SCF

Sofia Competition Forum

GUIDELINES ON CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

BULGARIAN COMMISSION ON PROTECTION OF COMPETITION

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

GUIDELINES
ON CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

I. INTRODUCTION

Competition policy is being implemented to the benefit of consumers, the participants in the relevant markets and society as a whole.

The development of modern economy is based on the functioning of the market in conditions of effective competition which provides entrepreneurs with the opportunity to freely offer their goods and services. The more companies offer goods or services of different quality and at different prices independently of one another, the greater the chance for the consumers to make the best choice for themselves, thus improving their well-being. From the point of view of both the consumers and the economic subjects, the most important positive effects of the action of market forces and effective competition on the market include:

- ensuring a greater variety of goods and services of higher quality and at competitive prices;
- encouraging innovations and effectiveness in economic activity;
- supporting society's economic development.

In the conditions of a free market the implementation of economic activity is a form of competition among undertakings. Sometimes free competition is distorted by certain types of behavior on the part of the participants in the relevant market. That's why rules for participating in the market are needed and those rules should be valid for all undertakings that actually carry out activities on the market or may enter it in the future. The objective of competition rules is to create conditions for free market initiative, to prevent restriction or elimination of competition among undertakings, as well as to make sure that the players on the market are not exhibiting dishonest behavior.

The national authority responsible for monitoring the compliance with the provisions of the Law on Protection of

Competition (LPC), and in certain cases with Articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU), is the Commission for Protections of Competition (CPC). In applying competition rules the CPC has at its disposal a wide range of legal competencies for creating conditions for effective competition such as:

- establishing infringements and ruling on their termination;
- imposing sanctions, including periodic sanctions, on the infringers;
- imposing behavioral or structural measures for restoring competition;
- approving the commitments taken by undertakings for restoring competition;
- interacting with public authorities with a view to eliminating barriers to competition created by their acts or actions[10], etc.

CPC activities on implementing the provisions of the LPC and Articles 101 and 102 of the TFEU aim at maintaining or restoring effective competition on the market by ruling on the termination of infringements on the part of the respective undertakings and by imposing sanctions on the infringers. The imposing of sanctions for violation of competition rules, on its part, has a restraining and disciplinary effect both on the undertakings which have infringed the rules, and on the remaining participants in the market, and contributes to preventing similar or other infringements in the future.

Reducing the number of infringements of competition rules, however, could be achieved not only through the sanction

[10] See CPC Guidelines on assessing the compliance of regulatory and general administrative acts with competition rules adopted by CPC Decision No 1777 of 20 December, 2011.

policy of the CPC. That's why one of the main priorities in the activity of the Commission is competition advocacy through promoting competition rules in society and the business circles, as well as through raising the awareness of the stakeholders with regard to the benefits of competition.

Through the present Guidelines the CPC directs the attention of undertakings to a specific tool which they can use in the process of preventing infringements of competition rules as part of the legal norms that regulate their economic activity. This specific tool finds its expression in the corporate programs for compliance with competition rules.

II. OBJECTIVE OF THE CPC GUIDELINES ON CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

The objective of these guidelines is to help the business understand better the benefits of drafting corporate programs for compliance with competition rules as well as to encourage the management of the undertakings to develop and adopt such programs. Along with the main provisions of the applicable competition law in the Republic of Bulgaria, as well as with the risks of violating those provisions, the Guidelines also focus on the main practical steps that the companies can take in developing their own corporate programs for compliance with competition rules[11].

According to the CPC, a large number of undertakings aim at observing the rules of competition while implementing their economic activity. By the present Guidelines the CPC aims at helping undertakings in adopting and applying good practices in implementing their economic activity. Despite the fact that the present Guidelines are not of an obligatory nature, they could serve as a useful source of information for those undertakings which would like to take actions for avoiding or preventing

[11] The Guidelines were adopted by the CPC decision № 1553/20.12.2012

potential infringements of competition rules. In this way, the corporate programs for compliance with competition rules could play the role of a preventive measure against potential infringements both for the companies as a whole, and for their employees.

In the Guidelines the CPC outlines the main stages that an undertaking needs to go through in the process of designing a corporate program for compliance with competition rules. It is a matter of an individual assessment on the part of the undertaking whether the compliance program will be designed by the employees, or whether it will seek professional advice and cooperation from external consultants in this field. In designing their corporate compliance programs, the undertakings could use the information published on the websites of the CPC and DG "Competition" of the European Commission (EC). Neither the CPC, nor the EC, however provide consultations in this respect. They don't approve individual compliance programs either. The drafting, introduction and implementation of programs for compliance with competition rules is a voluntary act on the part of the undertakings and the responsibility for those programs is entirely in the hands of the undertakings themselves.

III. NATURE OF THE CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

The corporate programs for compliance with competition rules comprise a set of actions, internal procedures and documents that undertakings design under their own initiative. These programs express the will of the management of the undertakings to adhere to competition rules; they are targeted at all organizational levels and all members of staff. Being a part of the internal company policy and procedures, the corporate programs impose certain obligations on the managers, employees and workers of the undertaking.

The programs for compliance with competition rules are after two main objectives: to prevent or reduce the risks of violating competition law and to provide the tools for their timely identification, on the one hand, as well as the procedure that needs to be followed in establishing already committed infringements.

Through the corporate programs for compliance with competition rules the companies voluntarily take certain actions aimed at identifying, preventing or solving cases of potential illegal behavior on their part by identifying the responsible employees and the procedures that need to be followed. In this way, the business itself outlines the specific frame in which it can realize its market behavior without infringing competition rules.

IV. COMPETITION RULES

In accordance with the Bulgarian and the European competition law, the main types of infringements that have to be avoided by the undertakings in implementing their economic activity are the prohibited agreements and concerted practices[12], as well as the abuse of monopoly or dominant position[13].

1. Prohibited agreements

The prohibited agreements and concerted practices between independent undertakings comprise one of the gravest forms of anticompetitive behavior. They aim at or lead to restriction of the competition on the relevant market. The reason behind the extremely strict persecution of this type of conduct on the part of the CPC has to do with its serious negative effect, e.g. eliminating competition among the participants in the market, slowing down the rate of improving production, harming consumers by restricting their free choice, etc.

[12] See Article 15 of the LPC and Article 101 of TFEU
[13] See Article 21 of the LPC and Article 102 of the TFEU

Article 15 of the LPC and Article 101 of TFEU contain a general prohibition for all types of agreements between undertakings, decisions by associations of undertakings as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition on the relevant market.

Prohibited are the agreements in which independent undertakings agree not to compete effectively among one another. These agreements may have the following form:

- fix prices or other trading conditions;
- limit production or trade;
- share sources of supply, territories or clients to which the goods and services are offered;
- apply to certain partners dissimilar conditions for equivalent transactions;
- exchange of information between competitors[14], etc

Prohibited agreements cover all forms of trade relations between independent undertakings by which those undertakings restrict or may restrict their freedom to individually and independently define their market conduct. In terms of their form, the prohibited agreements may be written or oral, and in terms of the participants in them, they can be horizontal (between competing undertakings on the same relevant market) or vertical (e.g. between a producer and a distributor).

Cartels occupy an important place within the group of prohibited agreements as a result of their significant anti-competitive effect. Cartels are formed with the purpose of mutual benefit for the participants achieved by means of artificially

[14] See CPC Guidelines on the exchange of information among competitors adopted by CPC Decision No 1778/20.12.2011

eliminating the competitive pressure that undertakings exercise on one another. The cartel is an agreement or concerted practice between competitors aimed at restricting competition through:

- fixing prices or pricing conditions for purchase or sale;
- allocating production quotas;
- allocating markets;

➢ rigging of public bids or tenders or public procurement award procedures[15], etc.

The LPC envisages the opportunity for an undertaking, part of a cartel, which cooperates with the CP in the process of disclosing the cartel and terminates its involvement in it, to be granted immunity from fines or reduction of fines[16].

In addition, both the LPC and the European competition law envisage an opportunity for the participants in certain agreements to be granted the so called exemption from the prohibition if they implement certain conditions that can be applied to certain categories of agreements or to individual agreements[17]. If the undertakings manage to prove in front of the CPC the presence of conditions for exemption from the prohibition in a specific cases, that would prevent the establishment of the infringement and the imposing of the respective sanction with regard to the infringement.

---

[15] See CPC Guidelines for counteracting bid-rigging in public procurement procedures adopted by CPC Decision No 570 of 20 May, 2010

[16] See CPC Program for immunity from sanciton or redution of sanction in case of participation of the undertaking in a secret cartel as well as Rules for implementing the Program adopted by CPC Decision No 274 of 08 March 2011

[17] See CPC Decision No 55 of 20 January 2011 for block exemption from the prohibition under Article 15, para 1of the LPC of certain categories of agreements, decisions pr concerted practices.

2. Abuse of monopoly or dominant position

Another form of anticompetitive conduct which is prohibited by Article 21of the LPC and Article 102 of the TFEU, is the abuse of monopoly and dominant position.

Monopoly is the position of an undertaking which by law has the exclusive right to carry out a certain type of economic activity such as railway transport, national post and telecommunication services, production of radioactive products, weapons, etc.

Dominant position is in place when the undertaking possesses market power which allows it to act to a great extent independently from its suppliers, competitors and clients. An indication for such a position is the large market share of an undertaking. The market share, however, is not the only factor that the CPC takes into consideration in investigating an alleged abuse of dominant (monopoly) position.

The undertakings that enjoy monopoly or dominant position do not want to lose their market share and incomes as a result of free and effective competition. Some of them undertake actions by which they take advantage of their market position and push away from the market their competitors, impede the entry of new participants in the market or exploit in an unfair way their suppliers or clients. Such a conduct leads to restriction of competition and has a negative impact on the well-being of consumers.

Such abuses may include:

- Imposing unreasonably high prices. In this case the dominant undertaking unilaterally sets prices which are considerably higher than its production costs. In this way, it gains profit which would be impossible to gain in the conditions of effective competition;

- Imposing unreasonably low prices. This is the case in which the undertaking purposefully sells its products at prices which do not cover the costs of the production and realization of products. In this way, the dominant undertaking aims at pushing away its competitors from the market or to preventing new participants from entering the market;

- Discrimination with regard to certain trading partners. For the undertakings enjoying dominant position certain training practices are prohibited such as selling one and the same products at different prices for the different clients, offering discounts and bonuses only to the clients who use only the dominant undertaking as a supplier, etc.

- Imposing unfair trading conditions. A typical example is that of a dominant undertaking which links the selling of a certain product with the purchasing of another one, which the client is not willing to buy.

- Terminating unreasonably long-term trading relations or refusing unreasonably to sign a contract at the presence of opportunities for production or supplies.

The actions listed above are provided as examples and do not exhaust all the potential forms of abuse of monopoly or dominant position.

V. BENEFITS OF THE DESIGN AND APPLICATION OF THE CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

All undertakings are obliged to take the necessary measures which can allow them to carry out economic activity while adhering to competition rules and preventing potential infringements of the LPC and Article 101 and 102 of the TFEU. In this relation, the drafting of corporate programs for compliance with competition rules could serve as a key factor for achieving the above mentioned objective by providing undertakings with

additional security guarantees in the process of implementing their economic activity. Despite the need for involving certain financial, human and other resources for drafting and implementing the programs, the advantages of the corporate programs for compliance are significantly bigger than the costs for their introduction and effective implementation.

The benefits of drafting and implementing programs for compliance with competition rules could be summarized, without being exhaustive, in several directions:

- Reducing or eliminating the risk for the undertaking to take part or be involved in any form of prohibited agreement or abuse of monopoly or dominant position;
- Avoiding sanctions imposed by the CPC as well as claims for harms from competitors, suppliers, clients and consumers;
- Terminating an infringement in a timely manner and potentially reducing the size of the sanction which may be imposed due to the shorter duration of the established infringement;
- Ensuring the opportunity for the companies to take advantage of the Leniency program in case of participation in cartel agreements;
- Avoiding long administrative and court proceedings and the costs related to them;
- Identifying, assessing and solving potential problems related to the implementation of competition rules;
- Improving company management and structure which makes companies much less risky when it comes to observing competition rules in future operations related to the activities they carry out;

- Reducing the risk of withdrawal of clients or suppliers;
- Strengthening the trust in the undertaking on the part of its clients and suppliers;
- Viewing the company as an ethical business organization of competitors, clients and suppliers, as well as of potential employees, thus contributing to enlarging its market share and facilitating the recruitment of highly qualified staff;
- Reducing the risk of discrediting the reputation of the company and of negative media coverage. The potential economic effect of harming the reputation of a company can be even greater than the risk of imposing a sanction by the CPC as it could lead to a considerable negative public response, and respectively to huge financial losses of actual or potential clients, as well as to a withdrawal on the part of consumers;
- Enhancing effective competition on the markets where the undertaking operates in the cases when it identifies the conduct of competitive undertakings or associations of undertakings that restrict competition on the relevant market and approaches the CPC.

VI. CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES – STEP BY STEP

The corporate programs for compliance with competition rules have to take into consideration a number of factors related to the specific characteristics of the company and the competitive environment of the markets on which it operates. There is no universal model for such a program that could be applied to all undertakings. Each company needs to carry out its own analysis by taking into consideration the specific circumstances and design its own compliance program. That is why the current Guidelines outline the main practical steps which have to be taken by the

undertakings in the process of drafting and implementing their individual corporate compliance guidelines.

Step 1 – Risk analysis or company's own analysis

The effective and successful corporate program for compliance with competition rules is based on a detailed analysis of the specific profile of the undertaking and its activity aimed at identifying the areas where there may be a risk of violating competition law and which should be addressed by the corporate program. That's why the analysis of the position of the undertaking on the relevant market and its individual characteristics comprise the first obligatory step towards introducing the individualized compliance program. More specifically, the main factors that need to be analyzed include:

- Size and legal and organizational form of the undertaking; internal organization, management type, corporate culture, resources. The analysis of these factors will help in determining the human resources needed for introducing and implementing the compliance program, the adequate procedures for training and reporting, etc.

- Scope of activity of the undertaking, the sectors and markets it operates on and other factors related to the competitive environment. In analyzing the above factors the undertaking should be able to identify some of the potential risks for actual or potential infringements of competition rules, which is of great importance in drafting the compliance program. For example, if the undertaking enjoys a dominant position on a given market, the corporate program needs to be focused on its potential actions or omissions which may be considered an abuse of dominant position. The market on which the company operates may pose risks with regard to the presence of anticompetitive practices by one or more undertakings the infringements of which have already been established and sanctioned by the CPC, by other national competition authorities, or by the European

Commission. This information would allow the company to put emphasis in its compliance program on the type of infringements which are typical of the economic sectors in which the company operates.

- Characteristics of the competitive environment in which the respective undertaking operates – characteristics of the respective product and geographic market, presence of competitors, legal framework, state regulation, barriers to market entry, market share of the undertaking and of its main competitors on the relevant markets, market relations of the undertaking with its suppliers, clients or competitors, etc. Each undertaking needs to analyze its position on the relevant markets by identifying the characteristics of supply and demand of the respective products which compete on the market, as well as the conditions and factors which determine whether and to what extent market competition is effective.

- Presence of branch associations of which the undertaking is a member. The uniting of independent undertakings into associations and branch organizations is a very common phenomenon. Often times, however, it is established that the member undertakings have adopted decisions which have led to restriction of competition. The decisions of those associations are prohibited if they aim at imposing adherence to certain economic behavior which restricts the competition among their member undertakings. In the practice of the CPC and other international competition agencies a number of cases can be pointed out in which associations of undertakings collect and exchange sensitive trading information (e.g. data on prices or other trading conditions) among the member of the association, give recommendations and provide forecasts on the economic behavior of the member undertakings, or create other mechanisms for anticompetitive coordination and cooperation between undertakings which are direct competitors on a given market. Such practices should be regarded as grave infringements of

competition rules. In the development of their compliance programs the undertakings which are members of branch associations may decide to include mechanisms and procedures which restrict the company to be involved into anticompetitive behavior as a member of an association of undertakings.

These are the main characteristics that need to be analyzed but they do not exhaust all potential factors that may also be included in the analysis. The individual assessment of the risk of infringing competition rules for the respective company is based mainly on the results of the analysis of the undertaking and its market position.

Step 2 – Taking a clear and categorical management commitment

A key moment in drafting and implementing an effective system and culture of observing the rules of competition within the company is the need for taking a clear and categorical commitment for implementing the corporate compliance program which has to be initiated by the company's top management.

In this sense, the first step in this direction is for the management of the company to clearly state that observing competition rules is part of the company's policy and to take specific measures to inform all employees of the company about this commitment.

Secondly, the management of the undertaking needs to take a solid position by informing its employees that it expects each one of them to be able to adhere to the provisions of competition law.

Thirdly, for the commitment of the top management to be effective, it has to be supported by actual actions on introducing and implementing the corporate program for compliance with competition rules. To that purpose, financial and technical resources need to be allocated, as well as staff and time necessary

for drafting and implementing the compliance programs which take into consideration the size of the company. In this sense, appointing a member of the top management who should be personally responsible for all activities related to the corporate compliance program is of key importance. It has to be noted that person from the management of the company to be responsible for the corporate compliance program should be appointed in view of the specific situation. When the undertaking is a small or medium-sized enterprise this responsibility could be taken by the owner or manager, or by a person pointed out by him/ her who occupies a management level suitable to the purpose.

In addition, the commitment and the position of the top management with regard to the corporate program for compliance should demonstrate to all employees in the undertaking that the adherence to competition rules is not only a legal obligation but also a key element of the business culture and the responsibility of the undertaking. That is why the general obligation for observing antitrust rules should be initiated by the highest management level and should cover the whole organizational structure of the company. The objective is to encourage both the members of the management boards of the undertaking and the other employees to observe the rules and procedures outlined in the corporate programs, to take clear and adequate actions and measures while taking into consideration the financial, trading and image risks for the undertaking as a result of violating competition rules. In this way, it will be ensured that potential infringement of competition rules may be prevented, disclosed or terminated early enough so that the company can avoid or minimize the unfavorable legal consequences for the undertaking stemming from the committed infringement.

It has to be emphasized that the introduction and effective implementation of corporate compliance programs are mostly within the responsibility of the top management of the undertaking. It is the management of the company that has to

ensure, through adequate measures and procedures, that the rules of competition are observed by the other employees. It is important for the measures taken by the management to be of such a nature as to invoke positive reactions and interest among the employees in order to encourage them to observe the rules and procedures established in the programs thus ensuring that the company staff will have a proactive position in case of a suspicion of the presence of a competition problem. The interest and commitment of the employees could be implemented by undertaking different measures the definition of which depends on the structure and internal policy of the undertaking as well as on the judgment of the company management. The following policies could be pointed out as examples of such measures:

- Ensuring an opportunity for ***direct communication*** between the top management and the other employees of the undertaking thus putting emphasis on the importance of observing competition rules;

- Drafting an implementing ***a code of conduct for the employees*** which should include the duties and responsibilities of the employees with regard to observing competition rules. In this way, any infringement of competition law would be equal to infringing this code, which could be related to imposing disciplinary penalties;

- Creating ***positive stimuli for the employees*** who have a proven record of adhering to the corporate program for compliance with competition rules and have expressed an active position by reporting a potential problem related to competition;

- other.

As it was already pointed out, the specific individualized approaches and measures for introduction and effective implementation of the corporate programs or compliance with competition rules need to correspond to the specific situation in a

given company. The measures taken by the big international companies would hardly be useful and effective in a small or medium-sized enterprise. That's why the specific content of the corporate programs for compliance with competition rules should be defined on the basis of the analysis, carried out as a first step towards the drafting and implementation of those programs. A program can generate positive results only when it is adequate to the specific situation in a given undertaking.

Step 3 – Creating a clear organizational structure for reporting problems

The introduction and effective implementation of a corporate program for compliance with competition rules would be impossible without creating an active ***mechanism for reporting*** on the part of the employees on potential legal problems with competition. This mechanism should comprise a part of the corporate program as it has to take into consideration the organization structure of the undertaking and the responsibilities of the different units and employees in it. Again, the top management of the undertaking needs to decide on the type of structure for reporting problems that should be implemented. It is believed that the reporting structure should satisfy several important criteria:

- appointing a contact person or persons, the so called compliance officer, responsible for the corporate compliance program and to whom the employees should turn in case of a potential problem.

- Depending on the specific situation in the undertaking, this person could be an employee the main duties of whom are related to the implementation of the corporate program for compliance. In the big multinational companies which exhibit a complex organizational structure, it may turn out that additional compliance officers need to be recruited or assigned in the individual structural units or in the separate territorial branches. In

other cases, the contact person may be an employee form the legal department of the undertaking, or from the administrative management of the company. The head of a structural unit (e.g. the head of Sales Unit) or even the owner or one of the owners of the company can also serve as contact persons in the case of small or medium-sized enterprises.

- The contact person needs to have direct access to the top management and the control or supervisory bodies of the undertaking in case that there is a problem related to the implementation of the company policy or the adherence to the compliance program, such as in case of suspicion of an infringement of competition rules. The direct access to the management of the undertaking could serve as a guarantee that it has been informed about the presence f a problem and can take the necessary measures for overcoming the problem in a way that complies with the law.

- The compliance officer needs to have the necessary authorities for the actual implementation of the program for compliance and to have at his/ her disposal sufficient human and financial resources, e.g. for organizing and carrying out training courses;

- The legal department of the undertaking or the law office providing legal services to the company, should be obliged to keep track of amendments to the legislation in the field of competition protection, as well as of the relevant court practice, in order to provide adequate training to the employees, quick reactions in case of an established problem and professional protection in case of proceedings initiated against the undertaking for infringements of competition law.

- There are other methods for reporting legal problems related to competition such as the opening of an anonymous telephone hot line, establishing a confidential reporting system, “open doors” policy, etc.

The choice of a reporting system is within the authority of the top management and needs to take into consideration the situation in the specific undertaking. Regardless of the chosen structure and form of reporting problems related to competition, the aim is to ensure a quick and adequate reaction of the undertaking in case of a potential or actual problem.

Along with establishing a suitable structure for reporting problems, the undertakings use as a common practice to include in their compliance programs suitable ***internal procedures for minimizing the risk of infringing competition law*** от on the part of their employees. Examples of such procedures are:

- Drafting a code of ethics for the employees which includes the requirement for observing the corporate program for compliance with competition rules;
- Introducing a system in which the employees could keep track in a certain form of the contracts they have established with competitors, suppliers and clients;
- Introducing a requirement for the employees to be given permission and guidelines by their supervisors before taking part in the meetings of branch or other business associations;
- Introducing a requirement for the legal advisers or lawyers of the company to check the trading contracts for compliance with competition law before they are signed;
- other.

Step 4 – establishing an internal mechanism for providing cooperation to the competition authority

When the activity of the undertaking is an object of investigation on the part of the competition agency, the undertaking and its employees need to provide the assistance required by the competition law in order to ensure the conducting of an objective,

comprehensive investigation which is completed in a prompt manner and minimizes the risk of imposing sanctions on the undertaking as a result of the failure to provide complete, accurate and timely assistance to the competition authority. In this relation it is recommended an ***internal mechanism for providing assistance to the competition authority*** to be included in the compliance program which should include at least the following aspects:

- the types of investigation that the competent competition authority could carry out with regard to the activity of the undertaking or the relevant market on which it operates (proceedings for establishing infringements, sector inquiries, etc..);

- the authorities that the competition agency has in carrying out its investigations, as well as the corresponding duties of the investigated undertakings related to providing assistance (requesting information, exhibits, written, digital, electronic and forensic evidence, taking down of oral explanations, on-site checks, closing premises, vehicles and other sites, etc.);

- the protection methods that have been provided to the undertaking and to its representatives and employees at the different stages of the respective investigation carried out by the competition authority;

- The competition authority could impose in the following cases: if the required assistance has not been provided; if the required information is not provided in a timely manner; if the provided information is incomplete, inaccurate, false or misleading; if the undertaking objects to an on—site check or impedes the exercising of other competencies of the competition authority;

- The mechanism for providing assistance needs to be able to point out the employee of the respective undertaking who has been assigned with the function of coordinating the activities for providing assistance to the competition authority

when conducting checks and investigations. That person could be the compliance officer but also a representative of the legal department or of any other organizational unit at the undertaking.

Step 5 – Training the staff of the undertaking

With a view to observing competition rules, the compliance programs containing these rules need to include, as an obligatory part, guidelines on designing and implementing of a ***training program*** targeted at the employees of the undertaking. The management of the undertaking has to select the most adequate and effective training methods aimed at the employees responsible for carrying out the day-to-day business operations of the company. Regardless of the selected forms of training and their frequency, they have to be able to ensure the achievement of the following objectives:

- The employees and workers have to get knowledge about the main provisions of competition law in order to be able to distinguish between the different manifestations of prohibited behavior, to be aware of the sanctions that can be imposed in the cases of violating competition rules. As a result of the training the employees of the undertaking should be able to identify actions that could be considered an infringement of competition rules both on their part and on the part of competitive undertakings or other participants in the market;

- The employees and workers need to be acquainted with the actions that they have to avoid in implementing their professional duties in order to ensure that the competition rules and the corporate compliance program have not been infringed;

- The employees and workers need to be acquainted with the program for compliance with competition rules of the undertaking. It is extremely important for the staff to be trained in making use of the reporting system (who is the compliance officer in the undertaking) in case of suspicion of an infringement of

competition rules by the employees themselves, by competitive undertakings or by other companies.

- Staff training needs to take into account the risks that the specific undertaking faces in implementing its economic activity on the relevant market as they have been identified at the first stage of drafting the compliance program.

- The training needs to be target oriented with a view to the specific on-the-job responsibilities of the different employees and the risk of infringing competition rules.

The intensity, content and form of the training need to take into account the type and degree of the risk to which the employee or the worker has been exposed, which can generally been divided into low, average and low. These risks have been identified and assessed as part of the risk analysis for the respective undertaking at the first stage of drafting and introducing the program for compliance with competition rules.

In this way, the employees exposed at a higher risk need a more in-depth training compared to the employees exposed at medium or low risk. An undertaking may decide, for example, that there is a high risk of cartel infringement due to the regular contacts of its employees from the marketing department with competitors. There may be a medium degree of risk with regard to employees coming from a competitive undertaking or with regard to managers who do not have regular contacts with competitors. A low level of risk is present in the case of employees involved in administrative or technical activities (e.g. shopping assistant in trade centers or information centers). In this way the training of employees in accordance with the level of risk would contribute to overcoming potential or current competition problems in the best possible way.

- Carrying out of regular checks of the knowledge of employees about competition rules. It is through the investigation

of established infringements that their commitment in the future could be avoided, and that would also lead to a smaller risk for imposing a sanction on the undertaking

➢ Updating the training programs, including through including examples of infringements of competition rules committed by the employees of the respective undertaking with the aim of avoiding their occurrence in the future.

The forms and methods of training could be as follows:

- Carrying out and participation in training seminars;
- Carrying out role play;
- Drafting in-company manuals (guidelines) containing description of the prohibited manifestations of anticompetitive activities;
- Electronic messages, on-line trainings and working groups;
- Regular publishing of newsletters that discuss current issues related to compliance with competition rules, etc.

Step 6 – Monitoring and evaluation of the results of the program and follow-up activities

Adopting a compliance program is a step in the right direction for every undertaking which wants to take active actions for observing competition rules. N the end of the day, however, the only objective evaluation for the effectiveness of the corporate program is whether it has contributed to observing the provisions for protection of competition. The success of a compliance program does not depend only on its adoption but is evaluated on the basis of the achieved results, i.e. avoided and/ or terminated infringements of competition rules. The formal commitment of the undertaking to implement the program will not be of much use if it is not accompanied by specific steps and actions which should

impose a culture for observing the rules. The undertakings need to be aware that their compliance programs and the efforts for implementing them will be evaluated only by the achieved result, i.e. whether they have allowed infringements to be committed.

It is extremely important for the undertakings to review their compliance programs as a way for the management to make sure that the identified risk areas have not undergone changes and that the actions on preventing or avoiding infringements are still adequate and effective. In this relation, the programs themselves could envisage mechanisms for regular review and evaluation of their effectiveness. In case of establishing new risks the program has to be updated in order to introduce new measures aimed at avoiding or minimizing these risks. If necessary, the review of the internal procedures and the envisaged control mechanisms may be assigned to external experts. By undertaking these steps the undertaking would demonstrate a clear commitment on the part of the top management to observe competition rules, putting itself in a position which gives it the opportunity not too allow the commitment of infringements.

The carrying out of regular evaluations of the different aspects of the compliance program as well as of legal and economic audits is recommended, especially in the cases which lead to new risks for the undertaking (such as the acquisition of a new company or the development of a new product or service). These evaluations and reviews need to be documented and comprise an obligatory part of the evaluation of the effectiveness of the program and of its improvement, if necessary.

The activity of each undertaking on observing competition rules through drafting and implementing a corporate program for compliance with these rules is not a single act. When an existing or new competition, organizational, legal or other problem related to the implementation of the compliance program has been identified, the undertaking needs to revise and update its program

in such a way as to ensure that the same or similar problem will not arise again.

VII. THE CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES FROM THE POINT OF VIEW OF THE LAW ON PROTECTION OF COMPETITION

The Methodology for setting fines under the LPC[18] does not envisage for the corporate programs for compliance with competition rules to be taken into consideration by the CPC in determining the specific size of the sanctions imposed on the infringers. The sanctions are determined on the basis of the gravity and the duration of the infringement as well as on the basis of the aggravating and mitigating circumstances. The potential existence or implementation, as well as the absence or non-observance of a compliance program for a given undertaking is not a circumstance which could influence the size of the imposed sanction for an infringement of competition rules established by the CPC. Despite the fact that the presence of a compliance program provides an opportunity for the affected undertaking to be distinguished by other potential participants in the infringement, the CPC considers that this circumstance should not be taken into account in determining the sanction as the only objective criterion for the effectiveness of the compliance program is the non-admission for the respective infringement to be committed. That's why the programs for compliance with competition rules should be drafted and implemented by the undertakings not with the purpose of these undertakings to be able to exert influence on the size of the sanctions that may be imposed on them by the competition authority, but with the purpose of creating conditions in the internal organizational structure of the respective undertaking that minimize the risk of grounds for imposing sanctions under the LPC to arise.

[18] Adopted by CPC Decision No 71 of 03 February, 2009

Appendix to

GUIDELINES ON CORPORATE PROGRAMS FOR COMPLIANCE WITH COMPETITION RULES

I. RISK FACTORS FOR PARTICIPATION OF AN UNDERTAKING IN PROHIBITED AGREEMENTS, DECISIONS AND CONCERTED PRACTICES

The respective undertaking is exposed to a high risk of participation in prohibited agreements, decisions and concerted practice if:

- the clients of the undertaking are also its competitors;
- employees of the undertaking participate in meetings of trade and professional associations, along with representatives of the competitive companies;
- employees of the undertaking, especially managers or employees occupying positions related to sales, who used to work for competitive companies;
- employees of the undertaking have at their disposal sensitive trading information about the prices, costs, business plans, etc. of the competitive companies;
- the undertaking operates on a market where most of the companies and their staff know one another;
- the undertaking operates on a market where the clients and end-consumers often change their supplier;
- the undertaking works in cooperation with its competitors, e.g. in the case of a joint enterprise;
- the employees of the undertaking have contacts with employees of competitive companies, regardless of the frequency of these contacts;
- the undertaking operates on a market which has already been an object of investigation for cartel by the competition authority;

- the undertaking signs contracts with provisions for exclusivity for a long period of time;
- the undertaking signs contracts with clients containing clauses for the conditions of reselling the goods or services, e.g. with regard to the prices for reselling;
- the undertaking signs licensing contracts containing provisions for exclusivity with other competitive companies;
- the undertaking participates in agreements related to the standardization of goods or services;
- the agreements signed by the undertaking include joint sales or the purchasing of goods or services;
- the agreements signed by the undertaking include provisions for horizontal cooperation with competitive companies.

II. RISK FACTORS FOR ABUSE OF DOMINANT POSITION

A specific undertaking which enjoys dominant position on a given market is exposed to a high risk of abuse of this position if:

- the undertaking refuses to supply an existing client without objective reasons behind the refusal;
- the undertaking offers different prices or conditions under the contracts of similar clients without any objective reasons for that;
- the undertaking provides unreasonable discounts or rebates to its clients as these discounts or rebates are aimed at rewarding the clients for their specific behavior;
- the undertaking imposes on its clients exclusivity provisions;
- the undertaking requires the clients who purchase a given product, to purchase another one with it (e. g. the so-called linked sales);
- the prices offered by the undertaking for its goods and services are so low that they cannot cover the production costs for those goods/ services;

- the undertaking refuses access to its own facilities, without the use of which the competitive companies cannot implement their activity.

III. MAJOR REQUIREMENTS FOR THE CORPORATIVE PROGRAM FOR COMPLIANCE WITH COMPETITION RULES

- All potential risks for infringing competition rules have been taken into account in drafting the compliance program and in carrying out the staff training;
- All staff members have been informed as to who is responsible for the compliance program (a legal adviser, a manager or a specially appointed staff member);
- All employees have direct access to the compliance program;
- All employees have been informed about the compliance program and have declared that they have been acquainted with the program and all their responsibilities that stem from it;
- Legal advice should be sought in each situation which raises suspicions of an infringement, concern, or even insecurity;
- Each infringement or suspicion of infringement has to be immediately reported to a legal adviser, the manager or to the employee responsible for the compliance program;
- The CPC has to be informed in case of any suspicion of or information about infringements of competition rules committed by competitive or other companies.

CONTENTS

SCF

Sofia Competition Forum

Commission on Protection of Competition
18 Vitosha Blvd.
1000 Sofia
Bulgaria
www.cpc.bg

United Nations Conference on Trade and Development
Palais des Nations, 8-14, Av. de la Paix
1211 Geneva 10
Switzerland
www.unctad.org