G06 – Antitrust Compliance
Part 1: Cornerstones for effective compliance programmes

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DICO guidelines are directed to Compliance Practitioners. They are designed to provide an introduction and overview on the subject. Therefore the guidelines deliberately avoid highlighting special cases and identifying legal exceptions.

DICO guidelines provide the reader practical and actionable recommendations on Compliance issues. On this basis, publishing a guideline aims for initiating a discussion regarding the subject matter but is not meant to constitute any kind of binding standard.

DICO guidelines constitute practical considerations by Compliance Practitioners and are not intended to give legal advice. No one reading or utilizing these guidelines should rely on this document for legal advice, but instead should seek such advice from competent legal counsel.

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Please also note: Convenience translation - only the German version (dated May 2016) is authentic
Due to the risks accompanying cartel infringements, antitrust compliance programmes are, today, common practice for many undertakings. However, there is still considerable debate as to the necessary content and scope of such programmes. These guidelines aim to give greater clarity on the requirements of such programmes, and to support DICO Members and interested third parties during the establishment, improvement and assessment of antitrust compliance programmes.

The present guidelines explicitly leave open the question of whether undertakings are legally obliged to introduce or maintain antitrust compliance programmes. Irrespective of this, certain cornerstones for effective programmes have emerged during the past few years in theory and practice. These cornerstones will, after a short description of the cornerstone concept, be introduced and described in detail in the following (under 2. and 3.).

Many undertakings include measures in their antitrust compliance programmes which serve to protect the undertaking against cartel infringements by their suppliers (so-called anti-trust damage prevention). For example, one measure could be to require cartel offenders participating in procurement processes to prove a successful “self-cleaning” – including the existence of an effective antitrust compliance programme. For procurement procedures by public clients in Europe, such self-cleaning is already required by public procurement (and cartel) law. Some undertakings have gone even further; and as part of their antitrust damage prevention, have contractually obliged suppliers who are active on “cartel-prone” markets to introduce and maintain antitrust compliance programmes.

Against this background, the aim of these guidelines is not only to assist undertakings during the establishment of their own compliance programmes, but also to serve to provide assistance to DICO members and interested third parties – including awarding public entities – with regard to the assessment of the effectiveness of suppliers’ (or bidders’) compliance programmes. The guidelines can also serve undertakings (in particular with respect to the stringent case-law on the liability for commercial agents) as a valuable instrument for sensitizing their commercial agents.

The guidelines also have a third aim: while competition authorities in many other jurisdictions (e.g., United Kingdom, Italy, France, Australia and Canada) may take into account the introduction or existence of effective antitrust compliance programmes by mitigating a fine in cases of antitrust infringements, this is not the case in Germany (and some other countries). The reason for this might be that up until now there were no recognized (or sufficiently precise) cornerstones for effective antitrust compliance programmes. The present guidelines introduce such cornerstones. They can therefore also be understood as a contribution to the debate on the acknowledgement of antitrust compliance programmes as a mitigating factor for fines issued by competition authorities.
2. The Cornerstone Concept

Antitrust compliance cannot be viewed in isolation. It is, together with other regulatory compliance issues, an integral part of a compliance management system. Accordingly, the cornerstones of an antitrust compliance programme have to fit in with the higher level systematics of compliance management systems.

As far as the structuring of such systems is concerned, guideline ISO 19600 (Compliance Management Systems – Guidelines) published in 2014 by the International Organization for Standardization (ISO) is one example. According to that guideline, elements of a compliance management system include, above all, the seven areas of: management culture, responsibility and organization, risk analysis, set of rules, training, monitoring and improvement (including the handling of violations). A similar picture is found in the IDW auditing standard 980 (Principles of Correct Auditing of Compliance Management Systems) from 2011.

However, contrary to the ISO Guideline and to the IDW auditing standard 980, these guidelines follow a broader aim and do not merely intend to provide information regarding the structuring of a compliance programme, but also describe criteria for the review of third party programmes (for example within the framework of self-cleaning audits under public procurement law). Additionally, these guidelines are explicitly aimed at undertakings of all sizes. In particular, they aim to give small and medium-sized enterprises (SME) pragmatic and specific information for the structuring of antitrust compliance programmes.

Consequently, these guidelines follow a cornerstone concept. This first section concentrates on certain integral parts of effective compliance programmes, i.e. it puts them “before the brackets”. Beside focusing on pragmatism and specificity, we also take account of the fact that certain contents of antitrust compliance programmes such as, for example, details of the risk analysis and the handling of violations, either cannot be reviewed by third parties, or can be done so only to a limited extent. This is because of the sensitivity and confidentiality of the information involved. In addition and in particular in the case of self-cleaning audits under public procurement law, the most exact criteria possible are necessary to enable a swift evaluation.

Aspects of (I) management culture, (II) responsibility and organisation, (III) risk analysis, (IV) sets of rules and (V) training are, in the sense of this guideline, cornerstones concerning effective antitrust compliance programmes. This concept of cornerstones is not intended to be considered as exhaustive or all-encompassing. On the contrary, it may well be appropriate to modify, adjust and expand the cornerstones according to size, risk exposure and risk tolerance of the company in question. Nevertheless, these cornerstones are intended not only as pragmatic assistance to companies (especially to SMEs) in establishing and developing antitrust compliance programmes, but also as a tool to contribute to current debates such as those concerning requirements for self-cleaning under public procurement law, and the possibility of rewarding the maintenance of compliance programmes when calculating fines. Further elements of effective compliance programmes will (as mentioned above) be covered in the second part of these guidelines.

When implementing and evaluating the following cornerstones, it is, in principle, irrelevant whether or not the antitrust compliance programme is part of a superordinate programme which may include aspects of anti-corruption, environmental regulations etc. The crucial point is that the central features outlined below exist and are put into practice. »
3. The individual cornerstones

Taking the aforementioned concept into account, we will now outline the central cornerstones one by one. This will demonstrate that — contrary to general concerns — establishing and maintaining an effective compliance programme does not impose disproportionate efforts, even on SMEs. A compliance programme based on the outlined cornerstones below does not require SMEs and larger companies to make substantial financial or organisational efforts; partly, this is due to advocacy measures taken by authorities, associations and companies. An essential component is rather that companies embrace the overriding importance of compliance in general and accord a higher standing to implementing compliance in business practice.

Given this fact and considering the severe consequences of cartel infringements, it has become a common assumption that even SMEs are under the obligation to establish and maintain an antitrust compliance system. Although the question over which and to what extend respective measures are appropriate correlates primarily with the size, as well as the risk exposure and risk tolerance of the company in question, the central points outlined below are key elements of effective compliance programmes.

Provided that a given antitrust compliance programme encompasses the basic framework of the cornerstones, it seems possible that (slight) deficiencies concerning certain key elements can be balanced with special efforts taken with regard to others. For reasons of transparency and comparability, it can be adequate, for instance in the context of self-cleaning audits under public procurement law, to introduce point values when reviewing a supplier’s compliance programmes.

3.1 Management Culture

An essential cornerstone of an effective antitrust compliance programme is a management that establishes a company-wide culture embracing and voicing a clear and unrestricted commitment to compliance with relevant antitrust laws, especially with regard to a ban on hard-core cartels. Ultimately, this kind of commitment shapes the character of the company’s entire business activity. Strong management cultures such as these are a precondition to compliant and pro-competitive alignment.

The company’s commitment should be (I) communicated unambiguously in text, audio or video format, (II) announced in-house employing appropriate means and (III) be an integral component in practical corporate culture. The specific means chosen for communication and announcement is of secondary importance. However, whether or not there are reliable indications for a cumulative fulfilment of all criteria is decisive. This can be illustrated using the following examples:

**Communication and announcement:** The company’s commitment could be made by placing a message from the management on the corporate intranet. Apart from that, the management could also add an introductory comment to the company’s internal set of rules (cf. 3.4) and make it available to the all employees concerned (in smaller companies i.e. via e-mail or notice). In this context, communication and announcement need to be repeated regularly and be kept up-to-date (i.e. every two years). Communication of this commitment does not need to be restricted to recipients within the
company. It can also be addressed to parties outside the company (i.e. by making statements in the annual report or on the company’s website). In the latter case however, the statement, extracts of it or comments on it should also be announced in-house.

**Management culture in business practice:** The management culture outlined above needs to become an integral component of practical corporate culture and be put into practice actively by the company’s management. For an effective antitrust compliance programme it is essential that the management level also takes part in antitrust training seminars (cf. 3.5). Providing sufficient personnel and material resources for effective compliance work and procedures allowing action against personnel involved if cartel infringements are confirmed are important (and externally verifiable) indications of a thriving management culture. If applicable, the latter should be demonstrated by reactions to infringement situations in the past.

### 3.2 Responsibility and Organization

The second key cornerstone of an effective antitrust compliance programme is the existence of clear responsibilities and an appropriate organizational and reporting structure. While company management has the ultimate compliance responsibility in undertakings of all sizes, medium-sized and large undertakings require an additional organizational structure. Only in very small undertakings may the management be able to handle compliance-related responsibilities alone, i.e. without further organizational support (for example through a managing director). That said, even at medium-sized and large undertakings, the compliance organization does not necessarily have to be within an independent structure. Often it is integrated into or part of other units, most commonly the legal department. Integrating the compliance team into the legal department can be particularly useful for antitrust compliance matters, because of the complexity of the underlying legal antitrust rules. Such a compliance organization is then responsible for the preparation and implementation of the compliance programme.

Regardless of the specific structure chosen for the compliance organization, it is important, in particular for SMEs and larger undertakings, to appoint a qualified contact person for antitrust compliance questions. This is the only way to ensure that employees will be able to obtain guidance on complex and specific antitrust questions – for example on the legality of working groups or bidding consortia – and to avoid or resolve potential legal issues in the most efficient manner. This contact person does not necessarily have to be an employee of the undertaking. SMEs may choose, for example, to appoint an external lawyer as their contact person for antitrust compliance questions. In such a case, it will be particularly important to ensure that the contact person is properly identified to employees, for example through the intranet or in the in-house policy (cf. 3.4.). In small and micro undertakings, it is often sufficient to ensure that one member of the management team is available as a dedicated contact provided he or she has a good understanding of the antitrust laws and attends periodic training on antitrust compliance issues (cf. on this 3.5.).

Large undertakings should also consider setting up an anonymous whistleblower system (“Whistleblower-Hotline”), which allows employees to submit information on potential infringements by telephone or in written form. Anonymity will significantly reduce any reluctance that employees may feel in providing information, and can thus enhance the effectiveness of a compliance programme. Information provided through such a Whistleblower-Hotline should be reviewed by internal or external experts outside of the regular reporting lines for employees.
3.3 Risk Analysis
Another cornerstone of an effective compliance programme is a detailed analysis of the specific risks to which the undertaking in question is exposed. Such an analysis enables an undertaking to identify and evaluate potential compliance risks specific to its business activities in the best possible way. This analysis should be conducted group-wide and should be updated at regular intervals (e.g. annually).

In the context of this analysis, undertakings should take account of the specific business activities of the group and consider the relevant regulatory and business environment. For undertakings with a wide range of different business activities or subsidiaries, it can be useful to prioritize the analysis on the basis of revenues generated by each business line or subsidiary.

The results of the risk analysis should form the basis for the specific set up of the undertaking’s compliance programme—especially with a view to the rules which must be included in the compliance policy and the content of the regular compliance training for the relevant employees. For SMEs it may be sufficient to reflect the results of the risk analysis in the text of the compliance programme and the training materials. Larger companies will want to carefully consider the results of the risk analysis and may want to report on the risks identified internally as appropriate (cf. 4.).

3.4 The set of rules
A further cornerstone of an effective antitrust compliance programme is the existence of a brief and coherent set of rules including short and easily comprehensible explanations about key antitrust concepts, such as “hardcore” prohibitions. As far as possible, the rules (or “code of conduct”) should discuss the applicable rules and their meaning in a company-specific context and should also clearly explain the sanctions which are imposed for infringements. This may be presented, for example, in a brief and coherent “Do’s & Don’ts” list.

In terms of content, the antitrust compliance rules should of course address “hardcore” prohibitions and the illegal exchange of information between competitors. In addition, the rules should cover matters such as illegal resale or distribution restrictions, the conduct of association meetings, and competitor contacts such as benchmarking or the requirements for bidding consortia and working groups. Further, the rules must detail the potential sanctions that can be imposed for infringements (those imposed by regulators as well as those that the company will impose in-house). Medium-sized or large undertakings may want to include business specific guidelines.

Undertakings should make sure that employees are aware of the existence and content of the antitrust compliance rules as well management’s commitment to ensure compliance (cf. 3.1.). This includes making the rules available to each employee possibly in written form. Alternatively, the rules can be provided to employees in another, easily accessible form, for example through the intranet or on a notice board. Undertakings should provide a local language version, or at least an English version, in foreign domiciled subsidiaries. The antitrust compliance rules should also identify the in-house contact for all questions and issues that arise (cf. 3.2.), if at all possible. New employees should receive the antitrust compliance policy as part of their “Starter“ or „Welcome“ pack.

In order to support in particular SMEs in the introduction of an effective compliance programme, the Working Group on Competition Law of DICO and the Association Supply Chain Management, Procurement and Logistics (BME) have developed a model antitrust compliance policy, which is available from the websites of DICO and BME (available in German only).
3.5 Training

Another cornerstone of an effective antitrust compliance programme is regular classroom antitrust training sessions. In such training sessions, the relevant employees are not only sensitized to the importance of antitrust law; they also have the opportunity to ask questions and thus gain more confidence for their daily work. The training sessions should also be used to emphasize management’s commitment to conduct that complies with antitrust law (cf. 3.1.), introduce the contact persons for antitrust issues (cf. 3.2.) and raise awareness of the internal code of conduct (cf. 3.4.).

The target group of the training should include, at a minimum, management and all employees who have contact with competitors, in particular sales staff.

In this regard, the content of the training sessions should be tailored to the respective target group. Companies that have heterogeneous business areas should organize training sessions tailored to each specific business area, in which employees from that business area participate. This will enable specific needs and risks to be addressed. In the case of small businesses and micro-undertakings, it may be sufficient from an overall risk and proportionality perspective if one member of management attends an (external) training session and passes on the information to the employees concerned.

The training sessions should be conducted by experienced antitrust experts who, wherever possible, are also available to answer questions from the employee’s everyday practice. While large companies often employ lawyers, SMEs may be well advised to arrange for external antitrust experts to hold their training. In this case, the training sessions should, wherever possible, be supported by internal employees, e.g., from legal or compliance. However, it may be sufficient in particular for small undertakings with a small number of employees who have contacts with competitors, if these employees make use of the offerings of external training providers. Individual associations and various commercial providers now offer relevant training. DICO also plans to offer antitrust training to members and interested third parties. Further information can be obtained from DICO’s website in due course.

The exact frequency of training will depend on the risk profile and other training offers – e.g., e-learning sessions – of the respective companies. As a rule, training should be repeated every two to three years (cf. relevant recommendation of DICO guideline L05 – target group-specific training plan, page 8). While e-learning sessions cannot replace regular classroom training, they allow for greater flexibility when it comes to the timing of repeat training. They may also be used as refresher training between two classroom training sessions. E-learning can also be used as a standard procedure to make new employees aware of antitrust issues shortly after they commence their new role.

The content of the training sessions should be tailored to the relevant business area and contain specific examples. Only by focusing on the respective business area specific risks can be described and employees can be given practical guidance for their daily work. This is another reason why training sessions should be conducted or supported by internal employees.

The training sessions should address the points covered in the set of rules and focus especially on hardcore antitrust breaches and the related sanctions. They should also include guidance on the
exchange of information, conduct at association meetings as well as on other contacts with competitors, e.g., relating to benchmarking and the requirements for bidders or joint ventures. Information on impermissible restraints on distribution (online and offline) should also be included since the antitrust authorities have become stricter in their imposition of fines in this field. Depending on the business area, it may be appropriate to include information on the abuse of dominant positions as well as on merger control. In order to increase the effectiveness of the training sessions, where possible they should also include interactive elements – e.g., anonymous electronic voting by participants in response to example scenarios.
4. Additional elements

As discussed, the cornerstones of this first part of these guidelines do not lay claim to being definitive elements of antitrust compliance programmes. On the contrary, it may be appropriate, depending on the size as well as risk profile and appetite of the respective company, to make amendments or additions to these key points. Additional elements of antitrust compliance programmes include in particular details of risk analysis, monitoring and reporting as well as improvements (including dealing with non-compliance). In terms of content, reference may be made to the relevant guidance of ISO 19600 and IDW PS 980. Useful additional information can be found in the “ICC Antitrust Compliance Toolkit” published by the International Chamber of Commerce. Specifically for the area of risk analysis, reference may also be made to the DICO working paper “A01 – Compliance risk analysis – Definitions and basic elements.” Relevant details will soon be included in the second part of these guidelines.
About DICO:

DICO – Deutsches Institut für Compliance e.V. was founded in November 2012 in Berlin at the urging of leading compliance practitioners and experts. As a nonprofit organization DICO has members from all industries in Germany, including well-known DAX companies, auditing and law firms, and from the science industry.
DICO considers itself to be an independent interdisciplinary network for exchange between economy, science, politics, and administration and considers itself to be a central forum for the consistent and practical promotion and further development of compliance in Germany. DICO promotes compliance in Germany, defines minimum standards in this area, assists with proposed legislation, and simultaneously promotes practical compliance work in private and public companies, promotes training, and develops quality and procedural standards.

About BME:

The Association for Supply Chain Management, Procurement and Logistics (BME), founded in 1954, is the leading professional association for supply chain managers, buyers and logisticians in Germany and Central Europe. The BME looks back on a 60-year-old history in which its member number has grown to 9,500 individual and corporate members (31.12.2016) - from small businesses to large enterprises. The annual purchasing volume of our members averages 1.25 trillion euros. We see ourselves as a service for our members who belong to all industrial and service sectors, including distributive trade, banking, insurance and public institutions. Our aspiration includes the know-how transfer in the fields of supply chain management, procurement and logistics. It is achieved through a continuous exchange of experience, education and training services as well as the scientific work on new methods, procedures and techniques.