

# Topical Questions About Rewards for Compliance Programs

## II Visegrád 4 Competition Law Conference

Budapest, 5 February 2018

Dorothy Hansberry-Bieguńska  
Partner, Hansberry-Tomkiel

JUDr. Zuzana Šimeková PhD, LL.M  
Partner, Dentons Europe CS LLP

Ondřej Dostal  
Head of Competition Compliance Unit, ČEZ, a.s.

dr. Zoltán Hegymegi-Barakonyi, LL.M.  
Partner, Baker & McKenzie

# Different approaches by competition authorities to promote compliance

---

- Providing a 'template' or framework for antitrust compliance programs (Australia, Canada, Japan, Netherlands)
- To 'endorse' or 'certify' a particular program meeting criteria (Brazil, Korea)
- Guidance tailored to Small and Medium Enterprises (the UK and Canada )
- Possibility of penalty reduction (UK, Italy, France, Chile, Malaysia, Singapore, Hungary)
- Companies may be required to give an undertaking (at the enforcement stage) to implement a compliance program (Canada, South Africa)

# Compliance credit

---

Compliance credit is a controversial topic:

”The best reward for a good compliance strategy is not to infringe the law.”  
- Joaquín Almunia, Brussels, 25 October 2010

Hungary (GVH Vj-29/2011 and Vj-74/2011): compliance with competition laws is the obligation of undertakings; a compliance program is not a mitigating factor.

## Compliance credit (cont'd)

---

US Sentencing Guidelines: grants a possible reduction in a fine if a convicted corporation had in place, at the time of the infringement, an effective compliance and ethics programme.

(US Sentencing Guidelines §8C2.5 (f) Effective Compliance and Ethics Program)

For two decades DOJ had refused to consider a company's compliance programme as mitigating factors in antitrust infringements.

In U.S v. Kayaba Industry Company: DOJ has recommended a lower fine in the face of evidence that companies took culture- changing efforts to improve their compliance programmes for the future.

(United States v. Kayaba Industry Co, No. 1:15-cr-00098-MRB (SD Ohio 5 October 2015))

# Credit for Compliance Programmes Available in Cartel Cases (Jan. 2017)<sup>1</sup>



<sup>1</sup> Whether specified in legislation or in practice as a mitigating circumstance.

<sup>2</sup> For criminal cases only.

<sup>3</sup> If introduced after infringement ended.

## Compliance credit (cont'd)

---

Compliance credit for pre-existing and/or an ex-post compliance program

Objectives of an effective compliance program (Conseil de la concurrence, Framework-document, 2012):

- Prevent the risk of committing infringements and
- Provide the means of detecting and handling misconducts that have not been avoided in the first place

# Elements of credible and effective (“robust”/“adequate”) compliance programs

---

- Senior management's commitment
- Appropriate (material and personal) resources
- Policies & procedure
- Training and information
- Monitoring, auditing and reporting
- Consistent disciplinary procedures and incentives
- Periodical review of the program

# Warning and compliance under Hungarian Competition Act (since 2015)

---

“No-fine” infringement decision for SMEs:

- warning as a specific sanction [§ 78 (8)], accompanied with
- a requirement to introduce an internal procedure to prevent future infringements [§ 76 (1) I]

So far applied in consumer protection cases only, therefore, no guidance on what kind of antitrust compliance program is appropriate for SMEs.



# GVH Notice no. 11/2017 on setting the fine in antitrust cases (effective as of 01/01/2018)

---

## Fine reduction for compliance programs as a form of co-operation

Fine reduction for pre-existing compliance programs:

- up to 7% if proved that the infringement discontinued due to the compliance program, and no senior official was involved in the infringement
- up to 10% if proved that the compliance program contributed to acquiring previously unknown evidence or evidence with significant added value (but no leniency application is required)

# GVH Notice no. 11/2017 on setting the fine in antitrust cases (cont'd)

---

Fine reduction for ex-post compliance programs:

up to 5% provided that introduction of compliance program is accompanied with participation in a leniency program, a settlement procedure and/or pro-active compensation

GVH will consider the offered compliance program appropriate if “meets the internationally accepted minimum standards”

[http://ec.europa.eu/competition/antitrust/compliance/compliance\\_programmes\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/compliance_programmes_en.html)

## Reference materials on compliance


This page contains reference materials on compliance submitted by both business organisations and national competition authorities, including templates and examples of compliance programmes. More documents may be added as available. The purpose of making these documents available here is to increase awareness about compliance efforts.

Disclaimer: The contents of these documents have been provided by external parties. The opinions expressed are those of the author(s) only and should not be considered as representative of the European Commission's official position. Neither the European Commission nor any person acting on behalf of the Commission is responsible for the use which might be made of the following information.

### Business organisations

- BUSINESSEUROPE: [Business compliance with competition law](#). November 2011
- International Chamber of Commerce (ICC), [Toolkit for SMEs](#), Why complying with competition law is good for your business, 2015
- International Chamber of Commerce (ICC), Commission on Competition: [Antitrust Compliance Toolkit](#), Practical antitrust compliance tools for SMEs and larger companies, 22 April 2013
- International Chamber of Commerce (ICC): [Compliance as an antitrust law enforcement tool](#) 
- International Chamber of Commerce: [Promoting antitrust Compliance: the various approaches of national antitrust authorities](#) . April 2011
- The Chief Legal Officers Round Table (CLO) compliance working group: [CLO Compliance Blue Print](#) , endorsed by the ICC. July 2010

### National competition authorities

- Autorité de la Concurrence: [La prévention des infractions: les programmes de conformité aux règles de concurrence](#), February 2012  
Framework document (available in [French](#) and [English](#)) and brochure ([French](#) and [English](#)) 
- Office of Fair Trading (OFT): [Guidance on competition compliance](#), June 2011

# GVH Notice no. 11/2017 on setting the fine in antitrust cases (cont'd)

---

Fine reduction for ex-post compliance programs (cont'd)

The Notice explicitly mentions the need for:

- public and unambiguous commitment of management to the program,
- proper personal material resources,
- appropriate action for internal information and training,
- appropriate monitoring and control mechanism, including sanctioning of a serious infringement and
- continuing development of the program based on regular review

# GVH Notice no. 11/2017 on setting the fine in antitrust cases (cont'd)

---

## "Failure" of a compliance program as aggravating factor

During an investigation it comes to the knowledge of GVH that a compliance program (which was imposed on the undertaking by a GVH decision within the past 10 years)

- earlier revealed the current infringement, BUT
- *"the responsible decision makers did not make some measures, at least to cease the infringement"*

It leads to a higher score in the category of "culpability" as one of the aggravating factors when calculating the fine (no specific percentage is defined in the notice)

# GVH Notice no. 11/2017 on setting the fine in antitrust cases (cont'd)

---

## Compliance vs. statutory informant program [§ 79/A]

Informant reward under Hungarian Competition Act since 2013 (1% of fine)

Since 1 January 2018, informant is not eligible for reward if he/she reports an alleged infringement to the GVH instead of using an internal whistleblowing system of a company operating a proper compliance program.

Therefore, GVH encourages employees to use whistleblowing of internal compliance programs (if they work properly).

# Compliance programs and credits in the Slovak Republic

- **Lack of clear legislative basis** and guidance on compliance programs and compliance credits leaves the room for the Slovak competition authority to consider allocation of potential compliance credits at its discretion:
  - Slovak antitrust regulations do not explicitly recognize compliance programs,
  - There is no legal mechanism for awarding compliance credits.
- Despite the legal gap, there is a **room for maneuver**:
  - The methodology for imposing fines in antitrust infringement prescribes that it is always necessary to take into account “specific circumstances” in order to maintain the objective of imposing fines
  - Individual factors for imposing fines must be in every case perceived as interconnected and in the mutual context
- It is not legally excluded that compliance program **may in individual case be taken into account** by the Slovak competition authority

# Slovak case law on compliance credits

- No relevant pool of precedents on compliance credits: limited in number and outdated:
- In its decision from 2009, the Slovak competition authority stated that **compliance program cannot represent mitigating factor in relation to imposing a fine** or in relation to the infringement itself
- Unofficially presented opinion of the Slovak competition authority is that the compliance program **may** in fact **represent an aggravating factor** in relation to establishment of the amount of the fine:
  - Implementation of the compliance program establishes an assumption that all employees are duly trained in antitrust compliant behavior and therefore the infringement could have occurred as a consequence of deliberate actions



# Effectiveness of compliance programs

- Despite the lack of clear regulation in Slovakia, compliance programs are **essential part of prevention** of antitrust infringements and even without a direct recognition of credits, mitigate indirectly potential negative consequences and potential amount of fine
- Practical experiences show that this is particularly the case where compliance programs are **effectively implemented**:
  - regularly and at all levels,
  - opt for an optimal choice of compliance tools, e.g. audits, trainings, mock dawn-raids,
  - learnings are then reflected in compliance policies.
- Raising awareness of the antitrust rules in the undertaking connected with the right internal and external policy settings may **mitigate the risk of infringements** and consequently potential fines by a high percentage

## QUESTIONS WORTH 10 % OF TURNOVER

---



- Can a company follow rules that it does not know?
- Can a company be sure that its employees, sales representatives, trade partners or even independent third parties do not involve it in breach of competition law?
- Can a company be sure that a breach of competition law is more lucrative than its own competition efforts?
- Can a company be guaranteed no duty to compensate a breach of competition law?



# NO

That is why competition law  
compliance matters!

# REWARDS FOR COMPETITION LAW COMPLIANCE PROGRAMS IN THE CZECH REPUBLIC?

---



- Competition Compliance Programmes (CCPs) and rewards for them not recognized by Czech law
  - Theoretical possibility of taking into account circumstances of an offence
- Czech Competition Authority
  - does not grant reduction in fine for operation of a CCP
  - issued a 2004 Guide promoting CCPs
  - recognizes potential educational role of CCPs
  - active in national discussion on practical benefits of CCPs
- Czech Compliance Association (<http://www.czech-ca.cz>) co-founded by ČEZ promotes importance of CCPs for fair business making, focus on prevention of competition law offences
- Efforts by leading CZ law firms for recognition of CCPs in calculation of fine

# SOME QUESTIONS ON REWARDING COMPETITION COMPLIANCE PROGRAMMES I.

---



- Does „simple adherence“ to law deserve a reward+even if interrupted by an offence?
- What are the benefits of CCPs for society and competition authorities justifying reduction of fine (e.g. prevention, resource savings, earlier detection,...)?
- *Food for thought: Are undertakings exerting genuine (+failed) efforts for competition law compliance any less deserving reward than leniency or settlements applicants?*
  - *Reflection of reality principle: difficulties in detecting cartels=leniency vs difficulties in promoting adherence to largely non-intuitive, not generally well-known, complex competition law=reward for effective CCPs?*

# SOME QUESTIONS ON REWARDING COMPETITION COMPLIANCE PROGRAMMES II.

---



- How does one prove genuine/utmost/effective effort for competition law compliance?
  - What is the minimum/optimum level of CCP effort required for reduction of fine?
- What part(s) of CCP operation should be rewarded? – simple introduction vs sincere and dedicated operation (education, prevention, detection, mitigation, monitoring,...) vs only detection of a breach and reporting to a CA?
- How does one prove that an offence reported to competition authority was detected thanks to CCP which therefore should be rewarded?

## Poland

- The Polish Competition Act does not provide for a reduction of fines for companies that have adopted a compliance program.
- The Competition Authority's Fine Guidelines do not include, as a mitigating factor leading to a lower fine, the adoption of a compliance program.
- To our knowledge, the Authority has not reduced a fine as a result of the adoption of a compliance program.
- There are no announced plans to introduce a measure to reduce a fine because of having carried out a compliance program.
- Currently, the Competition Authority is focused on learning about possible violations of the Competition Act from leniency applicants and whistleblowers.

## **Issues raised by a Competition Authority reducing a fine because a company adopted a compliance program**

- Should the absence of adopting a compliance program lead to a higher fine? If so, is that fair?
- What if the compliance program uncovers a competition violation and the company did not cease its participation quickly or at all?
- What if the compliance program uncovers a competition violation and the company did not report the violation to the Competition Authority?
- What if a manager, who has been instructed in a compliance program, is at the time or later directly involved in a violation? Is that an aggravating factor that could be used against the individual and/or the company?
- If a Competition Authority considers the adoption of a compliance program to be desirable, what steps can it take to ensure that all companies, large and small, have access to a suggested compliance manual?



# Conclusions (?)

---

Compliance credit (FOR WHAT EXACTLY?)

Failure / abuse of compliance programs (SHOULD BE SANCTIONED?)

Promoting / encouraging compliance (IN WHAT WAY?)

There is no “one size fits all” program (Conseil de la concurrence, Framework-document, 2012):

Compliance programs benefit from being tailored to suit each company's particular situation in terms of risks and individual characteristics, depending on (i) size, (ii) activity and markets and (iii) organization, governance and culture.

# Further information on compliance

---

<https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/>

[http://ec.europa.eu/competition/antitrust/compliance/compliance\\_programmes\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/compliance_programmes_en.html)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477592/SME\\_Compliance\\_Checklist.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477592/SME_Compliance_Checklist.pdf)

[http://www.autoritedelaconcurrence.fr/doc/framework\\_document\\_compliance\\_10february2012.pdf](http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf)

[http://gvh.hu/en/compliance/compliance\\_main](http://gvh.hu/en/compliance/compliance_main)

---

Thank you for your attention

Questions?