

COMPETITION COMPLIANCE PROGRAMS: TOWARDS SELF-REGULATION



Djohra BARKAT^{1*}

Faculty of Law and Political Science, University of BEJAIA

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Abstract: The initiative of companies to develop compliance programs by self-regulating is an effective remedy for competitive regulation. The objectives (preventive, curative and progressive) assigned to these programs highlight their undeniable importance. As regards companies, the said programs allow them to for see competitive risks and guarantee their financial and legal stability, about the Competition Council, it ensures compliance with the rules governing free competition by associating companies. However, the effectiveness of competition compliance programs can be relative and questioning, from either legal or practical standpoint.

Key Words: Competition, Compliance, companies, Self-regulation, Efficiency.

برامج المطابقة لقواعد المنافسة: نحو الضبط الذاتي

ملخص: تعتبر مبادرة المؤسسات بتبني برامج المطابقة عن طريق الضبط الذاتي بمثابة دعم فعال للضبط التنافسي، فالأهداف (وقائية، علاجية وتطويرية) المنوطة بهذه البرامج تؤكد على ذلك. بالنسبة للمؤسسات فإن هذه البرامج تسمح لهذه الأخيرة بالتنبؤ بالمخاطر التنافسية وضمان استقرارها المالي والقانوني، أما بالنسبة لمجلس المنافسة فهو يضمن احترام القواعد المنظمة للمنافسة باشتراك المؤسسات. لكن قد تكون فعالية برامج المطابقة لقواعد المنافسة نسبية ومشكوك فيها، سواء من الناحية القانونية أو العملية.

الكلمات المفتاحية: منافسة، مطابقة، مؤسسات. الضبط الذاتي، الفعالية.

Les programmes de conformité aux règles de concurrence : vers une autorégulation

Résumé: L'initiative des entreprises de développer des programmes de conformité en s'auto régulant est un remède efficace à la régulation concurrentielle, Les objectifs (préventifs, curatifs et évolutifs) assignés à ces programmes illustrent leur importance indéniable. Pour les entreprises, les dits programmes leur permettent de prévenir les risques concurrentiels et garantir leur stabilité financière et juridique, quant au Conseil de la concurrence, il garantit le maintien des règles guidant le jeu concurrentiel en faisant impliquer les entreprises. Cependant, l'efficacité des programmes de conformité aux règles de concurrence peut être relative et remise en cause, du point de vue juridique et pratique.

Mots Clés: Concurrence, Conformité, Entreprises, Autorégulation, Efficacité

*Corresponding Author: djohra.barkat@univ-bejaia.dz



Introduction:

After a vast movement of protest and questioning of the repressive policy carried out during the first years by the competition authorities, which had proven to ensure the optimal application of competition rules and to the required effectiveness, given that repression is not an end in itself¹. The current trend has shifted towards new implementation techniques, based on cooperation and voluntary initiative of different market players.

In reality, the trend was to review the classic modes of applying competition law (sanctions, injunctions, etc.), to move to more relaxed modes of application "soft law", aimed at the self-application of the rules of competition and the effective participation of companies in market regulation. This approach is manifested by the adoption of compliance programs by companies.

In France, compliance programs are introduced within the framework of negotiated procedures² namely the non-contestation of grievances procedure³, which subsequently became the settlement procedure, as a result of the harmonization of the rules of internal competition law with those of European law⁴. They are fully enshrined in the framework document, issued by the competition authority in 2012 on competition rules compliance programs⁵.

As far as Algerian law is concerned, the notion of competition compliance programs appears to be strange, insofar as the competition order does not make any illusion. However, the Competition Council was positive about the reception of such programs in Algerian law, during the 14th International Competition Forum, organized by the Organization for Economic Cooperation and Development (OECD) in 2015⁶.

¹ CANIVET Guy, "Propos conclusifs", in *Clémence et transaction en matière de concurrence. Premières expériences et interrogations de la pratique*, actes du colloque du 19 janvier 2005, <http://www.creda.cci.fr/>

² Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques, *J.O.R.F.* n° 113 du 16-05-2001, <http://www.legifrance.gouv>

³ Article L.464-2-III du Code de commerce français.

⁴, For a detailed study, See DECOCQ André & DECOCQ Georges, *Droit de la concurrence, Droit interne et droit de l'Union européenne*, 5^e édition, LGDJ, Paris, 2012.

⁵ Autorité de la concurrence, Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence, <http://www.autoritedelaconcurrence.fr>

⁶ See ZITOUNI Ammar & SLIMANI Djilali, "Les programmes de conformité aux règles de concurrence", Journée d'étude organisée par le Conseil de la concurrence, sur : Les programmes de conformité aux règles de concurrence, Le 27 avril 2017, <http://www.conseil-concurrence.dz>



Using its regulatory powers, the Competition Council has real decision-making⁷ and consultative power, which allows it to take any decision or measure aimed at encouraging and promoting competition, in order to guarantee efficient regulation by all means⁸.

The major objective is therefore to achieve efficient regulation by encouraging companies to comply with the rules of competition and to move towards self-regulation or self-regulation. From this perspective, the most relevant question that deserves to be raised is: **How do companies self-regulate by developing competition compliance programs?**

The importance of competition compliance programs can be seen from the definition and objectives of this procedure (**first topic**), and can be measured by the benefits that their application presents (**second topic**).

THE FIRST TOPIC: Competition compliance programs: an ethical approach in a legal context

Competition compliance programs are considered preventive *ex ante* regulatory measures within the framework of the administrative police. This procedure is based on the voluntary commitment to comply with competition rules, the definition of which remains necessary (**A**) as well as the determination of its objectives (**B**).

First requirement: Definition of competition compliance programs

The notion of compliance programs is a notion appropriate to competition authorities under the name competition programs, its definition requires strict determination of the concept (**1**) and a clear distinction between the commitment to comply and the compliance programs (**2**).

First section: The precision of the concept

From a terminological standpoint, competition compliance programs are synonymous with; compliance programs, competitive bidding programs, legal compliance. They are defined by the Competition Council as a means allowing companies and organizations to express their intention to respect the rules relating to competition and to preserve its principles, by giving effect to this desire through the adoption of a set of procedures⁹.

⁷ ZOUAÏMIA Rachid, *Le droit de la concurrence*, Belkeise Edition, Alger, 2012, p. 50 *et seq.*

⁸ Art. 34 of « Ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence, *J.O.R.A.* n° 43 du 20-07-2003, modifiée et complétée par loi n° 08-12 du 25 juin 2008, *J.O.R.A.* n° 36 du 22-07-2008, modifiée et complétée par loi n° 10-05 du 15 aout 2010, *J.O.R.A.* n° 46 du 18-08-2010 ».

⁹ Conseil de la concurrence, Programmes de conformité aux règles de concurrence, <http://www.conseil-concurrence.dz>



Although it is inspired by that used by the French competition authority, the aforementioned definition remains general and quite vague.

As for the French competition authority, compliance programs are tools, which allow economic operators to exploit every chance of escaping and avoiding possible infringements of competition rules, by developing alert mechanisms, consulting, audit and accountability¹⁰.

In a recent update of the 2012 framework document, the competition authority defined compliance as a driving force behind compliance programs. In the sense of authority, compliance encompasses both a process and an objective, implemented within companies and associations of companies in a sustainable manner¹¹.

Compliance programs illustrate design competition; they can also be defined as a set of voluntary actions and measures aimed at enforcing competition rules. The procedure is based on concrete initiatives that guarantee compliance with competition rules, by detecting possible violations and taking the necessary measures to reduce and avoid them in the future.

It is notable that compliance programs are enshrined in the framework documents of the relevant competition authorities that are not qualified as Soft Law tools, unlike negotiated procedures, which draw their basis from press releases, which can be a line separation between compliance programs, and commitments to comply made under negotiated procedures.

Second section: The distinction between compliance programs and compliance commitment

Although the tendency to comply with competition rules, as being a commitment has been incorporated into the non-contestation procedure as well as the commitment procedure¹², which is based on a commitment to change behaviour for the future, in other words the commitment to comply with competition rules, nevertheless remains that the points of distinction between the latter and compliance programs, as a procedure, are clearly observable.

From the legal standpoint, unlike the compliance commitment, which is governed by procedural notices issued by the competition authority and based on the provisions of the Commercial Code, compliance programs derive their existence of the

¹⁰ Autorité de la concurrence, Document-cadre sur les programmes de conformité aux règles de concurrence, *op.cit.*, point 21

¹¹ Autorité de la concurrence, Document-cadre du 24 mai 2022 sur les programmes de conformité aux règles de concurrence, <https://www.autoritedelaconcurrence.fr>

¹² Autorité de la concurrence, Communiqué de procédure du 2 mars 2009 relatif aux engagements en matière de concurrence, <http://www.autoritedelaconcurrence.fr>



framework document. Therefore, the rules included in the document can not be pleaded or contested before competition authorities or courts.

In short, compliance programs are of an ethical nature and of moral value of which legal value is questioning, they are based on the desire of companies to adopt such programs and they cannot give rise to a sanction in the event of distrust or of abstention, on the part of companies.

From a procedural point of view, compliance programs have a preventive nature aimed at the adoption of good behavior and compliance with guidelines before the commission of the anticompetitive practice, unlike compliance commitments, which represent a procedural step initiated after the commission of the anticompetitive practice. Commission and detection of anti-competitive practice and notification of grievances by the competition Council.

In this sense, the commitment to comply with competition rules concerns companies and organizations prosecuted and implicated in cases of anticompetitive practices, which waive the right to contest the grievances notified by the Competition Council¹³.

It follows that, while compliance programs are intended to provide guidance, assistance and pre-commission prevention of anti-competitive practices, the compliance commitment is aimed at reducing fines or the total or partial exemption from the penalty.

Second requirement: The objectives of competition rules compliance programs

By definition, competition compliance programs are threefold: preventive, curative and progressive, which aim at a main objective, that of healthy, fair, free and undistorted competition. They can be translated into the prevention of financial risks and damage to the reputation of companies **(1)**, better detection of breaches **(2)** and the development of a culture of compliance with standards **(3)**.

First section: Prevention of competitive risks

Competitive risks are considered all risks threatening the financial stability and reputation of companies as well as the risk of repeat breaches. The more we know the rules, the more we can avoid the risk of breaches and, at the same time, reduce the risk of sanctions and its harmful effects on the financial situation of companies.

¹³ For more details, see Marie-Anne FRISON-ROCHE & Marie Stéphane PAYET, *Droit de la concurrence*, 1^{ère} édition, DALLOZ, Paris, 2006.



Indeed, the amount of fines imposed annually by the competition authorities shows the heaviness of the sums paid and their impact on the financial stability of companies.

Also, prosecutions and accusations of companies before the competition authorities can negatively influence the reputation of the latter, who may well avoid the situation of questioning if they had compliance programs.

In the same trend, the compliance programs aim to prevent the reiteration and recidivism of anti-competitive practices and breaches of competition rules, in that reiteration can harm the efficiency and effectiveness of standards.

Second section: Facilitate the detection of anti-competitive practices and breaches

Compliance programs are based on the desire to comply, expressed by companies and organizations, where the chances of detecting anti-competitive practices and breaches are open. Companies can contribute, coordinate and participate voluntarily with the Competition Council, particularly in cases of prosecution and challenge, by providing it with the information and data necessary to rule on the matter in question¹⁴.

Companies also, having agreed to comply with competition rules, are less exposed to risk and less likely to commit anticompetitive practices and misconduct. Therefore, their ability to comply is higher, compared to other companies that do not have compliance programs.

Third section: The development of a discipline of compliance with standards

Establishing a culture of competing within a healthy and fair framework is one of the objectives most sought by the Competition Council, because this culture reflects a certain degree of conscience and economic citizenship.

The mission of developing a competition discipline by design is manifested by the adoption of awareness programs for all market players on competitive risks and threats as well as the seriousness of breaches of competition rules.

¹⁴ Walid CHAIELOUJ, " Competition by design : un outil de compliance aux services des entreprises et des autorités de concurrence", in *l'entreprise et l'intelligence artificielle, les réponses du droit*, Presse de l'université de Toulouse 1 Capital, France, 2022, pp.517-538.



Awareness is also raised through the distribution of explanatory guides, missions and debate conferences, television forums, and the integration of interactive computer software, in the form of CD-ROM or the creation of accessible files, etc¹⁵.

From this angle, emphasis must be placed on the information aspect and training of company personnel, through the organization of awareness-raising companies, training and professional training in competition matters...

Finally, although competition rules compliance programs are tools of great interest in terms of competitive regulation; their ethical and moral character can reduce their value and their legal force, which leaves their effectiveness dependent on the means available to the Council Competition and businesses to implement them.

THE SECOND TOPIC: Application of competition rules compliance programs: in search of effectiveness

In principle, compliance programs have a dual interest and of serving both companies and the Competition Council at the same time. For companies, it is a voluntary approach, which must be concretized by a compliance commitment **(A)**. As for the Competition Council, its role is to encourage, by all means, companies to take ownership of such programs and to ensure their implementation **(B)**.

First requirement: Application of competition rules compliance programs by companies

In order to deploy compliance programs, the French competition authority has recommended that companies remember five essential points, which can be summarized in three: the commitment to comply with competition rules **(1)**; awareness **(2)**; monitoring and control **(3)**.

First section: The commitment to comply with competition rules

The first step in the compliance process, companies must fully express their desire to integrate into the said procedure through a commitment, issued by the company manager in favor of respecting competition rules.

In this sense, the commitment to comply must move from its informal phase to the real and formal phase. This transition from virtual to real guarantees the credibility and effectiveness of its programs. The commitment must be clear, firm and public¹⁶.

¹⁵ Valerie LEDOUX et Jean Christophe RODA, " Les «compliance programs» en droit de de la concurrence", *Revue Contrats- Concurrence-Consommation*, December 2007, pp.5-8.

¹⁶ Autorité de la concurrence, Document-cadre du 10février 2012 sur les programmes de conformité aux règles de concurrence, Point 22, *op.cit.*



Company managers, admitting the breach of competition rules as a risk to be managed, while convincing their staff to comply and adopt pro-competitive behavior when they carry out their activities, must sign the compliance commitment¹⁷.

Company managers must also approach the Competition Council for support and encouragement in the compliance process. To this end, companies are invited to invest all means (human and financial) and provide all necessary efforts to enable the application and implementation of their programs, in particular through the adoption of a Code of good practice¹⁸.

Second section: Awareness

From this perspective, efforts are concentrated on the formative and informative aspect, which is seen as a learning and training process with a view to transmitting information and explaining to company staff the provisions of competition law and the consequences. Non-compliance with its rules on business stability. We know that the more the risk is known, the better we prepare for it.

In order to keep company staff informed of all the actions and actions of their companies, the awareness-raising process requires the establishment of a system for sharing information through the publication of press releases, memoranda information from the guides...

As staff training is a major requirement, companies must focus on improving the level of staff in competition matters by organizing learning sessions, inviting lawyers, and even economists, specialized in the field of competition to better explain competition law and the benefit of complying.

Staff training can also be done through the agreement of advanced training courses, refresher training and training for the benefit of company staff. This opportunity, although it requires financial resources, can be an irreplaceable remedy in the implementation of compliance programs.

Third section: Establishment of monitoring and control mechanisms

For the proper application of compliance programs, the commitment to comply with competition rules must be accompanied by the necessary means and mechanisms for monitoring and control.

¹⁷ ICC, " Boite à outils sur les programmes de conformité aux règles de concurrence", Copyright 2014, <http://www.iccwbo.org>

¹⁸ OCDE, Synthèse de la table ronde sur les programmes de conformité au droit de concurrence, Direction des affaires financières et des entreprises, Comité de la concurrence, 2 décembre 2021, <http://www.oecd.org>



The designation of a compliance referent or officer within companies, responsible for implementing compliance programs, constitutes a positive indicator attesting to the desire of companies to comply with competition rules.

The compliance officer is responsible for monitoring the application of competition rules within the company and ensures compliance with all standards and principles guiding competitive freedom. This mission requires legal background and sufficient knowledge, which allows it to better understand and make people understand the rules of competition¹⁹.

Beyond monitoring, companies must put in place a control, audit and alert system in the event of an infraction or shortcomings. To this end, companies must have more suitable means of detection and investigation....²⁰.

However, if the application of compliance programs by companies seems logical and obvious with regard to the rules protecting their interests, the case is not the same with regard to the rules of public order, which are less important to companies.

Second requirement: Application of competition rules compliance programs by the Competition Council

Implementation of compliance programs requires joint efforts between companies and the Competition Council. The latter must be more voluntary in implementing the compliance procedure by supporting companies **(1)**, adopting a less restrictive repressive strategy **(2)** and reserving the necessary resources for this task **(3)**.

First section: Support for businesses

Compliance programs are compliance tools, which is why the Competition Council must invest a lot in supporting companies in their process of complying with competition rules in order to ensure proper application.

The accompanying mission consists of guiding and assisting companies through publications of good conduct guides and guidelines, issuing opinions on competition-related issues and recommendations of solutions. He can also issue press releases and publish studies.

To this end, the Algerian Competition Council has demonstrated such an incentive by integrating a significant number of companies into the compliance process²¹.

¹⁹ DEFFAINS Bruno & LANGLAIS Eric, *Analyse économique du droit*, Editions de BOECK Université, Bruxelles, 2009, p.331.

²⁰ Autorité de la concurrence, Document-cadre sur les programmes de conformité aux règles de concurrence, *op.cit.*, Point 29



Second section: The adoption of a less restrictive repressive strategy

While it is admitted that sanctions are not always the ideal way to achieve economic efficiency, the use of alternative procedures remains a choice that offers more security and stability to companies.

Unlike commitments to comply with competition law, known within the framework of negotiated procedures, which are based on reward²², compliance programs are not compensatory. This is the reason that encourages competition authorities to rethink a reward-based compliance strategy.

This reflection focuses on the preference of companies engaging in compliance programs, either by jurisdictions or by competition authorities in order to benefit from reductions in fines and exemptions from sanctions²³.

In comparative law, competition authorities can require companies to establish a compliance program to make the compliance commitment mandatory. As they can also ask companies, to strengthen their already existing compliance programs or to prepare a compliance report regularly.

In the same context, the Competition Council can intervene in the verification of compliance programs to ensure compliance with the compliance commitment and participate in the evaluation of the programs.

Third section: Reserving the necessary resources

The participation of the Competition Council in the implementation of compliance programs goes beyond support; it recommends the mobilization of the means and resources necessary to cover the costs and expenses envisaged in the implementation of compliance programs.

In this sense, the Competition Council must reserve a sufficient budget for support activities taken as part of the implementation of compliance programs.

The financial burden appears heavier when it comes to the commitment to comply, where the Competition Council must carry out investigations and follow-up operations to rule on the matter.

²¹ See for example, Conseil de la concurrence, "Programmes de mise en conformité (Repenses des entreprises et autorités de régulation)", <http://www.conseil-concurrence.dz>

²² KIPANI Patricia, *Les engagements en matière de pratiques anti concurrentielles, analyse des droits français, européen et américain*, LGDJ, Paris, 2014. p.310.

²³ OCDE, *op.cit*, p.8 et seq.



In addition, as part of its repressive functions, the Council must have software and detection techniques more adapted to new technologies.

In short, the application of compliance programs by the Competition Council invites the latter to combine efficiency and legality.

Conclusion:

Compliance with standards by one's own will may appear to be the ideal of the philosophy of law, it reflects an unquestionable degree of conscience, and thus the initiative of companies to provide themselves with compliance programs and to self-regulate represents a significant value that weighs on competitive regulation. The objectives (preventive, curative and progressive) assigned to these programs attest to this importance.

However, the effectiveness of competition compliance programs can be called into question from two different angles:

Legally, compliance programs are framed by framework documents, which can diminish their legal value, especially since the adoption of such programs remains a choice for companies, who can abstain or waive when it comes to rules of public order that do not protect their interests.

Practically, the said programs are not taken by the competition authorities and the courts, neither as an aggravating or mitigating circumstance, nor as justifying in themselves leniency, which testifies to the uselessness of engaging in a process which will not serve to nothing, neither in the reduction of the fine, nor in the exemption from the sanction.

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