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# ELEMENTS OF AN EFFECTIVE ANTITRUST COMPLIANCE PROGRAMME[1]

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## Abstract:

Over the last years, hardly any company, and least all of the large and multinational companies, can manage without an individual compliance policy and company-wide compliance programmes, which is also a sign of good corporate citizenship. The implementation of effective antitrust compliance programs plays a significant role in the management of companies. Nowadays, an increasing number of jurisdictions have introduced the possibility to use effective antitrust compliance programmes as a mitigating factor for calculating the fines for antitrust violations. The following article looks at the decisive elements for such a programme. It refers especially to the new and relatively detailed guidance that has been issued by the Antitrust Division of the US Department of Justice, in 2019, when the DOJ gave up its longstanding policy of categorically rejecting any consideration of effective antitrust compliance programmes and announced a landmark policy shift through acknowledging the positive aspects of such programmes. Leniency programmes and antitrust compliance programmes are the cornerstones of preserving the positive impacts of effective competition on social and economic wealth of a society.

## Keywords:

antitrust compliance programme, corporate compliance programme, antitrust violation, leniency programme, code of conduct

1 This article is partially based on a German-language contribution In: Engelhart, M., Kudlich H., Vogel B. (ed.), *Festschrift für Ulrich Sieber*. Berlin: Duncker & Humblot, 2021.

## Introduction

Over the last 15 to 20 years, compliance in the corporate sector has taken a very dynamic development. Compliance is defined as the aim to abide by all relevant laws, policies, and regulations.[2] Pressure exerted on companies by society overall, the media and, in particular, by the enforcement activities of regulatory authorities to bring about lawful conduct, has led to the situation where hardly any company, and least of all the large and multinational companies, can manage without an individual compliance policy and company-wide compliance programmes. Moreover, company owners and/or board members and managing directors are often obliged by law, directly or indirectly, to implement compliance programmes as part of 'good corporate governance'.[3] A further issue is the enormous increase both in the number and amount of rules and regulations concerned, which in turn has led to an ever growing volume of compliance activities on the corporate side.

These compliance activities usually form an integral part of a comprehensive code of conduct[4] adopted by a large number of companies today.

## Corporate Compliance Programmes

### Scope of corporate compliance programmes

A company-wide compliance programme, also called Compliance Management System (CMS), covers a wide range of legal fields, the rules and regulations of which need to be complied with in day-to-day operations, in particular. In short, we speak of the entire set of internal policies and procedures that a company has in place to comply with the laws, rules, and regulations in order to avoid any infringements and to uphold its business reputation. Among the risk criteria playing a leading role are the fields of antitrust, corruption, data protection, export control and money laundering, etc., with especially negative consequences for infringements, but also fields such as M&A, environment, health and safety (EHS), sponsoring, relations with business partners etc. Compliance programmes are characterised by the implementation of business processes, though in

2 Compliance is typically defined as observing legal regulations and regulatory standards and meeting further essential ethical standards and requirements usually set by the company itself; see KRÜGLER, E., (2011) Compliance – ein Thema mit vielen Facetten. *Umwelt-Magazin*. 7/8, p. 50

3 In Germany, for example, the senior management is held liable for a legal infringement according to § 130 and § 30 para 1 Ordnungswidrigkeitengesetz (OWiG) if the infringement can be attributed to the management's breach of its organisational and supervisory duties. A violation of these duties can also lead to liability claims by the company towards the individual manager. Through this liability regime, high pressure is thus indirectly exerted on the senior management to implement sufficient compliance measures.

4 A code of conduct, frequently referred to as 'Business Conduct Guidelines', regulates in a more or less detailed way all essential matters of good corporate governance and also includes all obligations to be observed by all employees in day-to-day business. They cover, for example, regulations for the protection of commercial confidentiality, or how to handle gifts and invitations.

substance it is how a company wants its business to be carried out, subject to all applicable legal and ethical aspects.

### Regular Elements and Purposes of a Compliance Programme

The typical components and basic purposes of a compliance programme can be summarised under the general terms of: (i) prevent, (ii) detect, (iii) respond and (iv) continuous improvement.

a) Prevent
   This includes all measures and processes related to preventing violations of the applicable laws, such as company-wide communications regarding compliance culture and the observation of relevant rules and regulations, performing training courses, and, depending on the characteristics of the area concerned, even – in a broader sense – adequate legal counselling for day-to-day business.

b) Detect
   In addition to purely preventive measures, risk management processes and procedures need to be implemented in parallel in order to analyse the individual risk exposure of the company, both as a whole and the various business divisions, and to detect infringements, e.g. through audits and internal investigations. Furthermore, channels of communication need to be implemented for infringements to be reported (anonymously).

c) Respond
   Should an infringement have been committed despite the aforementioned measures, the company needs to react appropriately and even to take disciplinary action, including the termination of the employment contract if need be.

d) Continuous Improvement
   Finally, the compliance programme needs to be subjected to potential improvements and adjustments to new situations within the company on a regular basis in order to secure its efficiency.

## Antitrust Compliance Programmes

The basic purpose of implementing an antitrust compliance programme is to ensure compliance with all relevant antitrust rules and regulations and to avoid any involvement in any illegal anticompetitive business behaviour. However, beyond the companies' interest to avoid antitrust violations and to do what is necessary to demonstrate that they are good corporate citizens, the implementation of a sophisticated and comprehensive compliance programme has a significant economic dimension due to the heavy investments necessary. Besides the mere running costs for the compliance organisation there are further 'costs' that need to be taken into consideration, such as management attention, staff training, etc. Therefore, the question arises for each company about why to implement an effective antitrust compliance programme at considerable expense at all, rather than trying to make do with minimum requirements.

## Incentives for the Implementation of an Antitrust Compliance Programme

In addition to the more general corporate and social reasons already mentioned above, there arises the question in all compliance programmes of which risks are linked to infringements of the relevant laws. This is especially true for the implementation of a thorough antitrust compliance programme, as it requires a high amount of financial expenses and human resources. However, from a company's perspective, antitrust violations are currently among the top ranking potential risks to which a company is exposed in its day-to-day business. This is partly due to the potential drastic consequences and sanctions that a company is threatened with in case of participating in a serious antitrust violation, but to some extent also to the risk of discovery, which has continuously increased over the past years.

e) Risk of Discovery

Virtually all countries around the world have implemented an antitrust regime and established antitrust authorities. This kind of internationalisation and globalisation[5] of prosecuting antitrust infringements again has created its own 'competitive pressure' with regard to the prosecution of antitrust infringements. In addition, all these countries have also implemented leniency programmes that have developed a considerable dynamic and incentive effect. The consequence has been a paradigm shift in cartel prosecution, with numbers of cartels voluntarily disclosed to the authorities significantly on the rise after the introduction of the programme.

f) Sanctions and Other Consequences

The following potential consequences of participating in a serious antitrust violation explain why antitrust legislation falls under the highest risks for companies.

i) Imprisonment

For senior management and other individual employees, imprisonment seems to be the best deterrent against being involved in a hardcore cartel, as more and more jurisdictions are introducing imprisonment as a sanction for individuals. For example, countries like the US have a long history of imprisonment of up to several years for managers involved in a serious infringement of antitrust law.[6]

ii) Fines

The level of monetary fines has increased exponentially over time. To some extent a huge momentum of its own has built up, but in part it has been

5 See also the International Competition Network, an informal global network established in October 2001 by the heads of 16 competition agencies from around the world. This network today comprises almost 140 competition agencies. It aims to address practical antitrust enforcement and policy issues. More details can be found on the ICN website. ICN, *Members*. Available from: https://www.internationalcompetitionnetwork.org/members/ [Accessed April 20, 2021].

6 From 2000 to 2009, the average prison sentence amounted to 20 months; from 2010 to 2019 it was 18 months – see DOJ, *Criminal Enforcement Trends Charts*. Available from: https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts [Accessed April 20, 2021].

due to peer pressure among the competition authorities, based on increased interactions, e.g. via the International Competition Network (ICN) or the European Competition Network (ECN). These days, in the case of a serious violation over a period of time, a fine of more than one billion EUR for a single large company is no longer a rare occurrence.[7]

iii) Civil Damages

In addition to fines, actions for damages must not be underestimated. In particular, antitrust authorities and legislative bodies have taken strong efforts in recent years to facilitate the enforcement of claims for damages by parties that have suffered damages as a consequence of a cartel.[8] Irrespective of the fact that civil damages may cover enormous amounts nowadays, all the other effects on a company resulting from such actions must not be underestimated, e.g. legal costs, management attention, and the negative publicity resulting therefrom.

iv) Reputational Damage

The more a company is in the public eye, the greater the reputational damage that may result from participation in a cartel. This holds especially true if the disclosure of a cartel attracts high media attention, and if the misconduct and severity of the violation is considered particularly reprehensible by the public. Especially for large multinational companies, such severe reputational damage can have a significant negative impact on business success on a global level.

v) Debarment

Last, but definitely not least, antitrust law infringements come with a risk of getting debarred from public tender proceedings. Depending on the company's business model, this risk can be even more dangerous and drastic for the company than simply paying a very high fine. If a large share of its business comes from the public sector, debarment from public tenders for a number of years could significantly impact or even kill business in the countries concerned. It could be even worse if the violation is related to bid-rigging and to projects financed by the World Bank or any other regional development banks.[9] In a worst case scenario, the consequence of a bid-rigging

7 See, for example, the fines in the truck cartel or the fines against large tech companies like Google; see the following EC, *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel* (July, 19 2016). Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582 [Accessed April 20, 2021]; EC, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising* (March 20, 2019). Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 [Accessed April 20, 2021]; EC, *Cartel Statistic*. Available from: https://ec.europa.eu/competition/cartels/statistics/statistics.pdf [Accessed September 2020]

8 At an EU level, at the end of June 2020, the EU institutions agreed on the Directive on representative actions for the protection of the collective interests of consumers. This collective redress directive and the respective possibility of 'class actions' has to be adopted and implemented into national law by the EU Member States within two years.

9 E.g. the African Development Bank or Asian Development Bank.

cartel in one country could lead to exclusion from World Bank financed projects on a regional or even global level.

## Effective Compliance Programmes as a Mitigating Factor for the Calculation of Fines

a) Current State of Discussion

The question whether and to what extent existing effective (antitrust) compliance programmes may be considered a mitigating factor for the calculation of fines has been the subject of highly controversial discussions for many years between the corporate community and law firms on the one side, and regulators on the other side. Organisations and companies argue that considering compliance programmes as a mitigating factor would create an additional and reasonable incentive for going ahead with the high expenses and efforts to implement an effective compliance system. One factor here is certainly the fact that companies consider it highly unjust if their substantial compliance efforts are not taken into account in case of an antitrust violation, although these efforts show that they are trying to live up to the requirements for a culture of 'Good Corporate Citizenship' within society, and instead they are treated the same as other participants in a cartel who have not taken any compliance efforts so far.

However, this demand has always been categorically rejected, and still is, by the vast majority of antitrust authorities. The argument most frequently heard is that participating in an antitrust violation proves the ineffectiveness of the compliance programme, as it failed to prevent the violation from happening in the first place.[10] Therefore, taking the existing system into consideration in favour of the company must be rejected. Some argue that if companies need such an additional incentive, the fines in place are probably not yet high enough. However, the real reason for the negative attitude on the part of the authorities is probably the fact that the authorities are not overly interested in also checking the effectiveness and robustness of an existing compliance programme in addition to ever more complex investigation proceedings, which are already difficult to handle.

In recent years, a number of countries have decided to consider effective compliance programmes as a mitigation factor within the framework of calculating fines. Among these countries are Australia, Brazil, Canada, Israel, Italy, Spain, Switzerland, and the UK. Most jurisdictions, however, have not yet decided in favour of such recognition.

The most recent fundamental change took place in Germany. Although the Bundeskartellamt has always been a strict opponent to the recognition of already existing compliance programs, the recent 10th amendment to the German Act

10 See e.g. EC, *Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Businesseurope & US Chamber of Commerce. Competition conference Brussels, 25 October 2010.* Available from: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_586 [Accessed April 20, 2021].

against Restraints of Competition also introduced the possibility that antitrust compliance efforts both before and after an infringement can be taken into account for the calculation of fines.[11]

b) Paradigm Shift in the USA

Against this background, the turnaround of the Antitrust Division of the US Department of Justice (DOJ) is particularly noteworthy. In 2019, the DOJ gave up its longstanding policy of categorically rejecting any consideration of effective antitrust compliance programmes and announced a landmark policy shift.[12] Regarding the impact of the DOJ within the community of antitrust authorities, this turnaround could have a broad effect.[13] Based on this guidance, effective antitrust compliance programmes will be considered a mitigating factor in criminal antitrust investigations in the future.[14]

What is particularly interesting here is the underlying justification. The DOJ states that an antitrust violation is, after all, no proof of the ineffectiveness of a compliance programme, because in practice there is no such thing as a perfectly effective compliance programme. On the contrary, the DOJ recognises that 'no compliance programme can ever prevent all criminal activity by a corporation's employees.'[15] This is an honest and realistic assessment of the fact that even the most effective compliance programme cannot prevent violations permanently and reliably. As anywhere, there are also rogue employees in the corporate world who, intentionally and fully aware of all the consequences, violate the law and, for example, participate in a price-fixing cartel.

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11 This law came into force on January 19, 2021, see BGBL. I 2021, p 24. See also STEGER, J., SCHWABACH, J. (2021) Entscheidung in letzter Sekunde: Der lange Weg der Compliance-Defence im deutschen Kartellrecht, Wirtschaft und Wettbewerb 3, p. 138 et seq.

12 See US Department of Justice Antitrust Division, Evaluation of corporate compliance programs in criminal antitrust investigations, July 2019. Available from: https://www.justice.gov/atr/page/file/1182001/download [Accessed April 20, 2021].

13 The guidance of the Antitrust Division of the Department of Justice must not be confused with the different guidance of the Criminal Division of the DOJ. The latter published an update of its guidance on evaluation of eorporate compliance programs in June 2020, to take into account experience made in its application, as well as feedback from other stakeholders, and to give further advice regarding the question of whether the Corporate Compliance Programme concerned is actually implemented and lived in an effective way. See US Department of Justice Criminal Division, Evaluation of corporate compliance programs (updated June 2020). Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed April 20, 2021].

14 The guidance of the DOJ is primarily addressed to prosecutors as serious antitrust violations are subject to criminal prosecution in the US. However, this does not change the fact that the elements of an effective compliance programme, as mentioned here, can also be applied in jurisdictions where such antitrust violations are not yet subject to criminal prosecution.

15 See US Department of Justice Antitrust Division, Evaluation of corporate compliance programs in criminal antitrust investigations, July 2019, p. 3.

In addition, the DOJ has added nine essential elements to its guidance, which typically form part of an effective antitrust compliance programme and must be taken into account in the assessment of its effectiveness.

## Essential Elements of an Effective Antitrust Compliance Programme with Particular Reference to the New DOJ Antitrust Division Guidance

### General Aims of an Antitrust Compliance Programme

Before discussing the specific elements, one should bear in mind what antitrust compliance programmes are aiming to achieve. As already mentioned above with respect to general corporate compliance programmes, the same four general aims and purposes need to be covered also by antitrust compliance programmes: (i) prevent, (ii) detect, (iii) respond, and (iv) continuous improvement.

### DOJ Guidance on the Evaluation of Corporate Compliance Programmes in Criminal Antitrust Investigations

The DOJ Antitrust Division's Guidance is framed around the following three preliminary fundamental questions, which should be the starting point of the assessment and should be asked by the prosecutors in order to carry out a proper evaluation and arrive at an individual determination.

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

These questions aim at the critical factors of any compliance programme evaluation, which are the maximum effectiveness to prevent and detect any misbehaviour, and how seriously the programme is enforced within the company. They also point at the comprehensiveness of the compliance programme (even if individually adjusted), including the required internal processes.

To answer these three questions, the Antitrust Division has identified nine different categories as essential elements for an effective programme that should be taken into consideration when evaluating the effectiveness of an antitrust compliance programme.

a) Design and Comprehensiveness

The first element relates to the overall evaluation of the effectiveness of an antitrust compliance programme. This analysis is aiming at basically distinguishing between effective comprehensive programmes and mere paper tigers that only look good on slides, but are not characterised by a serious commitment behind it. The DOJ states some aspects here that can help evaluate the earnestness of a programme, e.g.

- When was the programme implemented and is a regular periodic update intended?
- Is the material content of the programme updated on a regular basis?
- Do internal controls exist to reinforce the antitrust compliance policies?
- Are there processes in place to track business-related competitor contacts?
- How are employees in sensitive functions trained and guided to make sure they can identify and report antitrust-related critical situations?

Many details regarding the questions listed above are stated in greater substance under the other elements mentioned below. What is fundamental for the assessment of the effectiveness of an antitrust compliance programme is the seriousness based on which the programme is implemented and complied by within the company. Communication by the senior management therefore plays a central role. However, two of the questions mentioned above have to be treated in more detail:

i) Are there Processes in Place to Track Business-Related Competitor Contacts?
This mainly refers to the kind of reporting system based on which employees are required to report each contact with a competitor, indicating certain information details (date, time, location, participants, topics discussed, etc.), via the reporting tool. Initially, a procedure as described sounds reasonable and is likely to raise the employees' awareness regarding the risks linked to competitor contacts. However, the disadvantage in this case is an enormous increase in red tape, which is likely to considerably affect the efficiency of those sales organisations that already today complain about the ever increasing administrative burden.

The amount of effort involved might be among the reasons why it appears that only very few companies have decided to implement reporting systems as described. Ideally, the assessment of a compliance programme should not be made dependent on that.

ii) Is the Company Following a Clearly Communicated Policy and Corresponding Guidelines on Document Destruction and Obstruction of Justice?
This issue is of major significance in those jurisdictions where the destruction of documents and evidence is sanctioned as an obstruction of justice, which is the case in jurisdictions influenced by Anglo-American legal systems in particular. Many other jurisdictions do not know the legal institution of 'obstruction of justice' in this form. Corresponding guidelines, which at the same time are to be appropriately communicated, would not bring about any noteworthy added value.

However, it is in any case absolutely recommendable to have a procedure in place based on which so-called document freeze orders (or freezing injunctions) by a court or a competition authority are handled properly and are implemented promptly upon receipt by the company.

b) Culture of Compliance

The central pillar of each compliance programme is a serious and unexceptional culture of compliance communicated by the senior management. Only if a clear and unambiguous expectation to observe all antitrust rules and regulations is communicated to all employees, and is also emphasised by a 'walk the talk' attitude, can all the other elements of a compliance programme prove their effectiveness. This tone from the top needs to be repeated at regular intervals and needs to clarify that participation, no matter of what kind, in hardcore violations for whatever reasons will not be tolerated ('zero tolerance policy'). As a result, appropriate sanctions need to be imposed for relevant violations. Only then will the underlying culture of compliance be taken seriously by the employees.

From a procedural perspective, the company's compliance culture is not only based on the antitrust-related compliance programme, but also on the overall corporate compliance programme. This includes potential business conduct guidelines and all other policies and procedures that are set out to ensure compliant behaviour in the market. All these rules need to be incorporated into the company's daily operational business and properly communicated to all employees.

c) Responsibility for the Compliance Programme

There has to exist a clear responsibility regime and governance ownership for all compliance issues within the company. Typically, this lies with the compliance department under the lead of a Chief Compliance Officer. The latter needs to be vested with a sufficient degree of authority and, ideally, maintain a direct reporting line to the CEO or CFO of the company, irrespective of whether he or she also reports to the general counsel of the company at the same time.

In any case, the compliance department needs to be equipped with all financial and human resources required to execute all training and communication measures necessary. The employees in the compliance department need to have an appropriate degree of seniority with regard to their hierarchical placement within the overall company structure.

Another criterion refers to the question of whether the members of the compliance department are responsible for nothing else than compliance issues, or whether compliance covers only part (maybe a minor part) of their overall tasks (known as the zebra function). This will most certainly be more critically looked at in large corporations and multinational conglomerates, whereas in smaller enterprises, depending on the size, it cannot be expected that all the employees responsible for compliance will take charge of compliance issues only.

d) Risk Assessment

One of the central elements of each compliance programme refers to the development of company-specific risk management. This second pillar is aimed at detecting potential wrongdoings within a company's line of businesses. Its core is the individual antitrust risk exposure assessment, which, among other things,

is to be evaluated with regard to its methodology and granularity. It also needs to cover all business areas and must be aimed at distinguishing between various levels of risk for the various lines of business at a global level.

The results of the antitrust risk assessment have to be analysed and incorporated into the training programme.

There are two other important issues. Firstly, there is the question whether and to what extent the resources involved are allocated to the various levels of risk. Secondly, there has to be a recurrent risk assessment process, which is not limited to presenting selective snapshots. Rather, this regular process should take into account new technological and other developments within the company's businesses, and should be reflected in updates and other 'lessons learned'.[16]

e) Training and Communication

Another central pillar besides risk management is the overall complex of company-wide antitrust training, which should take place on a periodic basis (typically every two to three years).[17] In this case, each company needs to decide how to most effectively develop its training system based on its individual situation. Generally, one can differentiate between more widespread training measures covering a broad audience and focusing on the basics only. Web-based training sessions, which can be rolled out company-wide, are a good solution here.

Then there is in-person training for specially defined target groups that, for example, are exposed to a higher antitrust risk (in particular, sales and service personnel, employees who have flexibility to set prices or are responsible for tender proceedings, etc.) or who are active in high risk areas. In order to ensure a proper tone-from-the-top communication, in-person training also needs to be provided to all senior management levels on a regular basis.

Depending on the content and, of course, the respective individual situation in the company, the training should be tailored to the employees' duties, their involvement in operational business and the antitrust risks based on the specific nature of the day-to-day business. The content of the training materials should be reviewed and updated according to legal, technological or other developments (e.g. a change of antitrust enforcement practice).

Proper documentation is also an integral element of the training concept, i.e. who the participants were, how the training was perceived by the audience, whether an evaluation was conducted, the extent to which the training had a measurable impact on the audience.

Finally, the DOJ expects senior management to make sure that internal disciplinary

16 See US Department of Justice Criminal Division, Evaluation of corporate compliance programs (updated June 2020), p. 2 ff. Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed April 20, 2021].

17 The DOJ criminal division guidance of June 2020 has even increased the focus on training programmes; see ibid, p. 5.

sanctions for any relevant wrongdoing, e.g. the termination of a labour contract, will be properly communicated, in order to demonstrate that the company does not compromise if it comes to compliance. This aspect also relates to both the corporate compliance culture and the managerial tone from the top.

Multinational corporations have to make sure that the basic elements of their compliance policy are complied with in all the relevant countries. Therefore, in terms of communication, a company has to convey its compliance policy to all employees and across all the countries that the company has subsidiaries in.

Many companies have specific business conduct guidelines that all employees, and especially all newly hired employees, have to take notice of and (ideally) should confirm, in writing, (on a regular basis) that they have read and understood the content and that they comply with these guidelines.

f) Periodic Review, Monitoring and Auditing

As already mentioned above in more specific contexts, an antitrust compliance programme, like any other corporate compliance programme, needs to undergo a continuous evaluation and improvement process that should not only be limited to a snapshot in time. Companies should implement a regular monitoring and auditing process to ensure that the antitrust compliance policy is observed by all employees throughout all hierarchy levels. Periodic auditing measures should contain spot checks and unannounced audits. This should include a review of (nowadays mostly electronic) documents and communications of selected employees.

g) Reporting

Another integral element of an antitrust compliance programme is an information and reporting mechanism to enable employees, as well as persons from outside the company, to report potential antitrust violations on an anonymous and confidential basis. The company has to ensure that reporting a potential antitrust violation does not lead to any kind of retaliation. Such reporting lines can be installed, for example, by implementing internal whistleblower hotlines or by retaining a law firm to serve as an ombudsman.

h) Incentives and Discipline

A system of incentives and discipline is a key element of any antitrust compliance programme in order to demonstrate that the company's management is committed to its compliance policy and that it does not tolerate antitrust violations. If talking about incentives, this usually means negative incentives as a deterrence factor.

The guidelines further ask whether there are incentives for employees to live up to the standards of the compliance programme. However, offering incentives for compliant behaviour may be difficult to implement because it cannot be proved whether an antitrust violation has occurred until it has been discovered. Therefore, negative incentives such as disciplinary measures applied in case of any serious

antitrust violations may be a more effective move. This may include a reduction of bonus payments down to zero due to the fine to be paid by the company, transfer to another position or even the termination of the labour contract.

i) Remediation and Role of the Compliance Programme in the Discovery of the Violation

Although the DOJ acknowledges that even the best compliance programme cannot prevent every violation, it is crucial how the company handles the situation once a violation has been detected. In order to receive credit for an effective antitrust compliance programme, remedial efforts and improvements of the programme should be conducted to at least try to prevent another antitrust violation. This includes a comprehensive review of the various elements of the existing compliance programme following the antitrust violation to find out about potential deficiencies of the programme.

Of special importance for the prosecutors will be the way in which a company reacts to the detection of a violation. Two major aspects relate to whether the company applied for leniency voluntarily and without undue delay, and whether the company was fully cooperative in the event of an official investigation. In that respect, it is recommended to have a corporate policy in place for full and voluntary cooperation and disclosure.

## How to Translate the DOJ's Nine Elements into the Antitrust Compliance Programme of a Specific Company

a) General Aspects and Necessary Efforts

The implementation of an antitrust compliance programme that includes all nine elements and criteria mentioned here requires considerable efforts even at first glance. In addition to the implementation and maintenance cost for the required compliance department,[18] there are further material and immaterial costs, such as management attention, time expenditure on the part of employees within the framework of necessary training, etc.

b) One Size Does Not Fit All

Against this background, it becomes obvious that the requirements for an effective compliance programme in a large or multinational company will differ significantly from requirements for small or medium-sized companies.

Therefore, all the elements in the DOJ's updated guidance can be regarded as best practices for an effective antitrust compliance programme. However, the DOJ has rightly pointed out that, in addition to these best practices, the individual situation of the company concerned always has to be taken into account when assessing the effectiveness of the programme. That is why the questions and listed

18 At Siemens, for example, the disclosure of violations of anticorruption laws has led to an expansion of the compliance department to a total of about 650 full-time Compliance Officers during the peak stage. Before that, the department employed roughly 60 people, of which most performed their compliance tasks in addition to their regular business-related responsibilities.

elements must not be considered a stringent checklist. It is much more decisive for each company to be identified through a number of different characteristics that must be assessed individually concerning the respective legal infringement, and also for the requirements of an investigation to be adapted to the individual circumstances in a company.[19]

By applying these criteria in connection with the above mentioned specific elements to the overall assessment, a prosecutor should be able to take the individual specifics of a company into consideration.

## Conclusions and Outlook

### Leniency Programmes and Rewards for Compliance Programmes as Incentives

The further expansion of antitrust compliance programmes, especially in small and medium-sized undertakings, will also largely depend on whether and to what extent an adequate balance can be found between the general incentives for the implementation of such programmes and the manifold burdens as a result thereof.

For large and, in particular, multinational companies with sufficient financial power, the implementation of not only an antitrust programme but also a corporate compliance programme goes without saying, whereas the situation is entirely different for small and medium-sized undertakings. This holds especially true for companies with limited financial strength. Therefore, rewarding effective compliance programmes in place could be an important factor in finding this balance.

### Role and Cooperation of National Competition Authorities

The implementation of leniency programmes initially resulted in a clearly higher number of cartel disclosures. This rise was triggered by the enormous increase in fines on the one hand, and by the possibility to be granted full immunity for the first leniency applicant, and therefore be exempted from paying a fine.

However, the number of leniency applications has been declining recently, especially in Europe. The underlying reasons are the subject of much discussion. One explanation would be a declining number of cartels, since leniency programmes, in combination with stricter international enforcement and prosecution efforts, have led to the settlement of most cartels of the past.

Secondly, it is obvious that the disadvantages linked to a cartel investigation as a result of a leniency application have become ever more complex and difficult to handle over time, even for the leniency applicant. This involves the investigation procedures

19 The US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020), p. 1. Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed September, 12 2020] for example, has listed the following non-exclusive criteria meant to enable an individual case-by-case evaluation: (i) the size of the company, (ii) the industry involved, (iii) the geographic footprint, (iv) the regulatory landscape, (v) and other factors, both internal and external to the company's operation.

as such, which have become more complex and time-consuming, while also being less predictable and controllable, not to mention political implications and instrumentalisations. In addition, considerable management attention is required, to say nothing of the increased cost of legal counsel. Furthermore, the efforts of the legislative as well as of the competition authorities to facilitate claims for damages might play a major role, since there are only limited privileges for the leniency applicant.[20]

Against this background, the reward for an effective antitrust compliance programme has to be seen as a move to better balance out the advantages and disadvantages of how to handle a situation when a company finds itself involved in a serious antitrust violation. Such a reward can also incentivise the implementation of an earnest compliance culture and full cooperation with the regulators in case of an antitrust violation.

The antitrust authorities realised long ago that the aforementioned incentive systems for companies in the area of antitrust compliance should be maintained and, ideally, expanded, as they would form an essential foundation for their own successful work.

It is also of high importance to improve cooperation among antitrust authorities in order to harmonise and align the procedural rules in the area of antitrust enforcement and leniency in order to reduce the complexity and the partial inconsistencies that still make it difficult to handle investigative proceedings on a cross-border level from a company perspective. The ideal platform for this harmonisation would be the International Competition Network on a global level, and the European Competition Network at EU level.

In this respect, an important step has just recently been achieved by the new ICN Guidance on Enhancing Cross-Border Leniency Cooperation.[21] These guidelines are aimed at harmonising the practices of competition authorities in multi-jurisdictional cartel investigations, in order to increase the effectiveness of global enforcement activities and to reduce disincentives for leniency applicants.

20 See the Directive on representative actions for the protection of the collective interests of consumers, as agreed upon by the EU institutions end of June 2020. Legislative train schedule, Area of Justice and Fundamental Rights, *Representative actions for the protection of the collective interests of consumers - a new deal for consumers*. Available from: https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-representative-actions-for-consumers [Accessed April 20, 2021].

21 See ICN Cartel Working Group, *Guidance on enhancing cross-border leniencycooperation*, June 2020. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf [Accessed April 20, 2021].