

Antitrust fines, alternative measures and compliance

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Antitrust between EU law and national law

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Introduction (i)

- **Components of an effective antitrust enforcement:**
 - "**Negative**" general prevention, on the basis of **deterrence**, aimed at avoiding future criminal activity: *ex post* sanctions
 - "**Positive**" general prevention: development of a competition **culture** in which anticompetitive conducts are considered socially reprehensible: *ex ante* prevention
- **Complementary between the two components:** effective deterrence implies collective blame toward anticompetitive conducts. Anticompetitive conducts shall be perceived as "bad" for the whole society

Introduction (ii)

The presentation aims at discussing the following complementary arguments:

- 1) **The fining policy** shows some problems, **although of different signs**, both at the EU and national level:
 - **at the EU level**, sanctions significantly increased in the last few years. This caused a debate on possible negative consequences (see *infra*);
 - **at national level**, the pursuit of an effective fining policy has been more problematic

- 2) Suggestions for introduction of **alternative preventive measures**:
 - introduction of other tools of deterrence to foster the respect of antitrust law (criminalization of antitrust law, individual sanctions);
 - more attention toward prevention through **compliance program**;

- 3) Requirements for an **effective compliance**

Sanctions: components of the antitrust fining system

- **PECUNIARY SANCTIONS: Becker/Wils model** → optimal fine = expected gains x inverse of the probability of detection

Consequently, two issues are relevant:

- 1) Level of penalties
- 2) Probability of detection

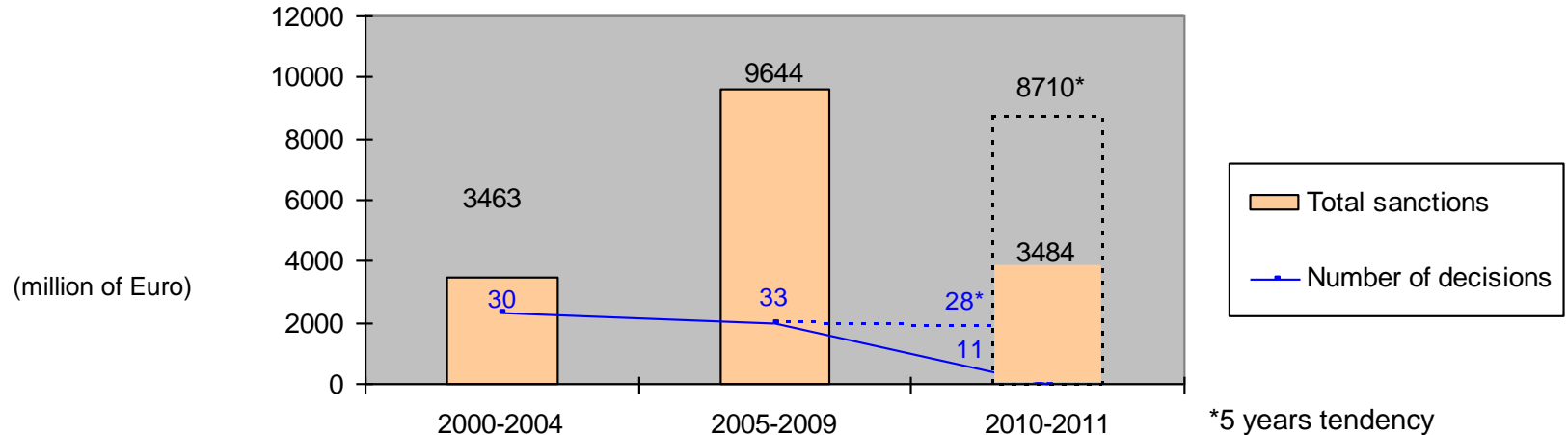
- The current EC fining guidelines (2006) significantly enhanced the deterrent and repressive character of sanctions: *“Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty [now 101 and 102 TFEU] (general deterrence)”*
- Art. 15 of Law 287/1990: The Authority may impose sanctions in case of serious infringements. Antitrust fines do not have *“the character of civil penalties (...) but of administrative fines with punitive nature (similar to those of criminal sanctions)”*, C.d.S. 1671/2001
- CEDU, decision of 27 september 2011, n. 43509/08, *Menarini Diagnostics*: *“having regard to the nature of the infringements in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall, as a matter of principle, within the criminal sphere for the purposes of Article 6”*

Three criteria (Engel):

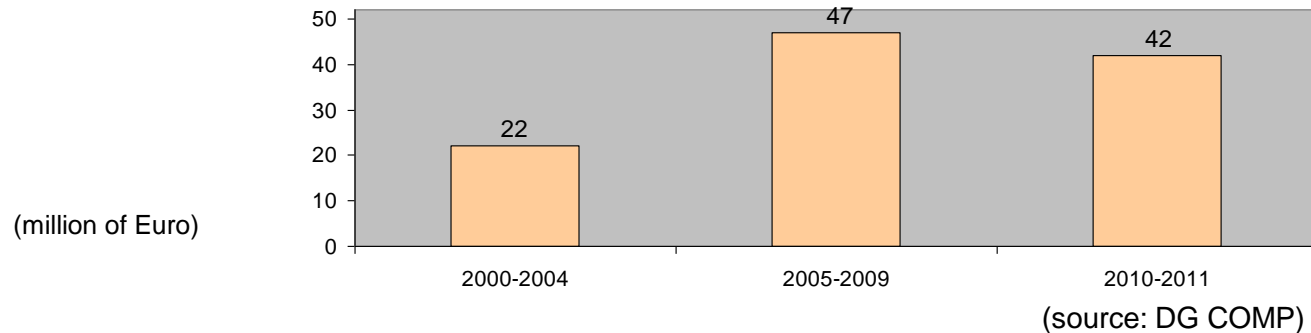
- 1) classification of the offence under domestic law;
- 2) nature of the offence (general/abstract application, repressive/preventive character);
- 3) nature and severity of the possible penalty (deterrent and punitive character)

Pecuniary sanctions: UE, application trends (101 TFUE)

- At European level, **the amount of total sanctions** imposed has significantly increased in the last 10 years:

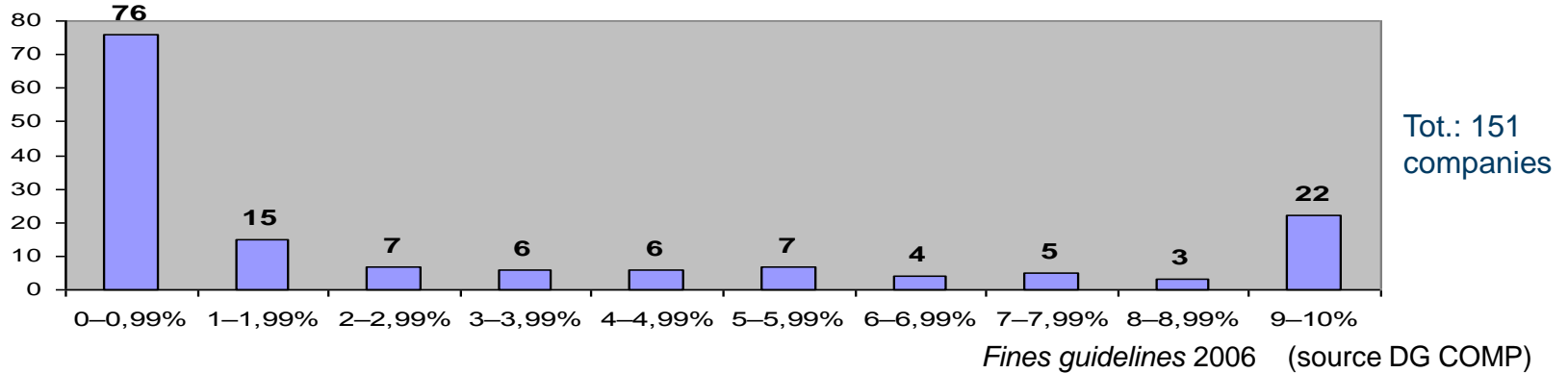


- Such trend is in line with an increase in the **average amount of the fines imposed**:

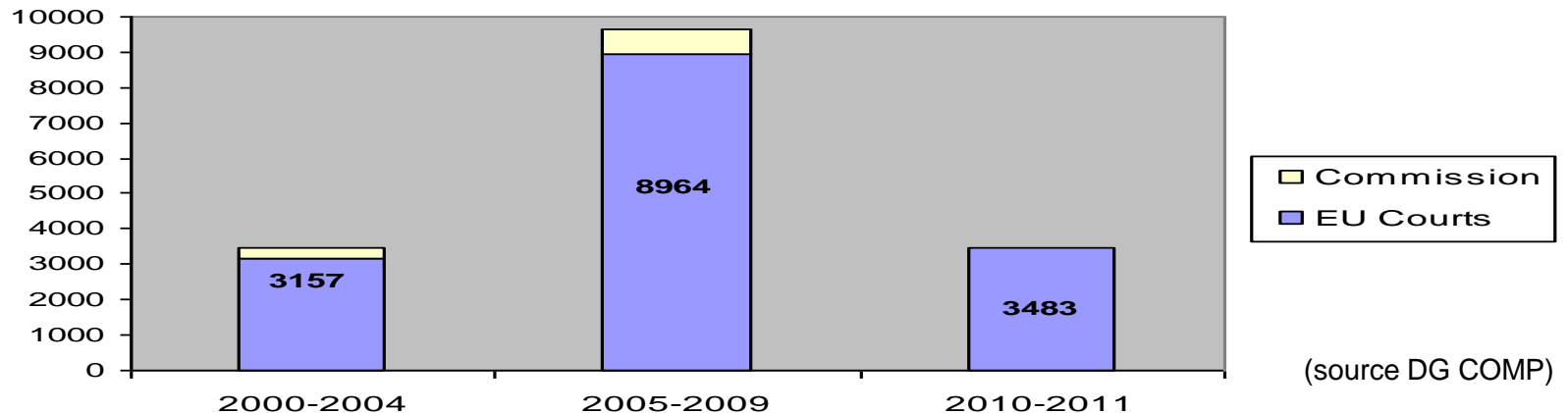


Pecuniary sanctions: UE, application trends (101 TFUE)

- Sanctions exceeded the 3% of the turnover in 35% of cases and were close to the upper limit of 10% of the turnover in 15% of cases:



- Judicial reductions were relatively low:



Alternative measures of prevention: UE

- It has been noted that excessive fines may cause the following risks:

- *Overdeterrence*;
- *Passing-on* to consumers;
- Company insolvency;
- Disproportion of fines

“the use of ever higher fines as the sole antitrust instrument may be too blunt, not least in view of the job losses that may result from an inability to make payments, and calls for the development of a wider range of more sophisticated instruments covering such issues as individual responsibility” (European Parliament, resolution 20/1/11)

- Actual debate on:

- a) Introduction of criminal fines: *“a serious limitation to the effective combat of cartel is ... the lack at Community level of criminal sanctions”* (Bo Vesterdorf)

Ranking by Businesses	Ranking by Lawyers
1. Criminal Penalties	1. Criminal Penalties
2. Disqualification of Directors	2. Fines
3. Adverse publicity	3. Disqualification of Directors
4. Fines	4. Adverse publicity
5. Private damages actions	5. Private damages action

OFT 962, The Deterrent Effect of Competition Enforcement by the OFT, November 2007

Alternative measures of prevention: UE – Which role for compliance?

b) Acknowledgement of the relevance of compliance program, even as a mitigating factor in the setting of the fine (Hofstetter-Ludescher; Murphy). Recently, three Authorities produced new guidance documents:

1) **UK**, OFT, *Drivers of Compliance and Non-compliance with Competition Law*, (2010)

- compliance program in line with the guidelines, implemented after the infringement or before and fraudulently violated, might be considered a mitigating circumstance (10%)
- In 2003, introduction of company director disqualification order → it is excluded where the management proves a genuine commitment to antitrust compliance: strong incentive to the adoption of the programs

2) **France**, *Autorité de la concurrence, Document-cadre* (2012)

- Programs already in place are taken into account only for the purpose of *leniency/partial immunity*. In case of infringement not eligible to the leniency program, fine is reduced if the company proves to have ceased the anticompetitive practice before inspection/investigation
- Commitment to set up compliance program/improve existing programs is considered in the framework of the settlement procedure (10% reduction)

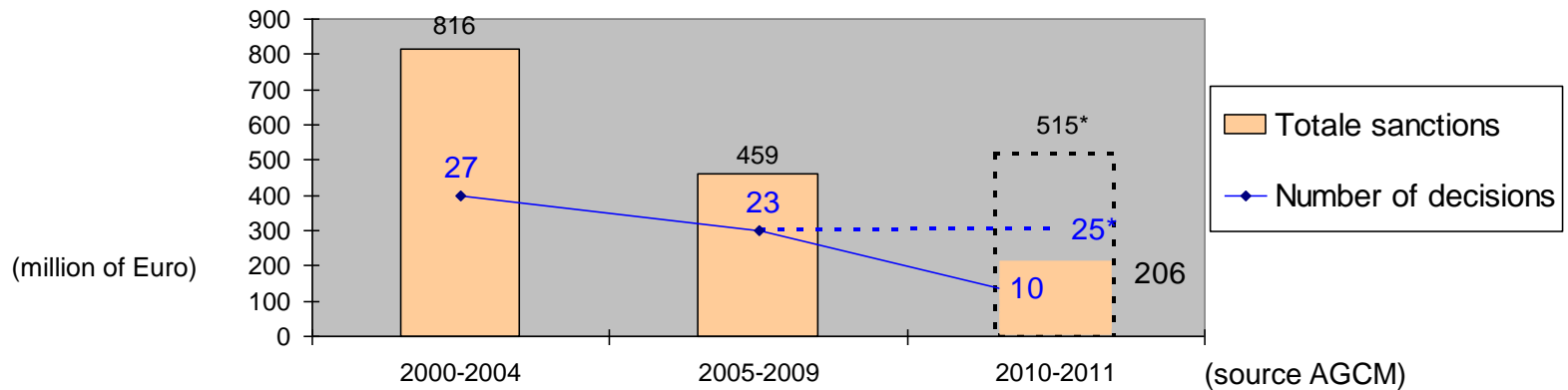
3) **EC**, *Compliance matters* (2011)

- Rigid position: a sufficient reward for a good *compliance program* is (a) avoiding unlawful behaviour and costs of non-compliance (administrative fines and civil damages); (b) getting the best out of the Commission's leniency program

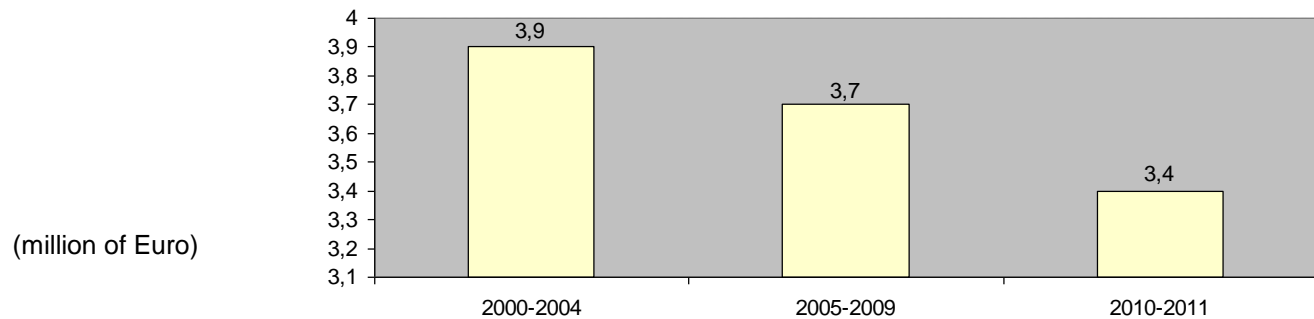
“the mere existence of a compliance programme will not be considered as an attenuating circumstance (...) the existence of a compliance programme will not be considered an aggravating circumstance”

Pecuniary sanctions: Italy, application trends (art. 2 e 101)

- At national level, problems are significantly different: after an increase in fines in 2000-2004, the total amount of sanctions showed a decreasing trend:



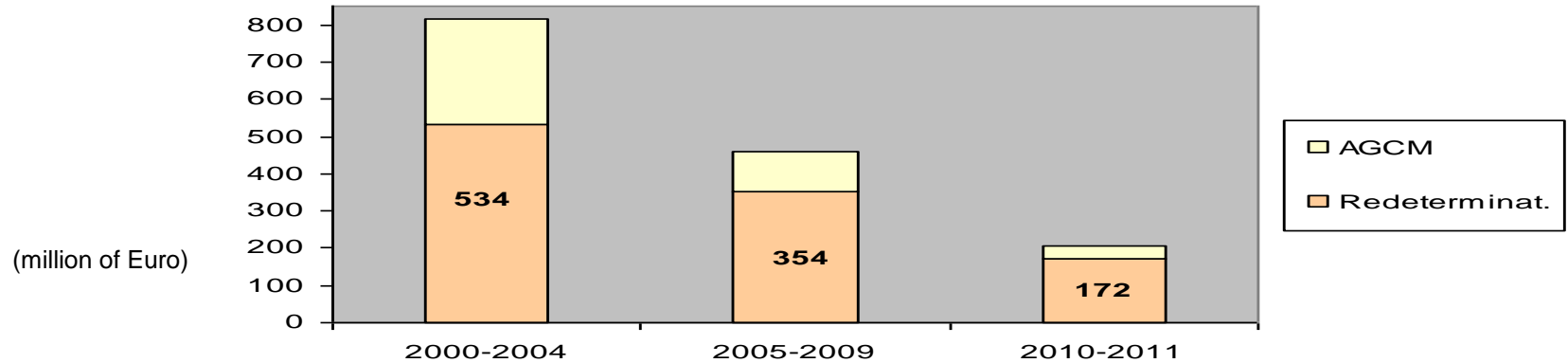
- Also the **average amount of fines** slightly decreased:



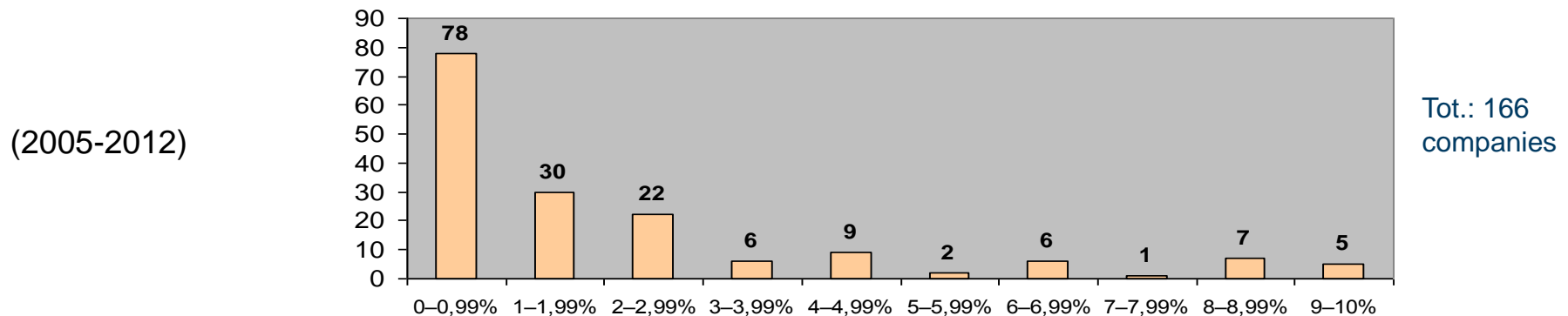
(source: elaborated from AGCM)

Pecuniary sanctions: Italy, application trends (art. 2 e 101)

- Following judicial review/AGCM redetermination of fines, sanctions were significantly reduced:



- Only in 20% of cases sanctions exceeded the 3% of the turnover and only in 3% of cases sanctions were close to the upper limit of 10% of the turnover:



Pecuniary sanctions: Italy, application trends (art. 2 e 101)

- In addition, the upper limit of 10% was reached only in cases involving small companies :

Italy: Art. 2 e art. 101 TFUE - % per turnover categories (2005-2012)						
	0– 10 mill.	10 –50 mill.	50-250 mill.	250-500 mill.	500-1 bill.	> 1 bill.
0 –0,99%	5	23	17	5	5	23
1 – 1,99%	5	13	8		1	3
2 - 2,99%	3	8	6	4	1	
3 – 3,99%	2	1	1	1	1	
4 – 4,99%	3	4	1		1	
5 – 5,99%		1	1			
6 – 6,99%	4	2	0			
7 – 7,99%			1			
8 – 8,99%	2	3	2			
9 – 10%	4		1			

Alternative measures of prevention: Italy

- Before such trend in the Italian fining policy, would it be possible to introduce alternative measures of prevention?
 - **Individual sanctions:**
 - **Right of recourse** of the sanctioned company against directors that have caused damages (artt. 2392-2393 civil code), **never proposed** until now;
 - **Action for damages:** to date, the loss of revenue was refund only in a case concerning a public sector company. The court of auditors sentenced *Trambus* members of the board of directors and of the board of auditors to pay damages after the ICA had imposed an antitrust fine on the company for an agreement in the sector of public local transport (case n. 325/2011);
 - **Administrative pecuniary** sanctions, generally considered easy to circumvent;
 - **Criminal sanctions**, in limited cases: bid rigging (art. 353 Criminal Code), speculation on the price of consumer goods (art. 501 bis Criminal Code, pasta case); however, it seems difficult in Italy to increase the application of **custodial sanctions**, because of cultural and institutional reasons: indeed, the above provisions had very limited applications
 - Prevention through effective **COMPLIANCE PROGRAMME** set up by companies, in line with the actual discussions at the European level

Incentive to compliance: (i) “post factum”

- Compliance activity seeks to align company’s incentives with employees’ incentives
- Improving compliance requires incentives for companies
- Competition authorities adopted different approaches in the assessment of existing compliance program (“*ante factum*”) and in the assessment of compliance program set up/improved quickly after the discovery of an infringement (“*post factum*”)
- **Compliance program “*post factum*”:**
 - 1) generally taken into account for fines reduction:
 - » EC: discretionary, *Napier Brown-British Sugar*, 1988
 - » France, guidelines 2012 → up to 10% reduction (with regards to programs adopted in the framework of a settlement procedure)
 - » UK: guidelines 2011 → up to 10% reduction (with regards to programs adopted immediately after the discovery of the infringement)
 - » Italy: I342-*Farmindustria/Codice di autoregolamentazione*, 1999; I266-*Assirevi/Società di revisioni*, 2000
 - 2) Failing to comply with a program set up as a commitment with the EC has been considered an **aggravating circumstance**
 - EC: *British Sugar*, 1998

Incentive to compliance: (ii) “ante factum”

- As regards programs existing “*ante factum*” that did not prevent the commission of an infringement, Authorities adopted different approaches (Jalabert Doury – Sproul):
 - **UE:** the main reward of a compliance program is to avoid sanctions / to get the best out of the Commission’s leniency program (*Compliance matter*, 2011, Almunia’s speech 25/10/2010)
 - **UK:** a genuine compliance program, including the elements detailed in the guidelines, may be worth of a reduction of up to 10% (guidelines June 2011)
 - **France:** no fine discount; however a reduction may be granted in case an effective compliance program (Best Practice Compliance) is in place at the time of the commission of an infringement not eligible for leniency and the company proves to have ceased the practice before inspection/investigation – the scope of reduction is not defined (guidelines February 2012)

- What is a Best Practice Compliance?

Antitrust compliance: (i) Requirements for a Best-Practice Compliance

- In order to consider compliance program as exemption/reduction from fines, the following requirements should be implemented: *best-practice* (cfr. OFT, Autorità francese, EC)



- **GENERAL CRITERIA:**

- Risk Identification**, specific to the sector and operations of the business (e.g. cartels, vertical agreements, abuse of dominant position) → **TAILORED COMPLIANCE PROGRAM**
- Risk assessment**: high (sales and marketing departments, staff who attends trade association meetings), medium (staff that has regular contact with competitors or involved in communication activity), low (*back office*)
- Risk mitigation**: regular and appropriate training activities, *ad hoc* procedures
- Review**: evaluate periodically the effectiveness of steps 1-3

Antitrust compliance: (i) Requirements for a Best-Practice Compliance

- A compliance best-practice mainly requires tailored procedures and a set of penalties:
 - a) **Senior management involvement** and support: the management body shall be familiar with the program, monitor and actively participate in its implementation;
 - b) **Responsibility for implementation**: the overall responsibility for the program must be assigned to specific persons; those people must have the resources and powers necessary to do so and must report periodically to the management;
 - c) **Training/instructions**: the basic compliance rules and procedures that have been established must be communicated to all employees, including through messages from the highest level of the board; employees must be specifically instructed in competition law matters;
 - d) **Implementation of procedures** to minimize the risk of competition law breaches. E.g. pre-approval to participate in trade associations/attend their meeting; follow up control of the meeting minutes;
 - e) **Monitoring and auditing**, implementation of internal whistleblowing procedures: the effectiveness of the compliance program must be re-assessed on a regular basis; introduction of confidential and anonymous mechanisms for employees to report possible violation (in order to avoid retaliation);
 - f) **Implementation of disciplinary sanctions** in cases of serious infringement of the program

- Complementarities with top management alternative sanctions: in the UK **company director disqualification order** introduced in 2003

Antitrust compliance: “ante factum” programs and subjective issues (1)

- It might be appropriate to take into account compliance programs respondent to the Best Practice guidelines in the setting of the fine

- Genuine compliance programs might also impact on the **subjective liability**, which is a precondition for the imposition of fines:
 - Reg. 1/2003: EC may impose fines on companies “*where, either intentionally or negligently*” they infringed competition law

 - L. 689/82, art. 6: “*in violations punished with an administrative sanction, each one is responsible for his conscious and voluntary acts or omissions*”

- The punitive characters of antitrust fines and the criteria for the imputation of liability suggest that the assessment of whether a company is effectively liable for an infringement or whether a genuine compliance program was fraudulently violated should be conducted *ex ante*. Antitrust Authorities have the tools to identify a fraudulent elusion of the program

Antitrust compliance: “ante factum” programs and subjective issues (2)

In particular, two issues are relevant:

- **Parental liability:**

At EU level: presumption of **decisive influence** of the parent company over a wholly owned subsidiary's conduct (C-97/08P *AKZO*, 2009) → hardly contestable presumption

The adoption of genuine compliance program should in principle exclude a ***culpa in vigilando*** of the parent company → **exemption from liability** (e.g. an infringement in a national market perpetrated by the subsidiary of a multiproduct multinational firm). This is excluded in case of compliance programs not properly implemented (Hofstetter; Thomas)

However, EU Courts have recently considered the adoption of compliance program to establish the liability of a parent company over the anticompetitive conduct of its subsidiary (TPI T-138/07, *PO/Elevators and Escalators*, 2011, par. 88)

2) Liability within the company:

According to Law 689/81, a company has an objective liability: it might be possible to introduce a change in the nature of the fine: in case a compliance program is established, the sanction might be considered compensatory in nature rather than punitive → fine reduction (see below...)

Antitrust compliance: (i) a benchmark for comparisons?

- At national level, a useful reference for comparison is legislative decree 231/2001 on companies' administrative liability, also applicable to criminal offences (including corruption). Thus, also in this case employees' incentives should be aligned to companies' incentives:
 - a) “***ante factum***” programs have direct incidence on company's liability (artt. 6, 7) → in any case, profits from the offence are always confiscated (which is not a strictly punitive measure)
 - b) “***post factum***” programs are considered as attenuating circumstance in the imposition of the penalty

- Art. 6 sets the minimum requirements that a program shall contain to be considered effective:
 - Identification of risk areas within the context of which crimes might be committed;
 - Setting of specific protocols aimed at programming training activities and agency's decisions in relation to the crimes to be prevented;
 - Identification of ways of managing financial resources that might prevent the commission of crimes;
 - Definition of information obligations for the body in charge of supervising the implementation and observance of the program;
 - Introduction of appropriate disciplinary sanctions for failure to respect the measures established in the program

Antitrust compliance: (i) a benchmark for comparisons?

- **Assessment criteria:**

- A model might be considered effective where its fraudulent violation could not be anticipated → **the assessment has to be conducted *ex ante*, at the time of the adoption and implementation of the program** (Trib. Milano, 17/11/2009)

- **Apportionment of the burden of proof:**

- As regards **top management level**: the company shall prove that the program was fraudulently eluded (Trib. Napoli, 26/06/2007)
- As regards **employees subject to the supervision of others**: the burden of proving failure to adopt/implement the program is on the prosecutor (D. Lgs. 231/2001 explanatory memorandum)

- Courts have only recently considered the implementation of such programs in their decisions, both in proceedings for interim measures (e.g.: Pfizer, GIP Trib. Bari), and in the context of a final ruling (e.g.: Impregilo, Trib. Milano, 17/11/2009)

Conclusions

- Two tools are necessary for an effective antitrust system:
 - 1) Fining policy → ”**Negative**” general prevention
 - 2) Alternative measures of prevention → ”**Positive**” general prevention
- To date, scholars have mainly devoted their attention to “negative” prevention: however, both at the EU and national level (even if for different reasons) alternative measures of prevention seems also necessary
- **Compliance is relevant**

The adoption of effective programs requires incentives: open debate, different solutions even within the EU, Competition Authorities play a significant role
- Setting effective criteria / procedural rules to identify genuine programs through an *ex ante* assessment
- In Italy, **Legislative Decree 231/2001** is a good benchmark for a reflection on compliance procedures criteria and methods

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