

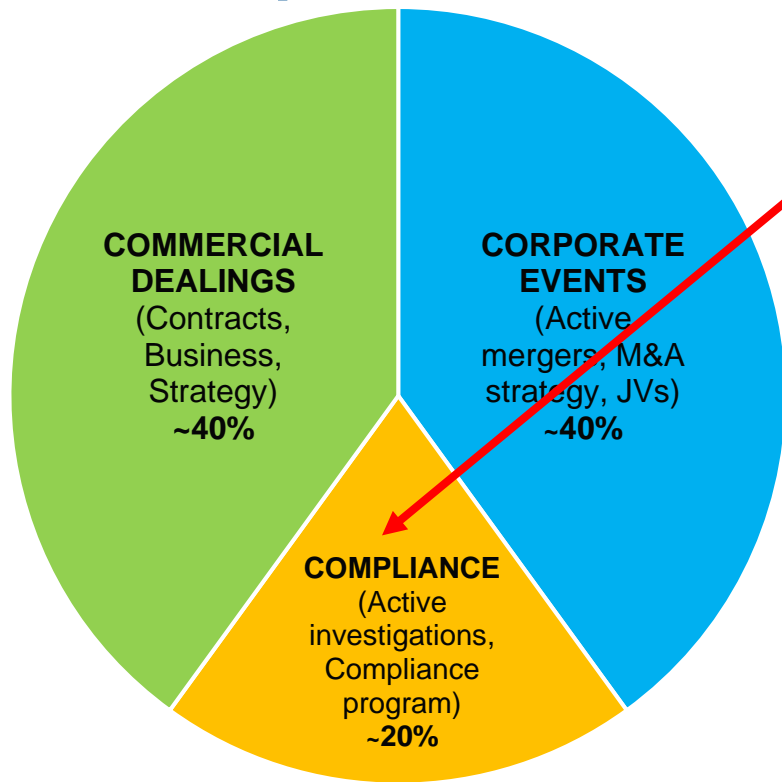
# **Compliance in Cartel Cases: a Practical Perspective**

International Competition Network - Cartel Working Group

5 December 2018

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## What Competition Law is *in practice*



Competition Law Compliance is:

- one of many compliances (anti-bribery, export control, privacy, etc.)
- a cost
- an *investment* cost (as opposed to active legal cases)

## Cartel Laws are Clear?

Hub & Spokes: “indirect contact between competitors via their common supplier is no different in substance from two competing retailers sitting across a table and telling each other what their prices will be next week” (UK Competition Appeal Tribunal in *Tesco*)

Price Signaling: “these companies have been making regular public announcement price increase intentions through press releases” (EU Commission in *Container Liner Shipping* case)

Pricing algorithms under focus: “Companies can’t escape responsibility by hiding behind a computer program” (EU Commissioner Vestager)

Even a single discussion between competitors is sufficient to trigger a cartel (*T-Mobile Nederlandse* judgment of 2009)

Even bilateral pre-pricing discussions are hard-core violation (*Bananas* judgment of 2015)

Strict liability, even if employee acts contrary to senior management’s instructions (*VM Remonts* judgment of 2016)

# Then, Which Compliance Program?

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AkzoNobel

## Speak Up!

Our Code shows what we stand for and how we behave. We encourage you to let us know if you think it is being breached.

AkzoNobel has defined a set of Core Principles by which it conducts its business. These Core Principles underpin our culture of Safety, Integrity and Sustainability. Our [Code of Conduct](#) and [Business Partner Code of Conduct](#) define and explain these Core Principles and how they apply in daily practice to our employees and business partners.

### How to raise a concern

Openness and honesty is something we value highly at AkzoNobel. We foster an

AkzoNobel introduced in 2000 an **Internal Amnesty Program**:

- after having expanded through a series of acquisitions; and
- having been caught in several cartels through its relatively autonomous divisions

=> it took XX years and it cost €XXM, but it saved €XXM in fines and damages

# Value of Compliance Programs: Authorities Do Change Their Minds

(103) On the other hand, the fact that a company has received from Hilti, in particular, for interim measures, the fact that Hilti initiated a permanent undertaking in 1987 by its objections and concerns of the Commission (that undertakes a permanent undertaking in 1987 by its objections and concerns of the Commission) will not be considered as an attenuating circumstance<sup>15</sup>. Nor will the setting-up of a compliance programme be considered as a valid argument.

L'Autorité entend toutefois souligner qu'elle estime désormais que l'élaboration et la mise en œuvre de programmes de conformité ont vocation à s'insérer dans la gestion courante des entreprises, tout particulièrement lorsque celles-ci sont de taille conséquente. Les engagements portant sur la mise en œuvre de tels programmes de conformité n'ont par suite, pas vocation, de façon générale, à justifier une atténuation des sanctions encourues au titre des infractions au droit de la concurrence, tout spécialement s'agissant d'infractions d'une particulière gravité telles que les ententes et échanges d'informations sur les prix futurs et la politique commerciale (V. en ce sens, point 464 de la [décision n° 17-D-20 du 18 octobre 2012 relative à des pratiques dans le secteur des revêtements de sols résilients](#)).

Compte tenu de ce qui précède, le document-cadre du 10 février 2012 est retiré.

European Union:

- 1988 EC decision of (*Hilti*)
- VS**
- 2012 EC brochure (*Compliance Matters*)

France:

- 2012 framework-document on non-rebuttal procedure and compliance programs
- VS**
- 2017 notice on settlement procedure and compliance programs

# A proposal: Compliance Program as Fine Reduction for Cooperation

## Antitrust: reduction of fines for cooperation

The European Commission has found that ARA breached EU antitrust rules by preventing competitors from entering the Austrian market for the management of household packaging waste between 2008 and 2012 ([press release](#)). The fine was reduced under the Commission's 2006 [Fining Guidelines](#) because ARA offered to cooperate in the proceedings.

This document explains this cooperation and how it can be applied in other antitrust cases. However, this would still need to be assessed on a case by case basis.

### Different type of cooperation than in commitment and cartel settlement cases

In antitrust cases other than cartels, there is currently limited practice for rewarding cooperation by the parties in a prohibition decision (Article 7 Regulation 1/2003).

When:

- Acknowledgement of facts and liability;
- Evidence collection;
- Procedural rights waiving; and/or
- Remedy offering

Which non-cartel cases so far:

- *ARA* (2016), abuse, 30% reduction
- *Facebook/WhatsApp* (2017), merger, unknown percentage
- *Consumer electronics* (2018), verticals, 40 to 50% reduction

# Proposal is incentive for overall enforcement

- Compliance intended and fine-discount-awarded as Cooperation:
  - If non-cartel cases can constitute Cooperation, so can a compliance program
- Legislative framework already available:
  - E.g., EU Fining Guidelines
  - ICN Member Authorities already adopting it
- A compliance program, not any compliance programs:
  - Not the “mere existence of a compliance program”
  - Authority is “not obliged to grant a reduction”
  - Case-by-case
- Deterrence *a contrario*: Incentive!
  - For leniency programs
  - For compliance programs
  - Most importantly: This is where cartel enforcement is heading

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