecco and managed by an external company if extended to competition law matters (24/7) • Setting up a Whistleblowing system enabling every employee to report to the Group's management board through Corporate General Counsel who shall ensure confidentiality 	<ul style="list-style-type: none"> • Reinforcement of the training sessions, edition of a welcome booklet, implementation of compulsory training sessions, annual memorandums, signature of a "personal commitment letter" for certain categories of employees • "E-Learning" sessions for all permanent employees and lectures by external advisors 	<ul style="list-style-type: none"> • Annual written declaration by sales managers and corporate client account managers attesting that they have not engaged into any anticompetitive practices
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Our lawyers are at your disposal to assist you in elaborating and setting up adapted compliance programs, taking into account any internal procedures already in place.

[1] In 2007, the global amount of fines imposed by the *Conseil de la concurrence* reached 221 M€, which represents more than 3 times the average amount of the past three years. On December 16, 2008 the *Competition Council* imposed the highest fine since its creation in 1986: 575 M€ to 11 steel trading companies (302 M€ for the Luxembourg company ArcelorMittal because of three of its trading subsidiaries' practices). A fine reduction of 17% has, however, been granted, ArcelorMittal committing to “*take matters of this nature extremely seriously and have a rigorous global compliance program in place to combat anticompetitive practices*”.

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