Autorità Garante
della Concorrenza e del Mercato

GUIDELINES ON ANTITRUST COMPLIANCE

(only the Italian text is authentic)

I. Introduction

1. The "Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law no. 287/90" recognize the adoption of and compliance with a specific compliance programme, that is appropriate and in line with both European and national best practice, among the possible mitigating circumstances.

2. These guidelines are intended to provide undertakings with guidance on: *i)* the definition of the content of the compliance programme; *ii)* the request for an assessment of the programme for the purposes of awarding possible mitigation; and *iii)* the criteria that the Authority intends to adopt in its assessment for the purposes of awarding mitigation.

3. The guidelines were developed giving priority to the pursuit of the following policy objectives: *i)* the promotion of a culture of widespread competition in the business community; *ii)* the prevention of antitrust infringements through the timely adoption of effective compliance programmes; *iii)* legal certainty about the criteria for the assessment of the compliance programmes for the purposes of awarding mitigation; *iv)* the definition of an incentive scheme consistent with that underlying the leniency programme.

II. The content of the antitrust compliance programme

4. The substantial suitability of a compliance programme to prevent antitrust infringements constitutes the key parameters in the assessment of the programme for the purposes of awarding mitigation.

5. Only a programme designed and implemented consistently with the characteristics of the undertaking and the market environment in which it operates can reflect the nature and degree of the antitrust risk to which the undertaking is exposed and can, therefore, be considered appropriate and potentially effective.

Characteristics of the undertaking. The compliance programme must be appropriate to the nature, size and market position of the undertaking. In general, in fact, the type of activities that the undertaking performs determines the antitrust risk to which it is exposed. In addition, the design of the processes and procedures required for the effective prevention of antitrust infringements must be proportionate to the complexity of the business organisation and to the structure of the levels of management. The position of the undertaking in the market is also an important element: this is evident in the case in which the market power of the undertaking is such as to require managing the antitrust risk caused by potentially abusive behaviours.

The market environment. The compliance programme must be appropriate to the market environment. For example, the collusive risks may depend on the number of active undertakings, the

(relative) size of these undertakings, the degree of transparency of the commercial conditions, the frequency of contacts between undertakings, for example at trade association meetings etc. Likewise, for a undertaking in dominant position, the antitrust risks may depend on the organisation of the production chain, i.e., the relationships that the undertaking holds with customers and suppliers. The dynamism of the competitive environment can assume importance as it affects the antitrust risk faced by the undertaking (e.g. the conduct implemented by a dominant undertaking in order to deal with the entry of new competitors) and consequently the need for continuous monitoring of the adequacy of the compliance programme.

6. In line with international best practices, an antitrust compliance programme is typically made up of the following elements:

Antitrust compliance as an integral part of the corporate culture and policy

7. An effective compliance programme requires clear recognition of the value of competition as an integral part of corporate culture and policy and lasting and continuous commitment to abiding by it. To this end, the undertaking must also demonstrate that it allocates sufficient resources to the implementation of the programme, as well as to ensuring the 'Programme Manager' is autonomous and independent and equipped with appropriate instruments.

Effective commitment to the prevention of antitrust infringements maybe ensured when:

- competition is expressly recognised - for example, in the Code of Ethics/Business Conduct - as a founding value of undertaking activity;
- a specific compliance programme is developed expressly for the prevention of antitrust risk. This does not exclude the possibility of connecting the antitrust compliance programme to control and management systems of other and different risks to which the undertaking is also exposed; the compliance programme is explicitly supported by the top management, including through their active involvement in the implementation and monitoring of the programme;
- sufficient corporate resources are allocated to the design, implementation and monitoring of the programme;
- a Programme Manager is identified, possibly even chosen from among the managers of other business functions, who is granted autonomy, independence, resources and appropriate instruments and who reports directly to the top management.

Identification and assessment of antitrust risk specific to the undertaking

8. An effective compliance programme must be drawn up on the basis of careful analysis of the risk of anti-competitive conducts that the undertaking faces ("antitrust risk").

9. Thorough risk analysis allows the correct identification of priorities of intervention through the identification of the most problematic areas and the most appropriate actions of prevention and/or management and the consequent maximization of the effectiveness of the resources used in their implementation. In fact, with a view to risk management, it is best that the individual undertaking prioritises allocating resources to activities and management areas most exposed to the risks of a breach of competition rules.

10. For this reason, the consistency of the compliance programme with the specific antitrust risk of the undertaking is a key element in the assessment of its suitability for the purposes of awarding mitigation. Ultimately, in fact, the effectiveness of the programme depends on its ability to prevent or manage antitrust risks within an undertaking, either minimising them or eliminating them altogether.

In order to ensure that the content of the compliance programme is defined in accordance with the specific features of the individual undertaking, taking into account the antitrust risks it faces, multiple factors usually need to be considered, including: *i)* the size of the undertaking and its market position; *ii)* the nature of the activities performed and the goods/services offered; *iii)* the competitive environment; *iv)* the internal organisational structure and decision-making processes; *v)* the regulatory/normative context.

Training and know-how

11. To ensure that compliance with competition rules constitutes an integral part of the corporate culture and policy, undertaking employees must have a thorough knowledge of antitrust matters and in-depth awareness of the antitrust risks related to their activities.
12. In general, therefore, an effective compliance programme requires training on the antitrust risks to which the undertaking is exposed, as appropriate to the size of the undertaking and the business environment. Normally, training does not consist of an isolated event, but rather involves regular updating, in line with the evolution of the environment and antitrust risk.

Staff training - especially for employees operating in the divisions most exposed to the risk of anti-competitive behaviours - is the crucial tool for disseminating knowledge of antitrust law and of the processes employed by the undertaking to ensure compliance. Typically, this objective can be achieved by means of training courses and the provision of *ad hoc* manuals and guides, which fulfil the specific needs of the individual undertaking as identified in the undertaking's antitrust risk analysis.

Systems to manage processes exposed to antitrust risk

13. Taking account of the specific features of the undertaking and the environment in which it operates, an effective compliance programme must include the design of management processes suitable to reduce the risk of conducts in breach of antitrust rules. It is desirable that the management of critical processes intended to reduce antitrust risk become an integral part of normal business.

The concrete solutions defined in the compliance programme strictly depend on the type of decisions/conducts that may determine possible infringements of antitrust rules and by the specific organisation of the corporate functions.

The first instrument generally consists of internal reporting models that allow staff to point out any antitrust issues quickly, to obtain clarifications on specific issues and to report, even anonymously, possible infringements. In the case of adoption of a whistleblowing system, this should ensure anonymity and protection of the reporting agent from possible retaliation.

The corporate system intended to ensure compliance with competition rules should also include regular due diligence, self-assessment (*internal audits*), regular detailed analysis of particular areas of activity, third-party legal consultancy and other initiatives that help identify promptly any conduct likely to infringe competition rules.

Incentive scheme

14. An effective compliance programme includes, in general, an adequate system of disciplinary measures and incentives aimed at encouraging compliance with the programme itself and, ultimately, with competition rules.

A credible compliance programme generally involves the option of applying disciplinary measures in the event of infringement of competition rules by employees.
At the same time, the undertaking may define incentives to ensure compliance with the antitrust risk management procedures and processes, as identified by the programme, for example as part of the objectives assigned to employees.
In this respect, the definition of the incentives for the Compliance Programme Manager is particularly important, with a view to Management by Objectives, so that he/she is suitably motivated to ensure the proper functioning and effectiveness of the programme itself.

Review and continuous improvement of the programme

15. A credible compliance programme cannot be limited to one-off activities, but rather requires continuous commitment. Periodic monitoring and possible updating of the programme are essential to ensuring the adequacy of the programme to prevent anticompetitive behaviours.
16. The review of the programme becomes particularly important in case developments in the activity of the undertaking or in the environment in which the undertaking operates require a reassessment of the antitrust risk. Such risk reassessment is equally important following developments in the antitrust case-law.

The monitoring and auditing of the programme normally involve the systematic review of the effectiveness of the different components of the programme, such as training and antitrust risk management. In particular, the same problematic behaviours identified by the programme may constitute a useful indication for refining analysis of the antitrust risk and improving the related prevention and management processes. At the same time, if no anomalous events are detected, this does not eliminate the need for regular monitoring of the compliance programme, since the absence of negative feedback might be caused precisely by the inability of the programme to detect them.

III. **The request for programme evaluation for the purposes of the possible awarding of mitigation**

17. As explained in the Guidelines on setting fines, the rewarding for the adoption of a compliance programme requires proof of the adoption and effective and concrete commitment to following a suitable programme.
18. The burden of proof of the adequacy and effective implementation of the compliance programme falls on the undertaking involved in antitrust proceedings, which must argue with precision the adequacy and effectiveness of the programme adopted.
19. The undertaking involved in a formal investigation that intends to benefit from mitigation in light of its compliance programme must submit a *request* to the Authority accompanied by an *explanatory report* that clarifies: *i)* the reasons why the programme is adequate for the prevention of competition infringements; and *ii)* the concrete initiatives put in place by the undertaking for the effective and efficient application/implementation of the programme.
20. The explanatory report must be accompanied by appropriate *documents* including not only the preparatory programme documents (such as internal guidelines or operating manuals) but also documents that show the effective and concrete commitment to following the programme.
21. For the purposes of the possible awarding of mitigation, only compliance programmes adopted, implemented and transmitted by the Parties to the proceedings within six months from the notification of the opening of proceedings can be assessed, given that transmission at a later date would not allow the Authority to ascertain the existence of a serious and sound commitment by the Party to adopting a corporate policy of internalization, dissemination and compliance with competition rules. Similarly, any

changes to the compliance programmes adopted before the opening of proceedings must be introduced and communicated by the Parties within the cited deadline.

The suitability of the programme to the prevention of antitrust infringements

22. The undertaking must explain why the programme is effectively suitable to mitigate its antitrust risk, and the consistency of the programme with the specific characteristics of the undertaking and the market in which it operates.

In the case of undertakings that participate in meetings on potentially sensitive issues, for example in the context of meetings of trade associations, the undertaking concerned must demonstrate that the measures provided for by the programme are such as to effectively protect it from the risk of being involved in discussions involving anticompetitive matters.
In the same way, undertakings active in the provision of goods and services to public administration, which systematically participate in tender procedures, must demonstrate that the programme has been drawn up and implemented in such a way as to protect it effectively from the risk of contacts and discussions with potential competitors during tenders, both avoiding initiating such contact and adopting appropriate measures to avoid occasions of potentially dangerous contacts (e.g., in choices relating to the possible establishment of temporary associations of undertakings and sub-contracting agreements, or in the interaction between undertakings and the contracting body).
Furthermore, for undertakings in a dominant position it is essential to illustrate the suitability of the programme to prevent possible abusive behaviours, which should be identified on the basis of careful analysis of the antitrust risks to which the undertaking is exposed; for example, for dominant, vertically integrated undertakings, the supply of goods/services used by competitors as input for their activity are particularly important.

Effective and efficient implementation of the programme

23. Without prejudice to the rights of the undertaking against self-incrimination and legal privilege, the explanatory report must indicate the implementation initiatives actually undertaken by the undertaking and the documents proving such implementation.

To this regard, particularly important elements are the documents proving the appointments of the Programme Managers and staff assigned to its implementation with appropriate powers of supervision and reporting to the governing bodies of the undertaking, as well as the documents drawn up to be used for training programmes and periodic staff updating. Further useful documents that the undertaking has to produce may concern, for example, the establishment of an internal reporting and/or whistleblowing system, disciplinary measures for employees that expose the undertaking to antitrust violations, etc.
It is, on the other hand, the burden of the undertaking to demonstrate that the implementation and adherence to the compliance programme is an integral part of the undertaking's activities, by providing suitable documentary evidence (such as emails or other internal documents of the undertaking) of continuous and regular activity for the prevention of infringements, such as discussions to clarify the significance of the programme, specific references to compliance with the programme by top management, checks on the state of implementation of the programme and incentive/corrective measures, in addition to periodic training and refresher courses.
All of the above are purely indicative and not exhaustive, and important documents other than those mentioned may emerge as suitable to demonstrate that the decision to adopt the programme responds to an effective, adequate and continuous commitment to the prevention of unlawful conduct on the part of the undertaking.

24. For programmes adopted before the initiation of the investigation procedure, the explanatory report, together with the attached documentation, must explain in detail all the activities for its effective implementation, indicating the reasons why the application initiatives actually implemented are to be considered effective ways of implementing an appropriate programme and, possibly, the changes to the conduct under investigation in accordance with the compliance programme.

25. Even in the case of programmes adopted after the opening of proceedings, the explanatory report, together with the related documentation, in addition to describing the programme, must provide indications about the implementation initiatives already in place for its execution and the results achieved.
26. Finally, if the undertaking has changed its compliance programme to make it more effective after the opening of proceedings, the explanatory report and the accompanying documents must clarify: *i)* the characteristics of the previous programme; *ii)* the initiatives taken to its execution; *iii)* the improvements made to the programme and the reasons for their introduction; *iv)* the initiatives taken by the undertaking to give execution to the new programme after its introduction and the results - even partial - achieved. In this case, in fact, the Authority values in particular improvements made by the undertaking to a programme that it decided to change itself and the commitment demonstrated in the implementation of the new measures for the prevention of anti-competitive behaviours.

IV. The rewarding of antitrust compliance programmes adopted after the opening of proceedings

27. With specific reference to the programmes adopted *ex novo* after the opening of proceedings, save for exceptional circumstances, the reduction, by way of mitigating circumstances, shall be no more than **5%**.
28. In order to benefit from mitigation, mere approval of the programme by the management body of the undertaking is insufficient; instead, there must be the effective and concrete implementation of the programme within a time frame that allows such implementation to be assessed by the Authority in the course of the proceedings.
29. The quantification of the mitigation is commensurate to the completeness and quality of the programme presented (suitability), but also to the greater or lesser possibility for the Authority to check the effective, concrete and continuous implementation of the programme.

V. The rewarding of compliance programmes adopted before the opening of proceedings

Effective programmes

30. The adoption of an adequate and effective compliance programme before the opening of proceedings by the Authority is, in principle, the case most worthy of consideration in terms of rewards.
31. Adequate compliance programmes that have worked effectively to enable the prompt detection and interruption of the infringement before the notification of the opening of proceedings are eligible for the most significant reward, of **up to 15%** of the sanction to be imposed.
32. In cases eligible for leniency, a mitigating factor of up to 15% for pre-initiation programmes can be awarded only if, as a result of the discovery of the infringement, the undertaking or association of undertakings has submitted an application for leniency before the Authority conducts inspections in relation to the alleged collusion (or in any case before the notification of the opening of proceedings).

Manifestly inadequate programmes

33. No reduction of the sanction may be granted for programmes already in place before the opening of proceedings that are manifestly inadequate. In these circumstances, the undertaking may benefit from a potential reward of **up to 5%** only if it demonstrates having introduced substantial changes to the compliance programme after the opening of proceedings (and within six months from the notification of the opening of proceedings), similarly to the reward for the presentation of a programme *ex novo*.
34. By way of example, a programme is deemed to be manifestly inadequate in the case of the following: *i)* serious deficiencies in the content of the compliance programme; *ii)* the absence of evidence of the effective implementation of the programme; *iii)* the involvement of top management in the infringement.
35. A compliance programme is also deemed to be manifestly inadequate if, in case of eligibility for leniency, an undertaking or an association of undertakings fails to put an end to the infringement and to submit, as quickly as possible, a request for leniency pursuant to Art. 15, paragraph 2-*bis* of Law no. 287/90 and of the notice on the non-imposition and reduction of fines.

Programmes not manifestly inadequate

36. Compliance programmes adopted before the opening of proceedings that have not proved to function in a totally effective way - not allowing the prompt detection and interruption of the infringement before the inspections by the Authority - but that are not manifestly inadequate, may qualify for mitigation of **up to 10%**, provided that the undertaking adequately amends the compliance programme and begins its implementation after the opening of proceedings (and within six months from the notification of the opening of proceedings).
37. It falls under the responsibility of the undertaking to demonstrate that: *i)* the programme adopted by the undertaking was carefully developed for the prevention of the risks of anti-competitive activity and that the implementation of the programme was undertaken with seriousness and constancy for its full duration, although it did not actually prevent the occurrence of an unlawful conduct and its prompt discontinuation/reporting; *ii)* the changes to the programme proposed by the undertaking are suitable to overcome the deficiencies that prevented the effective operation of the original compliance programme.
38. The quantification of the mitigation shall be commensurate with the completeness and quality of the programme already existing at the time of the opening of proceedings and the changes implemented *ex post* by the undertaking, according to the characteristics of the undertaking and the market context in which it operates.
39. While starting from the assumption that the evaluation of each programme must take account of the specific characteristics of the case in question, it is evident that the prolonged involvement in long-lasting unlawful activities despite the existence of a compliance programme is to be considered as typically symptomatic of the inability of the programme to prevent competition infringements. This circumstance shall be taken into account by the Authority in the assessment of the programme for the purposes of granting and/or quantification of mitigation.

VI. Repeat offender undertakings

40. No more than 5% mitigation may be granted to a repeat offender undertaking, as defined under part 22 of the Guidelines on setting fines, which already has a compliance programme in place and only upon demonstration of changes made to the programme after the opening of proceedings.
41. No mitigation may be granted to a repeat offender undertaking for having adopted a compliance programme, if it already benefited from a reduction in antitrust sanctions, following a previous investigation. The same applies to programme changes made after the opening of proceedings.

VII. Compliance programmes and commitments under Art. 14-*ter*

42. No presumption of adequacy and effectiveness may be invoked by the undertaking in the event that the compliance programme is the subject of commitments made binding pursuant to Art. 14-*ter* of Law no. 287/90.
If the same undertaking is involved in a subsequent proceedings, for the purposes of awarding mitigation, it still bears the burden to provide all the elements necessary to demonstrate the concrete implementation of an adequate compliance programme.

VIII. Compliance programmes within groups of undertakings

43. With regard to groups of undertakings, in the case of antitrust proceedings that also involve the parent company, for the compliance programme of this parent company to be deemed appropriate, it must be adopted and implemented at group level. For the purposes of the assessment of mitigating circumstances, therefore, both the programmes adopted and implemented by the parent company and the subsidiaries Parties to the proceedings will be considered.
44. The adoption of a compliance programme by the parent company shall not be considered sufficient to exclude the liability of the parent company for the anti-competitive conduct of its subsidiary.

IX. Consideration of compliance programmes as an aggravating circumstance

45. The Authority does not normally consider the existence of a compliance programme as an aggravating circumstance, save in exceptional cases.
For example, if the compliance programme has been used to facilitate or conceal an infringement, mislead the Authority about the existence or the nature of an infringement and/or to engage in conducts intended to prevent, hinder or in any case delay the investigation by the Authority and there is evidence that the indications included in the programme have been effectively followed (for example, in case the undertaking responds incompletely to requests for information or engages in obstructive conducts during inspections). These occurrences may be qualified as an aggravating circumstance pursuant to para. 21 of the Guidelines on sanctions, which includes "*to behave in such a way to prevent, hinder or delay the Authority's investigations*".
46. Moreover, if the undertaking is a repeat offender and has already benefited from a reduction in antitrust sanctions for having adopted a compliance programme following previous investigations, this element shall be taken into account in establishing the extent of the aggravating circumstance for repeat offending.

47. Finally, if proceedings are launched against an undertaking that has benefited from a reduction in antitrust sanctions for having adopted a compliance programme for failure to comply with formal decision issued by the Authority, this element, although not an aggravating circumstance, may be taken into account in the determination of the gravity of the infringement and of the related percentage in the calculation of the sanction.

X. **Transitional and final provisions**

48. These Guidelines apply to formal investigations initiated by the Authority, pursuant to Article 14 of Law no. 287/1990, after their publication.