

The strategies of antitrust compliance in the current economic-legal panorama

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OVERVIEW

- Opposite views regarding Antitrust Compliance Programmes (ACP)
- Antitrust compliance programmes in the experience of European and overseas Competition Authorities
- Compliance matters: minimum and optimal contents

Purpose of the adoption of Antitrust Compliance Programmes for companies

Prevent the commission of antitrust infringements

Facilitate the discovery and identification of anti-competitive conducts

Make the Management and employees aware of the importance of antitrust discipline

Effectiveness of antitrust compliance programmes: opposite views



W. Wils

*Antitrust Compliance Programmes &
Optimal Antitrust Enforcement*



B. Geradin

*Antitrust Compliance Programmes
& Optimal Antitrust Enforcement: A
Reply to Wouter Wils*



The opinion of the European Commission (W.Wils)

Positive Effects

Can lead to an infringement being reported to the competition authorities

Can lead to an on-going antitrust infringement being terminated

Can prevent the occurrence of antitrust infringement

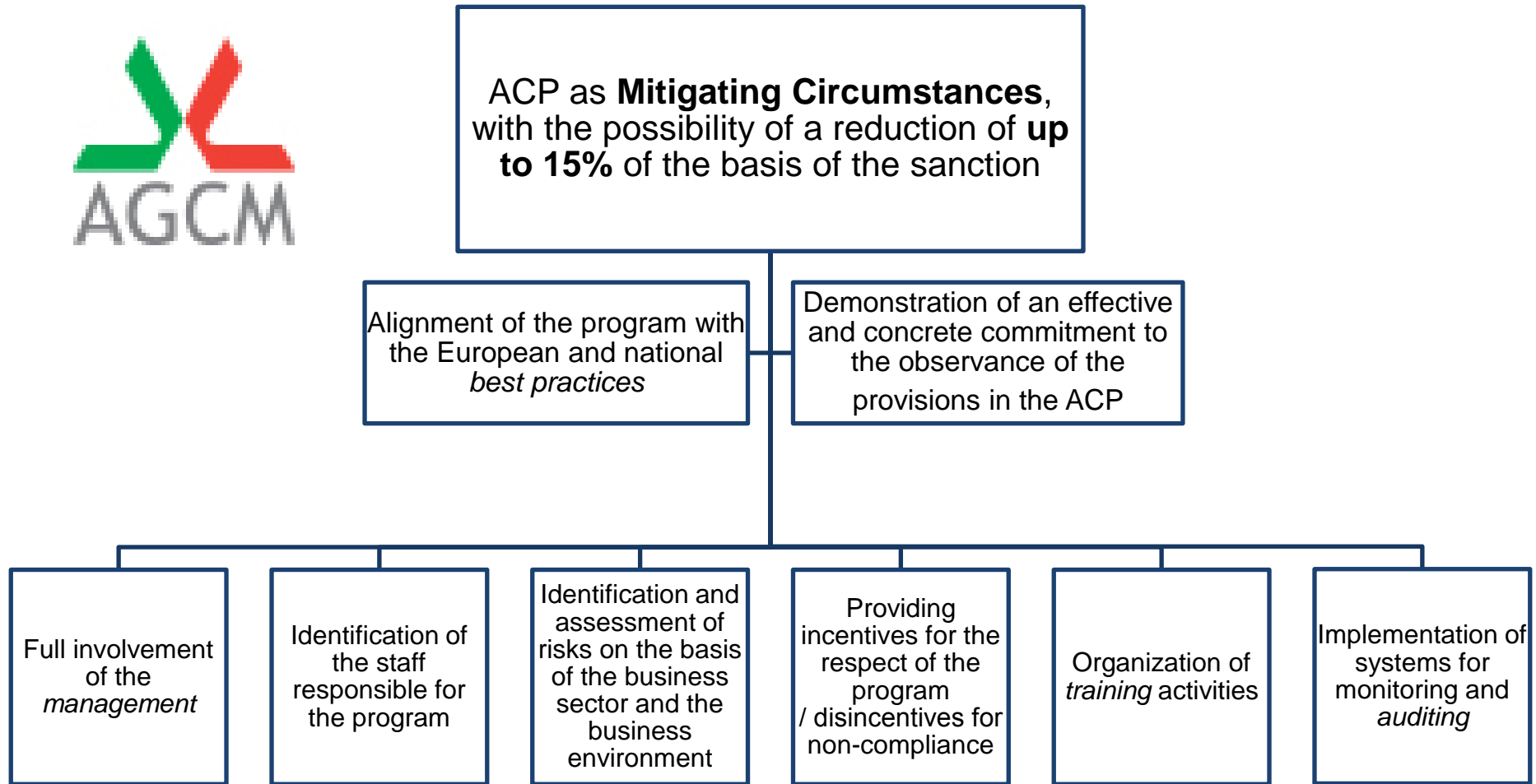
Negative Effects

Perverse learning effects (greater knowledge of the problem and how to move around it)

The Company, instead of reporting the infringement, it conceals or destroys its evidence

- There is not any empirical evidence indicating that generally the positive enforcement effects of antitrust compliance programmes outweigh the negative enforcement effects
- Application in four business models: the adoption of ACP is not a sufficient condition for a real compliance (absence of antitrust infringements)
- Real Compliance:
 1. Adoption of ACP
 2. Modulation of the incentives set for Management
 3. Exemplary behaviour by the company's leading individuals
 4. Wider corporate culture
- Adoption of Antitrust Compliance Programmes should not determine immunity or reduction from fines (EC - Compliance Matters)

An innovative approach: Guidelines of the ICA on the quantification of sanctions – 22 October 2014



Importance of Antitrust Compliance Programs for the European authorities and overseas

	Existence of Guidelines	FINE	
		Immunity	Reduction
European Commission	✗	✗	✗
CMA (UK)	✓	✗	✓ *
Autorité de la Concurrence (France)	✓	✗	✓ **
AGCM (Italy)	✗	✗	✓ ***
US	✓	✗	✗
Canada	✓	✗	✓

* Fine reduction up to 10 % on the ground of "adequate steps having been taken with a view to ensuring compliance"

** Reduction of up to 10 % for companies that , during the process of settlement , does not have an ACP at the time of issuance of the statement of objections , but who undertake to introduce it

*** Reduction in the base of the sanction up to 15%.

The progress of the companies: the options provided by the ICC Antitrust Compliance Toolkit

Foundation elements of the programme

1. Embedding an antitrust compliance culture and policy

- Recognize that your company faces antitrust risks associated with its activities and objectives;
- Consider how your company can set out antitrust standards all employees must meet when doing business;
- Get business leaders to show personal support actively for ethical business practices.

2. Compliance organization and resources

- Nominate a suitably **senior individual** to oversee the implementation of the antitrust compliance programme;
- Make sure they can and will report to highest levels of management;
- Decide how to involve subject matter experts to develop policies and/or guidance.

3. Risk identification and assessment

- Decide how to identify antitrust risks and trend, ideally as part of your general risk management process;
- Consider what controls are needed to manage, minimize or eliminate the risks identified;
- Share the insights of the assurance process and scope for improvements with senior management.

4. Antitrust compliance know-how

- Tailor antitrust know-how guidance to the risk profile and needs of the company;
- Decide on the best way to deploy interactive training and updates.

The progress of the companies: the options provided by the ICC Antitrust Compliance Toolkit

Reinforcement of an existing programme

5. Antitrust concerns-handling systems and investigations

- Embed a successful reporting culture that supports timely reactions and fair outcome;
- Consider the merits of appointing an **external** provider to act as a **"hotline"**.

6. Internal investigations/due diligence and disciplinary action

- Consider the most efficient way of investigating potential concerns (time may be of the essence);
- Devise a simple but effective way of dealing with individuals who violate company policy.

7. Antitrust certification or incentives

- Think about asking employees to certify their understanding and commitment to compliance requirements;
- Consider compliance incentives (in reward structures or promotion processes) to reinforce engagement.

8. Monitoring and continuous improvement

- Decide how you will monitor the effectiveness of your controls;
- Introduce a compliance improvement plan if necessary.

The attribution of responsibility - the criteria set by the EU case law

- Charge to the parent of the antitrust violation put in place by its subsidiary (and calculation of the limit of the penalty prescribed by law) if the parent company, with its subsidiary constitute a **single economic entity**.
- Conditions: i) the parent company must have the ability to exercise a **decisive influence** over the subsidiary, and ii) it must have exercised this power **in practice**.
- Burden of proof:
 - in scenarios of totalitarian or almost totalitarian control, **rebuttable presumption** that the conditions are met;
 - in other cases of control, it is for the Commission to prove how different legal entities constitute a single economic entity.

Exceptions: a chance to win the Rebuttable Presumption

Some situations in which the parties could demonstrate the absence of any operational and strategic influence on the subsidiary:

- **Purely financial investor** (which holds shares in a company only in order to reap profits) which refrains from any involvement in the management and control of the investment
 - European Commission, 20 October 2004, Comp/38.238, *Tabacco Greggio/Spagna*
- Existence of **legal constraints** which have the effect of preventing the full exercise of control (eg . A binding contractual relationships with third parties or law that prevents exercise of decisive influence
 - Tribunal, 13 July 2011, case T-45/07, *Unipetrol*
- Detention of the shareholding for a **very limited period of time**, so no power to affect, directly or indirectly, on its business

The Importance for Competition Authorities of the adoption by the companies of ACP

Massive adoption of effective ACP: multiplier of the chances to discover anti-competitive behaviours

Significant facilitation in investigations and inquiries

Incentives to the adoption of ACP by Group: impact on parent companies' liability and economic independence of the subsidiary

THANK YOU FOR YOUR ATTENTION!

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