

Fair Trade Commission's Guidance for Enterprises' drafting of Antitrust Compliance Programmes

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I. Background

Globally, at the present time, the number of countries that have promulgated Antitrust Laws (or Competition Laws; in Taiwan the 'Fair Trade Act') has well exceeded 100, with many of them having amended relevant regulations and providing their competent authorities with more effective investigative tools, regulatory powers as well as toughening relevant penalties. Inasmuch as the majority of the industries in Taiwan are export-oriented, or hold transnational operations in response to the trend of internationalisation, enterprises involved in antitrust infringement incidents would unavoidably face, not only the applicableness of the Fair Trade Act of Taiwan, but also investigations or even penalties from antitrust competent authorities of other countries. Considering that the majority of countries implementing competition laws take as mitigating factors in penalty decisions whether enterprises have in place and implement diligently an internal compliance programme, as well as for the purposes of enhancing enterprises' awareness of the antitrust rules and reducing the costs resulting from antitrust infringement, the 'Fair Trade Commission's Guidance for Enterprises on Antitrust Compliance Programmes' (hereafter 'The Guidance') was promulgated for enterprises to adopt as guidance when setting up internal compliance programmes.

II. Legal Basis: Article 165 of the Administrative Procedure Act and Fair Trade Commission's Guiding Principles on Administrative Guidance.

III. Purposes: Through the promulgation of this guidance, to provide enterprises with recommendations on antitrust compliance programmes and facilitate enterprises' voluntary setting up and diligent implementation of antitrust compliance programmes that are tailored to their own operational conditions and organisational culture.

IV. Meaning: The term 'Antitrust Compliance Programme' in this Guidance refers to a mechanism for the compliance of antitrust rules of different countries and a set of procedures and guidances for efficiently and effectively responding to concerns of non-compliance that are designed by the enterprises to mitigate risks of antitrust non-compliance.

V. Recommendations for enterprises on setting up antitrust compliance programmes

With the fact that the business scale and industrial environment of each enterprise varies in mind, enterprises should examine their own operational conditions and organisational culture when setting up anti-trust compliance programmes. The recommended contents to be included and relevant matters to be vigilant about are as follows:

1. Meaning: The compliance programme should specify explicitly its meaning to the operation of the enterprises.

2. Significances and benefits: The compliance programme should include the explanation of the significances and benefits of the setting up and the implementation of the compliance programme, such as mitigation of risks to the enterprises that result from non-compliance, preventing employees' engagement in high non-compliance risk behaviours and increasing enterprise's awareness to non-compliance behaviours. Besides, compliance programmes can help enterprises to spot non-compliance behaviours at their earliest juncture and to apply for leniency programme as soon as possible, and therefore to be able to cooperate with competent authorities reducing the potential costs of time and money to the enterprises when facing investigations, fines, lawsuits, and negative media coverage. It may even promote a law-abiding reputation for the enterprises and thus help attract more employees and business partners.

3. Major countries' antitrust rules and penalties

A. In Taiwan, the penalties for concerted action (Cartel) imposed pursuant to the Fair Trade Act is in nature a system that employs administrative measures first (i.e. administrative fines) followed by judicial measures (i.e. criminal penalties) if non-compliance behaviour persists. Nevertheless, other countries may deploy only administrative fines (such as the European Union), or only criminal penalties (such as the US and Canada). Enterprises should take into consideration the factor of their operation locations and pay attention to the potential differences in the content of local laws.

B. In the compliance programme, list the anti-trust laws and penalties of major trade partners' countries, or provide with links to access these rules (the website of the Fair Trade Commission provides relevant links www.ftc.gov.tw).

4. Specific Measures: state clearly in the compliance programme specific measures, steps, procedures and matters to be vigilant about, as well as the roles, responsibilities and matters to cooperate with for each level of staffs.

A. Instil enterprises' culture of compliance

- (1) At least one high level (leadership level) manager is specifically charged with the responsibility to promote the compliance programme, to discuss on the progress of the compliance programme and the non-compliance risks facing the enterprises regularly in high level management meetings, as well as with the obligation to report the implementation status to the Board of Directors. The Board of Directors and the auditing committee shall review regularly the implementation status of the compliance programme and matters for its improvement.
- (2) Invest sufficient resources (including budgets and manpower) in facilitating the implementation of the compliance programme and assign senior members of the legal department to oversee the implementation of the compliance programme.
- (3) Make antitrust law a fixed part of the enterprises' legal education. Management staff should actively attend both internal and external antitrust related education and training.
- (4) Matters related to the implementation of the compliance programme should be announced to all the employees with the signature of the actual responsible persons or a high level manager of the legal department so to make the employees understand the commitment of the management team to the compliance programme.

B. Compliance policy and procedures

- (1) Set up clear antitrust behaviour rules, including dos' and don'ts, and print them into booklets and disseminate them to relevant employees to comply diligently.
- (2) Based upon court and competent authority precedents or industry developments, review routinely whether amendments to the compliance policy and procedures are needed.
- (3) Compliance programmes should set up specific compliance policies and procedures for different internal units according to their individual non-compliance risks.
- (4) Demand the employees read thoroughly the compliance rules and request for their signatures with the purpose of declaring their consent to comply with the laws.
- (5) Enterprises should hold and update constantly knowledge of the latest antitrust laws of every country to whom it has business connections and modify the contents of the compliance programme timely in response to these updates.
- (6) Notify the competent authority immediately when a concern of antitrust infringement becomes alarming. Seek immediate professional legal advice when engaged in non-compliance behaviour and apply promptly for the application of the leniency policy in order to reduce liability for the infringement.

C. Offer education and training courses

- (1) Education and training recipients: it should include all the senior management level staff, all the employees who may have contact with the competitors (including those attending trade association meetings), and all the employees who are involved in price setting and product sale.
- (2) Education and training frequency: the frequency may vary depending on business operational conditions, but it is recommended at least once a year.
- (3) Education and training formats: it can be face-to-face lectures, online learning or a combination of different course formats.
- (4) Education and training speakers: it includes external expert/scholars invited by the enterprises and internal staff with sufficient professional knowledge from the law department or the senior management team, or officers from the competent authorities.
- (5) Education and training contents: it may include, for example, forms of high non-compliance risk behaviours, antitrust compliance behaviour rules, company compliance programmes, antitrust laws and liabilities, leniency policy, and reporting mechanisms.
- (6) Evaluation and records: provide adequate evaluative tests to staff who participate in education and training and archive with adequate methods the entire evaluation and records process.

D. Establish internal control, audit and reporting mechanisms

- (1) Internal control mechanisms refer to a series of procedures aiming at detecting constantly anti-trust breaching behaviour during business operation. It should be designed to monitor business behaviour regularly and continuously, including:
 - a) Identification of non-compliance risks: concerted action (including joint price fixing, limitation on production, sharing markets or customers, and joint purchasing), abuse of dominant market positions (such as abuse of monopolistic power, preferential treatment without objective justification, tie-in, predatory pricing, and refusal-to-deal) are, for instance, commonly considered as behaviour of higher non-compliance risk.
 - b) Analysis and evaluation of non-compliance risks
 - (i) Employees at higher risk of concerted actions: members in the core management team, employees of the sales and marketing department, employees of the purchasing department, employees who are frequently involved in trade association meetings, employees who are frequently in contact with competitors, employees who are involved in pricing, employees who used to work for competitors before taking their current positions of same nature.
 - (ii) Employees at medium risk of concerted actions: managers who have no dealing with competitors or trade partners, administrative support think-tanks, employees who moved from competitors but are not involved in any aforementioned high risk actions.

- (iii) Employees at lower risk of concerted actions: for example, labourers, support staff, administrative staff and human resource staff who have not had any dealings with competitors.
- c) Mitigation of non-compliance risks:
- (i) Reduce high risk employees' contact to competitors and their chances to attend trade association meetings along with strengthening the education and training for high risk employees.
 - (ii) High risk employees should provide legal staff with relevant meeting agendas for review purpose and obtain approval before having contact with competitors or attending trade association meetings. They should report after the meetings relevant meeting contents and minutes, confirming there is no exchange of price, quantity, or other sensitive information relevant to production or sales. In addition, the enterprise should set up a filing system for properly archiving the above records.
 - (iii) Audit regularly written documents and computer records (including emails), contracts with competitors or trade partners, and meeting records or telephone contents of employees who have contact with competitors, that are relevant to business operation. In addition, it shall be ensured that written documents and electronic files are properly preserved and filed in archives.
 - (iv) Provide more frequent education and training to employees of high risks.
 - (v) The internal compliance programmes set up by enterprises should be submitted to external legal professionals for review and assessment.
 - (vi) Praise internal units that have successfully implemented the compliance programme.
- d) Adequate response to antitrust competent authorities' investigation
- (i) Apart from setting up internal staff in charge of the compliance programme, enterprises should have in place a standing list of external legal institutions for the purpose of consultation.
 - (ii) When alerted to rumours of a non-compliance incident, or when under investigation from the competent authority, enterprises should have all the relevant information ready, notify internal legal staff, staff in charge of the compliance programme, managers of the highest level of the areas under investigation, and the public relation department in order to respond properly according to enterprises' internal standard procedures for investigation. The enterprises should also initiate a primary investigation internally, to identify the staff involved in the potential infringement and her/his management level, review relevant documents and interview with employees involved in the incident. In the meantime, analyse relevant laws and

evaluate the possibility of being charged of infringement, as well as its legal consequences.

- (iii) Contact external legal consultants to evaluate infringement probability, legal consequences and the question regarding whether to apply for application of the leniency policy. When necessary, enterprises may contact their local Taipei Representative Office for assistance on appointment of legal consultants.
- (iv) Cooperate with the competent authority on the investigation and ensure the confidentiality of the investigation process and the documents under investigation; make employees aware that some antitrust competent authorities may toughen the penalties to those under investigation in the event of intentionally not providing or destroying relevant information.

(2) Auditing mechanisms: it refers to processes that can be used to evaluate whether potential non-compliance behaviour exists and to help the enterprises handle non-compliance behaviour adequately. Specific measures of the mechanisms include:

a) Set up auditing staff to review regularly whether enterprises' business behaviour violates the laws.

b) If any non-compliance behaviour is spotted, such behaviour should be ordered to stop immediately and be handled appropriately.

c) Cooperate with the competent authority promptly in the event of non-compliance.

(3) Reporting mechanisms: it refers to systems and processes that enable the employees to provide timely and reliable information to support the internal investigation of non-compliance behaviours. The design of the system should include incentives that encourage employees to provide information.

a) Set up a dedicated phone line for internal compliance advice.

b) Set up a confidential and anonymous reporting system or assign legal staff to support employees who have provided information.

c) Make employees aware of the existence of external reporting mechanisms (such as reporting to the competent authorities) and the contents of the leniency policy.

E. Provide adequate rewards and punishments

Enterprises should set up an internal reward and punishment mechanism that is relevant to the compliance programme so as to increase the incentives for compliance and impose punishments for non-compliance.

(1) The types of rewards may include merit points in the year-end performance review, opportunities for promotion, and award money.

(2) The types of punishments may include demotion, pay cut, dismissal, and legal actions.

F. Make contacts and consultation channels known to employees

Enterprises should set up a one-step window on legal matters for keeping good interaction with the competent authorities. In addition, employees should be made clearly aware of the contact details of the competent authorities.

VI. Legal effect

This Guidance is meant to provide recommendations for enterprises when they set up internal anti-trust compliance programmes. It is, therefore, not legally binding. Enterprises may tailor antitrust compliance programmes according to their own business sizes and operation strategies to suit their operational conditions.

VII. Monitoring on Effectiveness

Business may send their anti-trust compliance programmes and the implementation report in written form to the Fair Trade Commission for future reference and for the monitoring and evaluation of the effectiveness of this Guidance.