



ICN Cartel Working Group Sub-group 1 Webinar

Compliance in Cartel Cases - II

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Speakers:

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ICN Cartel Working Group

Compliance Programs in Cartel Cases: The Italian Experience

Alessandra Tonazzi

Director, European and International Affairs
Italian Competition Authority (ICA)

7 April 2021

Public Enforcement and Compliance

- From the perspective of companies, an effective compliance program allows to reduce the risks of an antitrust violation and, thus, of the likelihood of antitrust fines: in Italy, up to 10% of the turnover
- From the perspective of a public Authority, what are the benefits?
 - ✓ compliance program are relevant in the context of the so called 'positive general prevention' to promote a culture of widespread competition
 - ✓ they complement the 'negative prevention' based on deterrence and sanctions
- Particularly relevant in Italy, business structure mainly composed by SME
 - ✓ ICA's Guidelines for setting fines (2014): the adoption and effective implementation can be recognized as a mitigating factor (max 15%)
 - ✓ ICA's Compliance Guidelines (2018) provide concrete indication on how to file the request and the criteria used in their assessment

Low Awareness in SMEs

- “Are you aware of the compliance program template adopted by the national business association in 2016?” from a [2018 survey](#) conducted by Linklaters

Question	YES	NO
Businesses with more than 50€ turnover	83.8%	16.2%
SMEs	16.7%	83.3%
Trade associations	58.3%	41.7%

The Framework (1/2)

- Compliance programs as a mitigating factor in the sanctioning decision
 - The reward consists of a reduction of the basic amount of the sanction
- A system of three reward thresholds (up to 15%, 10% and 5%) based on the **adequacy** and **effectiveness** of the compliance programs and on the timing of its adoption (before or after the opening of the investigation)
 - Balancing certainty and discretion

The Framework (2/2)

- Transparency: in 2018 the ICA issued a Guidance on antitrust compliance programs, after three year of experience and a public consultation process (30 contributions)
- The Guidance does not provide a “template” but the main elements to be tailored to the nature, size and market position of the undertaking
 - Competition as a value of the corporate culture
 - Definition, assessment and management of antitrust risk
 - Definition, implementation and monitoring of incentive scheme and training program

Main Principles for the Assessment

- “Cosmetic” compliance programmes are not considered
- A compliance program is deemed to be manifestly inadequate in the case of
 - serious deficiencies in the content of the compliance programme;
 - absence of evidence of the effective implementation of the programme;
 - involvement of top management in the infringement

Compliance Programs and Leniency

- How to deal with cases eligible for leniency? The most debated issue...
- Compliance and leniency, risks of conflicting incentives: if the 2nd leniency applicant (50%) may qualify for 15% → total 65% discount may discourage the leniency race
- The decision to submit a leniency implies several risks for the company (private enforcement and criminal sanction in bid rigging cases), only partially considered by the current framework
- In the past, the ICA took into account: (a) the type of the offence in assessing compliance programs (see also TAR Lazio: a 5% discount «is not illogic nor disproportionate» in a bid rigging case); (b) the timing of the leniency application (I808-FM4, leniency 1 year after the adoption of the program, 10% for compliance)

Compliance Programs and Leniency

- According to the Guidelines: 15% discount only if the company applies «*for leniency before the Authority conducts inspections*» (otherwise, 5% if the program is amended)
 - ✓ Reward for the company ethical commitment
 - ✓ Wider policy objectives: without a leniency application, the conduct may continue
- *Other possible benefits*: in public procurement procedures, the finding of a violation may be a ground for exclusion (Article 57, Directive 2014/24/EU and Article 80, para. 5, Legislative decree no. 50/2016).
 - Companies may still be permitted to participate if they can provide evidence that adopted “self-cleaning” measures”, including effective compliance program (see AS1474, Authority anticorruption Guidelines no. 6)

The ICA Practice (2015 - March 2021)

The AGCM examined antitrust compliance program in 18 cases (13 anticompetitive agreements; 5 abuses).

Rigorous approach

- 9 cases: the ICA granted a discount between 5-10% (only in one case 15%)
- 4 cases (anticompetitive agreements): discount granted to some parties and rejected to others
- 5 cases: rejected

Example 1

- In two bid-rigging cartels in tenders for forest fire fighting services (Case I806, February 2019), four companies submitted a compliance program but only two received a reduction of the sanction.
- Two companies adopted a compliance program ex novo (between the opening of the investigation and the sending of the Statement of Objections - SO) but they were not considered effective because, following the adoption and implementation of the program, these companies continued to participate in the cartel; as a result, no reward was granted.
- Another company also adopted an ex-novo compliance program (drafted by an external consultant) and ceased its cartel conduct (the date of the last evidence of its conduct coincides with the date of receiving the program); the AGCM granted a 10% reduction.
- The fourth company has had a programme in place since 2015 but it was considered by the AGCM not effective due to its participation to the cartel activities; however, after the opening of the investigation, its programme was amended substantially and it obtained a 5% reduction in sanction.

Example 2

- In a cartel affecting the sector of corrugated cardboard sheets and corrugated cardboard packaging (Case I805, July 2019), 17 companies (including the relevant trade association) submitted a compliance programme for the first time
- It was deemed in line with the Guidelines (i.e., it was sent before the SO and with evidence of implementation) and therefore the AGCM granted a 5% reduction as a mitigating factor.
- Two companies belonging to the same group improved their pre-existing programmes and obtained a 15% reduction in sanction due also to their key role as leniency applicants

Conclusion

- **The approach set out in the Guidelines is overall well-balanced and has been appreciated by stakeholders intervening in the public consultation. They may hopefully represent a valuable work tool for SME and a way to spread the antitrust culture**
- **The Guidelines accompanying report specify that the Guidelines are not intended to lay down ‘once and for’ all the ICA position. Some aspects may be eventually refined on the basis of the experience gained.**

Thanks for your attention!

Alessandra.tonazzi@agcm.it

Competition Law Compliance

Making it effective and fun

April 2021



What is Competition Law Compliance?

Helps to:

- educate and keep undertakings on the right side of competition law;
- protect businesses against anti-competitive conduct;
- to spot anti-competitive behaviour; and
- know what to do in the event of suspected anti-competitive activity.

Need not be difficult and overcomplicated though



Compliance Officer

Culture of compliance from top to bottom

Design individually

Market specifics & Business needs

Analysis and risk assessment

Monitoring and review

Implementation and training

Planning and development

8 Steps for a Competition Law Compliance Programme

Step 1

Step 2

Step 3

Step 4

Step 5

Step 6

Step 7

Step 8

START

FINISH



9 Tips for Successful Compliance

8
8. Report any suspected anti-competitive behaviour immediately

7. Training and monitoring of compliance ongoing and the competition compliance programme reviewed regularly

6
6. Management & Staff to sign declarations re understanding and training in competition law compliance

9
9. Seek legal advice if there is any uncertainty or doubt



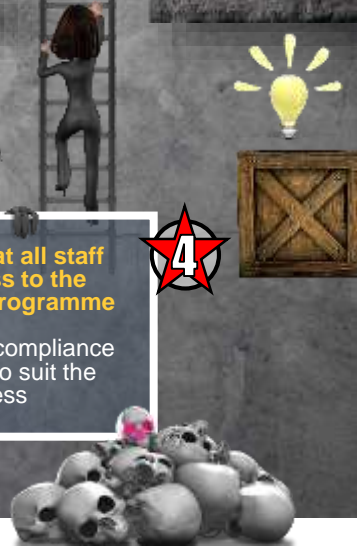
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1. Ensure that the identity of the Compliance Officer is known to all staff

2
2. Ensure that the Compliance Officer has an open door policy

5
5. Give training to all staff on the compliance programme

4
4. Ensure that all staff have access to the compliance programme

3. Design the compliance programme to suit the business



Value Competition Law Compliance

Our Guide:

<https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/Your-Business-and-Competition-Law-How-it-Helps-What-you-Need-to-Know.pdf>

Competition and Consumer Protection Commission

Ireland

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ICN CWG WEBINAR on “COMPLIANCE IN CARTEL CASES - II”

7th April 2021



Index

1. Origins of the CNMC's Antitrust Compliance Programmes Guidelines ("Compliance Guide")
2. Objectives of promoting a compliance policy
3. Effective compliance programmes. CNMC's Compliance Guide evaluation criteria
4. CNMC's Compliance Guide: Incentives



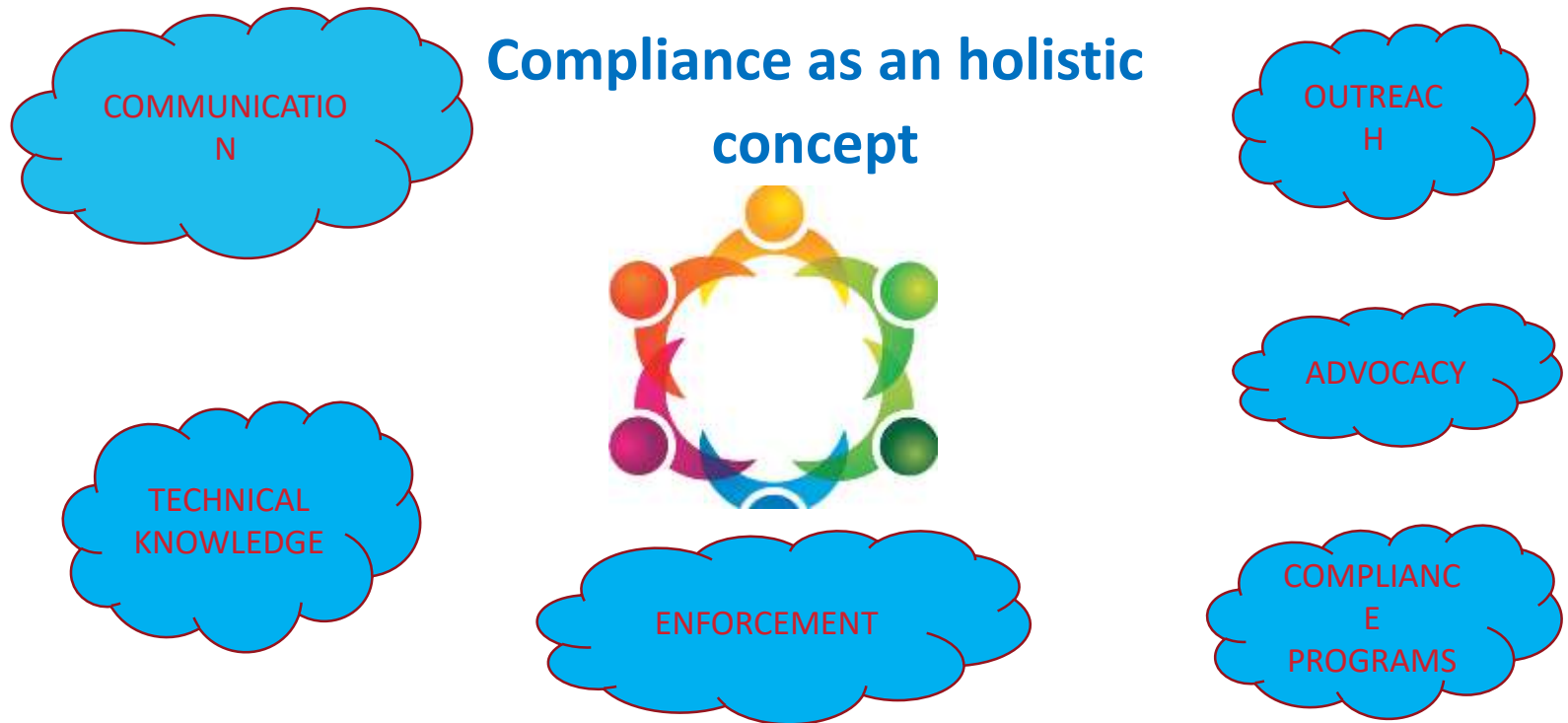
- ❖ Intense public-private collaboration through the "**Compliance Dialogues**" and the "**Compliance Space**" since 2016.

- ❖ Introduction of different initiatives in relation to compliance in the CNMC's **action plans** since its constitution.
i.e. 2017 Plan: "Role of Compliance Programs (CP) to "reduce, anticipate and correct" anti-competitive behavior".

Elements that reinforced the debate on compliance

- **Proliferation of CP display in cases** (ie. Automobile Manufacturers in 2015, International Removals in 2016, Stevedores de Vigo in 2018, Vaillant Technical Assistance in 2019, among others).
- Impact of the **exemption provided for in article 31 bis of the Criminal Code**
- Future implementation of the ***Whistleblowing Directive***
- **Positive international trend** around the recognition of CP by antitrust authorities (new initiatives in the **US, Italy, the Netherlands...**), compared to the traditional "*Kokott doctrine*" of *DGCOMP*.
- **Exemption of the prohibition on contracting: Self-Cleaning measures:** Article 72.5 of Law 9/2017 on Public Sector Contracts (transposition of Article 57.6 of the European Public Procurement Directive)  **CNMC** *Decision of March 14, 2019, expt. S / DC / 0598/2016, on Railway Electrification and Electromechanics.*

Objectives of promoting a compliance policy



Objectives of promoting a compliance policy

- **Boosting ad-intra enforcement of competition rules, and raising compliance awareness of the Spanish Competition Act** through implementation of CPs by firms (free of charge for the CNMC): **Δ training (ad intra) → Δ awareness → Δ prevention → Δ detection (ad intra) → Δ enforcement → Δ deterrence → more intrusive detection: the firm, unlike the market, is a control environment.**
- Impact of the future implementation of the **Whistleblowing Directive – management of internal complaints.**
- **New technologies impact:** big data and new search technologies enable a **more active, less expensive and more effective control** not only by firms, but also an ex ante and ex post control by the CNMC concerning effective compliance activities (e.g. certified control audits)

CNMC's Compliance Guide evaluation criteria:

Introduction

- ✓ **First draft: Early February 2020**

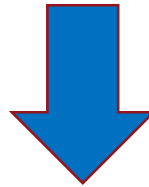
- ✓ **Public consultation process during the month of February 2020.**
 - Consultations received:
 - Compliance professionals and their associations
 - Competition law practitioners and their associations
 - Public bodies and several regional competition authorities

- ✓ **Guide publication: June 2020**



CNMC's Compliance Guide evaluation criteria: Introduction

- ❖ Analysis of the criteria on a case-by-case basis
- ❖ Depending on the characteristics of each company:
 - Size / resources
 - Risk exposure



The company bears the burden of proof to demonstrate the effectiveness of its CP

CNMC's Compliance Guide evaluation criteria: Evaluation criteria

The criteria of the Guide reflect the common bases of both national and international CP analysis.

- ❑ Tone from the top / Involvement Managers
- ❑ Independent Compliance Officer
- ❑ Risk Map & Matrix
- ❑ Effective Training
- ❑ Reporting channel
- ❑ Whistleblowing procedures
- ❑ Disciplinary regime



CNMC's Compliance Guide evaluation criteria: **Involvement of managers**

- **Crucial role** of managers in the **design and implementation** of compliance culture.
- **Key managers:**
 - Legal representatives
 - De jure or de facto administrators
 - The ones with powers of organization and control

* **Importance of incentive**

design

Direct involvement of key manager



Presumption of ineffectiveness
(case by case assessment)



CNMC's Compliance Guide evaluation criteria: **Compliance officer**

Autonomy and independence

Ability to **report directly** to the management body (presumption of effectiveness)



The company's staff, within the scope of their functions → **the first control barrier**

The compliance officer is not a policeman, but a **collaborator**

CNMC's Compliance Guide evaluation criteria: **Risk map and control matrix**

"Risk map" → Identify, analyze and assess risks (in each company, in each unit).



"Control matrix" → protocols and mechanisms for prevention, detection and early reaction to risks.



Measurable and verifiable instruments



Constant updating



New violations



New Risks



CNMC's Compliance Guide evaluation criteria: Effective training

- ❖ **Basic pillar** of any CP: critical for the effectiveness of the rest of the CP elements (involvement, reporting channel, controls, etc).
- ❖ **Training adapted** to the field of activity and the functions of the employee/manager.
- ❖ The training should be assessed in relation to **close collaborators** (partners, distributors, major suppliers, etc.).

Training should be:

Accesible

Measurable

Adaptable

Verifiable



CNMC's Compliance Guide evaluation criteria:

Reporting Channel

WHISTLEBLOWING Directive

- ➔ Protection against retaliation
- ➔ Internal advice mechanisms
- ➔ Preferably anonymous



Deterrent and detection potential



CNMC's Compliance Guide evaluation criteria: **Whistleblowing procedures**

Internal, transparent and predetermined mechanisms that facilitate the collaboration with the compliance officer, being able to:

- **Warn** about **suspicious** or **findings of infringements**.
- **Develop a procedure** for handling complaints
- **Protect whistleblowers**



Internal advice accessibility in case of doubt

CNMC's Compliance Guide evaluation criteria:
Disciplinary Regime



Disciplinary measures that punish

+

Incentives that reward (carrot and stick)



Predictable and transparent measures

* Including dismissal. STJS CAT 11 December 2019

STRUCTURE

❖ **Ex-Ante Programs**

4.1.1. Cartel Infractions

- 4.1.1.A. Leniency application
- 4.1.1.B. No leniency application

4.1.2. Non-Cartel Infractions

- 4.1.2.A. Collaboration in detection and investigation
- 4.1.2.B. Other cases

❖ **Ex-Post Programs**

Commitment to implement or significantly improve a pre-existing CP

CARTEL INFRACTIONS

EX ANTE Compliance Programs

- Leniency application

- ✓ Beneficiary of:



- IMMUNITY REDUCTION

- ✓ Recognition of the effectiveness of the CP in the CNMC decision accordingly (i.e. self-cleaning measures: exemption prohibition on contracting)

- No leniency application

- Adjustment of the fine due to attenuating circumstances (collaboration) under article 64.3 LDC

NON-CARTEL INFRACTIONS

EX ANTE Compliance Programs

- Collaboration in detection and investigation
 - ✓ Adjustment of the fine due to attenuating circumstances under article 64.3 LDC, and may even reach exoneration
 - ✓ Recognition of the effectiveness of the CP in the CNMC decision accordingly (i.e. self-cleaning measures: exemption of the prohibition on contracting) → *CNMC Decision Estibadores Vigo*
- Other cases (acknowledgement of facts, immediate termination of conduct, remedies)
 - ✓ Adjustment of the fine due to attenuating circumstances under article 64.3 LDC
 - ✓ Recognition of the effectiveness of the CP in the CNMC decision accordingly (i.e. self-cleaning measures) → *CNMC Vaillant*

EX POST Compliance Programs

- Plan to design a CP or to improve any ex-ante CP as soon as possible (and in any event before the proposal for resolution)
- Modulation of the sanction as mitigating liability (collaboration) under article 64.3 LDC



Statement by representatives certifying implementation or improvement of the CP → within 6 months from decision / commitments decision

CNMC's Compliance Guide: Reactive measures of the CP that will determine its effectiveness

1. **Bringing the infringement to the attention** of the CNMC (leniency and other cases): very significant evidence of the CPs effectiveness
2. **Active and effective collaboration**
3. **Acknowledgement of the facts**
4. **Immediate termination of the conduct**, on a voluntary basis and from the outset
5. **Adoption of remedies**, on a voluntary basis and from the outset

THANK YOU!

www.cnmc.es



Effective Compliance Program and the Role of JFTC

- Law enforcement and advocacy for initiatives taken by enterprises related to competition law compliance are “*a pair of wheels*” in competition policy.
- Compliance program as a “*tool for controlling and avoiding risks*”
- The inclusion of *3Ds* is indispensable for ensuring the effectiveness of competition law compliance.
 - I. *Deterrence*: Prevention acts in violation of competition law through compliance manual, in-house training, legal consultation system, internal disciplinary rules, rules concerning contacts with other competing enterprises
 - II. *Detection*: Verification and an early discovery of acts in violation of competition law through audits, internal reporting system, in-house leniency policy
 - III. *Damage Control*: Appropriate response to an act in violation of competition law through decision making at the initiative of top management, active use of leniency programs, contingency manual, internal probe



Compliance In Cartel Cases: U.S. Perspective

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Office

Disclaimer: The views expressed herein do not necessarily reflect those of the Department of Justice.

Spectrum of Compliance Benefits

- Preventing the misconduct
- Prompt detection facilitating Leniency Application
- Potential resolution by Deferred Prosecution Agreement (DPA)
- Potential sentencing credit (fine reduction)
- Avoiding Probation or a Compliance Monitor

United States v. Barclays (2015):

- **Culture of compliance:** “dramatic steps” “to change its corporate culture and instill a new attitude toward compliance and good corporate citizenship.”
- **Risk assessment:** Conducted a global review of its risk and control programs, which was “truly comprehensive,” “detailed,” and “extensive;”
- **Remediation:** Separated its legal and compliance functions from its business functions, and implemented an “expanded effort to monitor [its employees’] electronic communications”

United States v. Kayaba (2015):

- **Tone from the top:** “Direction for this change came straight from the top—KYB’s president”
- **Design and Comprehensiveness:** approval & certification
- **Training and Communication:** tailored to the needs of senior management and sales personnel
- **Remediation:** “management committed to instituting policies that would ensure that it would never again violate the antitrust laws.”

United States v. Inoac Corp. (2017)

- **Design and Comprehensiveness:** internal controls & pre-approval
- **Tone from the top:** direction for this change came straight from the top.
- **Responsibility for Compliance:** established a compliance office and appointed a chief compliance officer who reports directly to the board of directors; each regional compliance manager is paired with an outside counsel versed in domestic compliance laws.
- **Monitoring and Auditing:** The compliance office conducted unannounced and unscheduled audits, during which emails and documents will be searched.

Resources

- Antitrust Division Compliance Guidance: [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#)
- Speech: [Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs](#)
- [Antitrust Division Manual Chapter III](#)
- Justice Manual: [JM 9-28.000](#) Principles of Federal Prosecution of Business Organizations



Perspectives from Hong Kong on Competition Compliance

Charlotte Ho

Head (Investigations I), Hong Kong Competition Commission

ICN CWG SG1 Webinar on 7 April 2021

The information in this presentation represents
the views and opinions of the speaker only and is
only for participants' reference.

HKCC's efforts and measures to promote competition compliance

A. Enforcement Actions

B. Enforcement Policy Requirements and Incentives

C. Advocacy



A. Enforcement Actions

I. IT industry case (2020)

- Infringement Notice and Commitments
- Tribunal orders on Compliance

II. Hospitality industry case (2021, ongoing)

- Infringement Notices and Commitments



A. Enforcement Actions

I. IT industry case (2020)

- 2 IT companies (Nintex and Quantr)
- Engaged in an anti-competitive exchange of commercially sensitive price information → amounted to price fixing
- Single incident / tender of small amount
- Infringement Notice (IN) + Commitments, requiring them to:
 - Admit liability; and
 - **Take steps to strengthen their competition compliance programmes at its own cost**

*Effective competition compliance program should be **tailored to the specific business, and be appropriate to its size and functions.***



A. Enforcement Actions

I. IT industry case (2020) (con'td)

- One IT company (Nintex) accepted the IN and Commitment, the other (Quantr) did not.
- HKCC filed a case against Quantr in the HK Competition Tribunal, **seeking remedies which included an order that Quantr adopt certain compliance measures**
- Tribunal Ordered: **staying of proceedings on condition that the Quantr adopted particular compliance measures**
 - 1st instance in HK where the Tribunal has granted an order relating to the adoption of competition compliance measures



A. Enforcement Actions

I. IT industry case (2020)

- The IT companies concerned were small-sized.
- Compliance measures required include:
 - i. Circulation of the Infringement Notice and the HKCC's training materials to its staff and authorised resellers,
 - ii. Adoption of a competition compliance policy, in the form of a written statement signed by its directors, indicating their personal commitment to compliance with competition law and that competition law compliance is the responsibility of all staff and a key requirement of its resellers,
 - iii. Attendance of the HKCC's training sessions by its staff and authorised resellers.



A. Enforcement Actions

II. Hospitality industry case (2021, ongoing)

- 6 hotel groups and 1 tour counter operator
- Facilitators of price-fixing cartel in relation to sale of tourist attraction tickets sold at premises of the hotels
- Cooperation
- Infringement Notices + Commitments, requiring:
 - Admission of liability
 - **Take steps to strengthen their competition compliance programmes at its own cost**



A. Enforcement Actions

II. Hospitality industry case (2021, ongoing)

- For 5 larger hotel groups: Requirement to appoint an **“Independent Compliance Advisor” (ICA)**:
 - **Conduct a Compliance Review** to identify the internal inadequacies of the operations which gave rise to the relevant contravention, and to provide advice and propose rectifying measures to minimise their risk of engaging in similar anti-competitive conduct in future.
 - **Produce a Compliance Review Report** setting out findings and recommendations
 - **Produce Annual Reports x2** setting out status of implementation
- For the remaining 2 parties, compliance requirements similar to those for Nintex and Quantr in the IT case.

Effective competition compliance program should be tailored to the specific business, and be appropriate to its size and functions.



B. Enforcement Requirements and Incentives

I. Leniency Policies (revised in April 2020)

- Express requirement for the leniency applicant to “[...] *continue with, or adopt and implement, at its own cost, a corporate compliance programme to the reasonable satisfaction of the [HKCC]*”.

II. Cooperation & Settlement Policy (April 2019)

- A similar requirement on undertakings cooperating and settling with the HKCC in return for reduction of recommended pecuniary penalties and other benefits

III. Policy on Recommended Pecuniary Penalties (Jun 2020) (“RPP Policy”)



B. Enforcement Requirements and Incentives

III. RPP Policy (Jun 2020)

- 4-step approach in calculating recommended fines:
 - Step 1 – Determining the base amount
 - **Step 2 – Making adjustments for aggravating, mitigating and other factors**
 - Step 3 – Applying the statutory cap
 - Step 4 – Applying any cooperation reduction
- The HKCC takes into account an undertaking's compliance programs as a mitigating factor under Step 2.
- Compliance could be considered as mitigating if an undertaking demonstrates *“a clear and unambiguous commitment to competition law compliance throughout the organisation and that steps were taken, appropriate to the size of the business, to achieve this.”*



C. Advocacy

- Competition law in Hong Kong very young
 - Competition Ordinance only became effective in **Dec 2015**
- Unlawful conduct was previously lawful
- HKCC engaged in multipronged advocacy programme
 - a) Outreach to trade associations
 - b) TV, Radio, Digital, Outdoor advertising
 - c) Hour long seminars to business and trade associations
 - d) Publish materials e.g. *“How to comply with the Competition Ordinance”*



C. Advocacy

Lawyers Training (Oct 2020)

- 12-hour training programme for lawyers in firms that advised on commercial, regulatory and/or white collar crime but lacked competition expertise
- 4 x 0.5 days (3-hour session each), delivered remotely
 - 6 hours underlying principles of competition law
 - 6 hours implementation of **compliance programmes** and responding to investigations
- Session taught by:
 - Staff in the investigation and legal teams
 - Executives
 - NGAs (on compliance)



Thank you!



Website: <https://www.compcomm.hk/>

Email: international@compcomm.hk



Online resource portal:

<https://www.compex.org/en/index.php#>



Canadian Treatment of Compliance Programs in Cartel Enforcement

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April 7, 2021

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The Road to Corporate Compliance Program Credit in Canada

Canada a relatively early adopter of “positive” approach to compliance in cartel enforcement as reflected in compliance guidance, immunity/leniency programs and agency statements

September 2010 – Canada updates its Corporate Compliance Programs Bulletin reflecting public consultations and 2009 amendments

- Corporate compliance programs *may influence* the Bureau's choice of a compliance response

Bureau subsequently chooses to formalize its treatment of compliance programs in subsequent revisions to Corporate Compliance Programs Bulletin

Requirements - Corporate Compliance Programs

June 2015 – Canada introduces formal credit in revised Corporate Compliance Programs Bulletin

- “We believe this will be an important tool that will help us to increase compliance by rewarding companies with existing credible and effective compliance programs and encouraging companies without such programs to put one in place.” – John Pecman (former Commissioner of Competition), 25 November 2014
- Revised Corporate Compliance Programs Bulletin set out the benefits for companies that put in place and maintain “credible and effective” competition law compliance programs, as well as the basic elements of such programs.
- Potentially significant benefits BUT requirements are stringent based on Bureau description of what qualifies as “credible and effective” = no free lunch !
- Nature of credit – Bureau can take into account in considering:
 - how to proceed against companies and in making its recommendations to Crown in criminal matters, including recommendations on the fine that should be imposed
 - the magnitude of remedy to seek with respect to non-merger reviewable matters.

Requirements - Corporate Compliance Programs

Major areas of potential impact

- Criminal sentencing and civil remedies
 - Criminal Matters
 - When the Bureau is satisfied that a compliance program in place at the time the offence occurred was credible and effective, the Bureau will treat the program as a mitigating factor when making recommendations to the PPSC in conjunction with an application under the Bureau's Leniency Program.
- Choice of civil or criminal track (cartels and deceptive marketing practices)
- Due diligence defence (deceptive marketing practices)
- Consent agreements/non-contested resolutions (including prohibition orders in criminal matters)
- Treatment of management involvement in breach
 - Where management participated in, condoned or were wilfully blind to conduct breaching the *Act* – aggravating factor in leniency BUT program can still be considered if corporate due diligence can be established and individuals rogue.
- Importance of compliance risk in third party activity (trade associations)

Application to Prosecution – Competition Bureau

Leniency in Sentencing

- Competition Bureau Immunity and Leniency Programs Bulletin (March 2019)
- The Bureau's recommended fine to the Director of Public Prosecutions is informed by numerous variables, including ***any credit to be given for the existence of an effective corporate compliance program*** and ***the value of the leniency applicant's cooperation*** to the Bureau's investigation.

Recommended fine = Base fine +/- (net effect of aggravating and mitigating factors) - leniency cooperation credit

Requirements - Corporate Compliance Programs

Credible

- A program must demonstrate the company's commitment to conducting business in conformity with the law

Effective

- The program 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 of contravening the law and the harm it may cause to the Canadian economy

Corporate Compliance Bulletin sets out detailed summary of elements of credible and effective programs

- Mix of prescription and recommendations

Requirements - Corporate Compliance Programs

A ***credible and effective*** compliance program has ***seven*** basic elements:

1 – Management Commitment and Support

Management's clear, continuous and unequivocal commitment and support is the foundation of a credible and effective corporate compliance program.

2 – Risk-based Corporate Compliance Assessment

A thorough assessment of the potential risks faced by a company will allow it to properly design compliance strategies that address those risks.

3 – Corporate Compliance Policies and Procedures

A corporate compliance program should be tailored to the operations of a business and establish internal controls that reflect its risk profile.

Requirements - Corporate Compliance Programs

4 – Compliance Training and Communication

A credible and effective corporate compliance program includes on-going training and communications focusing on compliance issues for staff at all levels who are in a position to potentially engage in, or be exposed to, conduct in breach of the Act.

5 – Monitoring, Verification and Reporting Mechanisms

Monitoring, verification and reporting mechanisms are vital to the success of any corporate compliance program.

6 – Consistent Disciplinary Procedures and Incentives for Compliance

Consistent disciplinary actions as well as appropriate compliance-related incentive plans demonstrate the seriousness with which the business views conduct in breach of the Act and its commitment to compliance.

7 – Compliance Program Evaluation

A program's ability to deliver its core objective must continuously be assessed. It is also necessary to monitor new developments regarding the Acts and business activities to determine their impact on the program

Reflections

1. **Practical difficulty in meeting “credible and effective” standard ?**
2. **Limited (but not zero) examples of compliance credit to date in criminal cases**
3. **Impact of Canadian bifurcated cartel enforcement model ?**
4. **Deployment in domestic vs. international cases ?**

Thank You

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Compliance in Cartel Cases – II

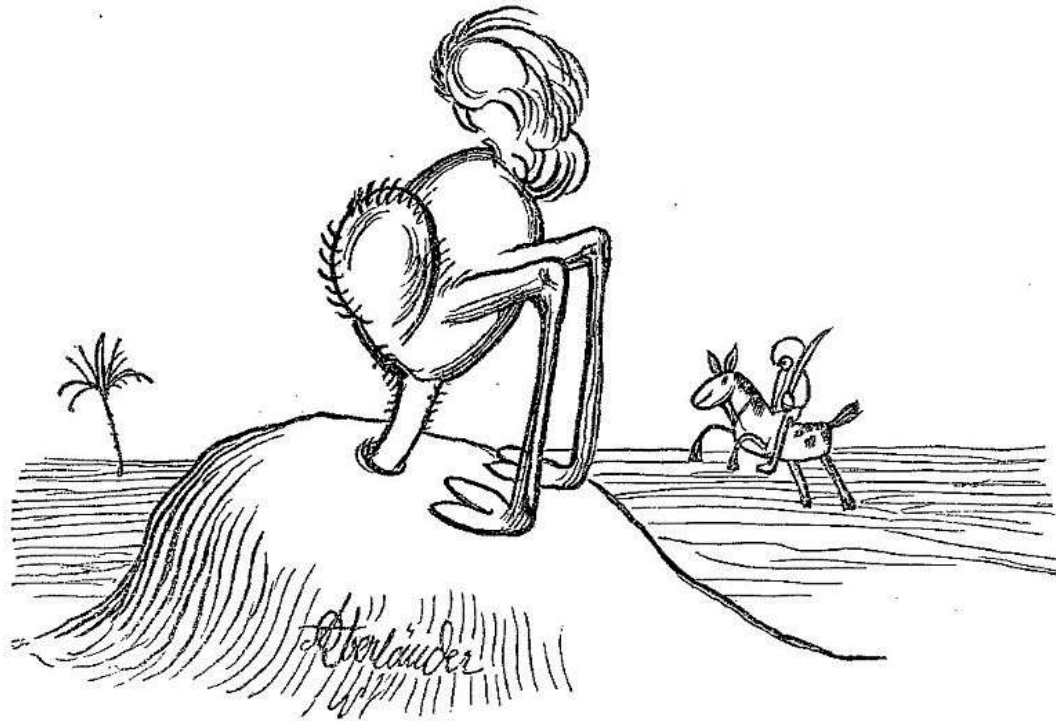
Private Practice Insides

ICN Cartel Working Group – SG1
7 April 2021

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GERMANY HUNGARY ITALY POLAND ROMANIA SLOVAKIA SPAIN TURKEY

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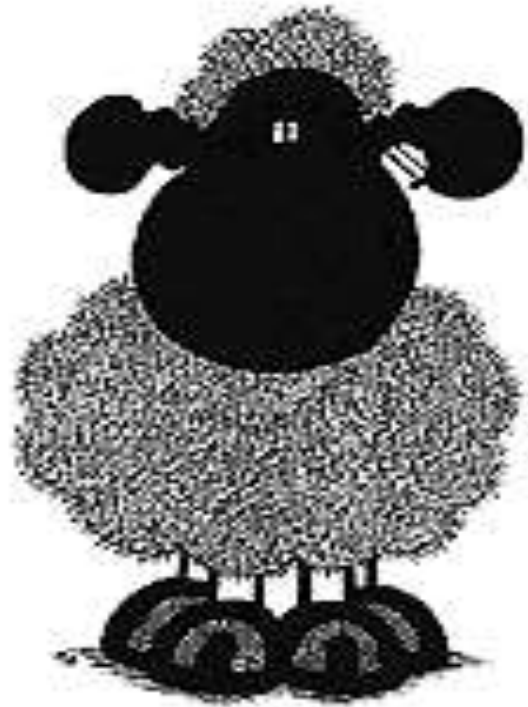
COMPANIES' TYPICAL APPROACH



08.04.2021

Folie 72

WHY COMPLY?



08.04.2021

Folie 73

BLACK SHEEP DESPITE COMPLIANCE PROGRAM

BUT WE HAD A COMPLIANCE PROGRAM!

**NO WAY BEING BIG BROTHER IS
WATCHING YOU ALL THE TIME...**

**THE WHOLE INDUSTRY ALWAYS
FUNCTIONED THIS WAY.**

WHY COMPLY?

**„If you think compliance is
expensive,
try non-compliance.”**

(Source: former U.S. Deputy Attorney General Paul McNulty)

COMPLIANCE PROGRAMS AS A MITIGATING FACTOR OF FINES



08.04.2021

MINIMIZATION OF RISK



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RISK ASSESSMENT



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OLD FASHIONED COMPLIANCE ...



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OUTDATED FRONTAL LECTURES



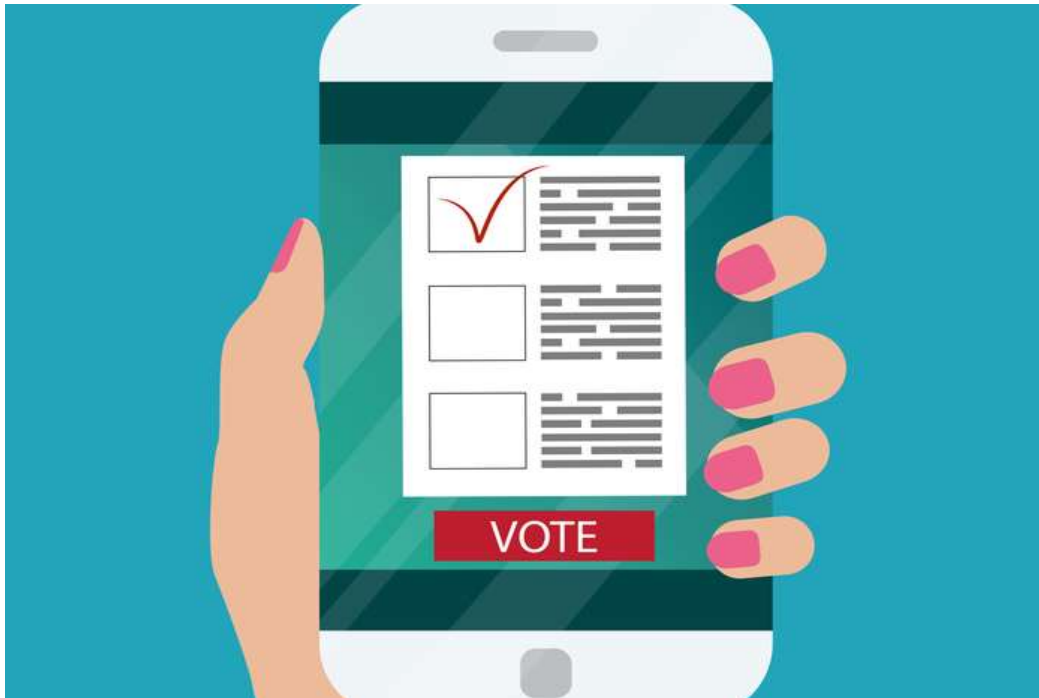
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WORKSHOP



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ENGAGEMENT OF TRAINED PERSONNEL



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VIDEO CLIPS



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QUIZ



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SHORT DO'S & DON'TS



Do's



Don'ts

INTERNAL WHISTLEBLOWER HOTLINES



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INTERNAL LENIENCY PROGRAMS



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BUSINESS ONLY WITH COMMITTED THIRD PARTIES



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CONTRACTUAL PENALTIES



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NO UNILATERAL RECIPE



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MOCK DAWN RAIDS



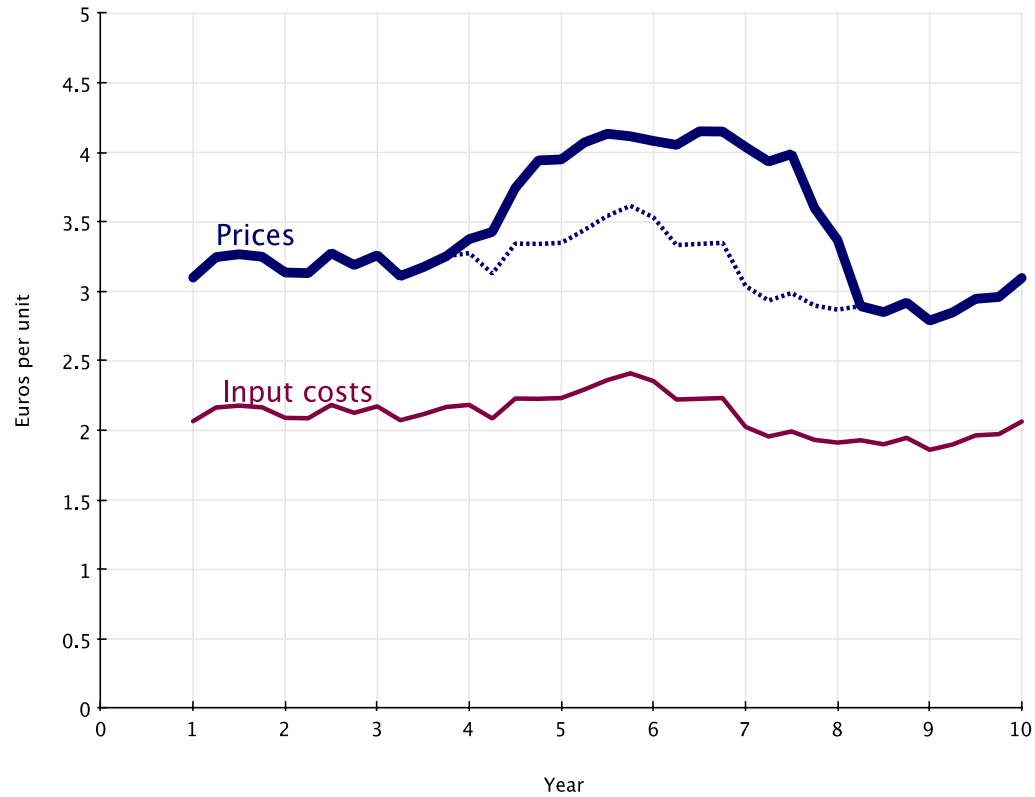
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COMPLIANCE OFFICER



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SCREENS



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MONITORING TOOLBOX



- Regular sample interviews
- Random check of Emails (10 of the last 100) as far as data protection rules allow (or get the ok)
- 360° Reviews with focus on compliance
- Link bonus and variable income on compliant

HOW TO REACH SMES BEST?

TRADE ASSOCIATIONS – CARTEL FACILITATOR



08.04.2021

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