



**Advocacy Working
Group**



Report on Competition Compliance

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Project Purpose

Promoting a culture of compliance has long been an important non-enforcement tool for competition agencies in combating cartels and preventing other anti-competitive conduct, along with effective enforcement of competition law. This Advocacy Working Group project aims to:

1. promote the exchange of competition agencies' experiences in encouraging companies to foster a culture of competition compliance, which may include implementing a compliance program;
2. to collect insights from Non-Governmental Advisors (NGAs), many of whom have experience in advising on, designing, or studying compliance programs, on how to develop an effective program. Such insights may include how to secure support for a compliance program from key decision-makers, as well as the design and implementation of the program itself.

The project team conducted a survey to collect views and insights from Member Agencies and NGAs in preparation for this *Report on Promoting Competition Compliance*. We have received responses from 28 Member Agencies and 13 NGAs whose views and experiences are collated and presented in this report.

Background and Definitions

According to the *ICN Anti-cartel Enforcement Manual*¹, **compliance** refers to the efforts businesses make to prevent infringements of competition laws. A **compliance program** is a formal tool or tools that businesses employ to achieve compliance. **Compliance culture** refers to the general attitude of a business towards compliance and competition laws; it can enhance a compliance program by infusing values, morals and ethical expectations set by the organization. A culture of compliance can be improved through compliance efforts, including compliance programs.

The *Manual* discusses the importance of businesses' internal compliance programs and compliance culture to help detect and combat cartels. It also highlights "internal commitment [of a company]" as one of the key elements in ensuring an effective compliance culture. It concludes that "a clear commitment from the top management is the core of successful compliance", while securing strong commitment at all levels is "the most challenging". An OECD report² also identifies that, "It is a constant and recurrent feature of compliance literature and agency guidelines that for a compliance program to be effective, the tone from the top is essential. Senior management needs to lead by example and express clear expectations regarding compliance, creating a 'culture of compliance'."³ Several other literatures published by the international competition community also indicate that senior management's commitment is a fundamental precondition for successfully instilling a compliance culture within a business.⁴

¹ ANTI-CARTEL ENFORCEMENT MANUAL, Chapter on Cartel Awareness, Outreach and Compliance, ICN, March 2012

² [Competition Compliance Programmes](#), OECD, 2021

³ Ibid section 5.2.

⁴ For example, [Competition Compliance Toolkit for Businesses in ASEAN](#), ASEAN, 2018.

Previous AWG work also highlights compliance messages and competition agency initiatives. In particular, the report *Explaining the Benefits of Competition to Businesses* discusses key compliance-related messages agencies have used and communications strategies for engaging with businesses.⁵

⁵ [Explaining the Benefits of Competition to Businesses](#), ICN AWG, 2016.

Summary

- The Promoting Competition Compliance survey generated **28 responses from competition agencies** in 27 jurisdictions, and **13 NGA** responses based in 9 jurisdictions.
- We asked competition agencies and NGAs to pinpoint the critical elements of an effective compliance program. In addition, we asked agencies about their initiatives to help businesses implement compliance programs, and we asked NGAs about strategies to promote a culture of compliance, securing top management's commitment, how to best support SMEs, etc.
- A good number of competition agencies and NGAs find '**Detection, reporting, audits and monitoring**', '**Oversight and tone at the top**', '**Education and training**', '**Risk assessment and enhancement**', and '**Program evaluation**' to have high significance in an effective compliance program.
- A majority of NGAs mentioned that the compliance programs being '**tailored to company / business / jurisdiction**' is important for a program's effectiveness. However, this element did not raise the attention of competition agencies to a similar extent.
- While the **two groups of respondents share a similar view** on what are the most important elements of an effective compliance program, the groups also **have slightly different focuses**. The groups provided a large variety of suggestions, including communications through non-conventional means, on what could be done to promote a stronger compliance culture within firms and the business community.
- Competition agencies undertake a wide range of initiatives to encourage and help businesses strengthen a culture of competition compliance. The most commonly adopted approaches are (a) **increasing businesses' awareness of competition law in general** and (b) **providing compliance guidance to businesses**.
- NGAs shared their views in great detail on:
 - Strategies to promote a culture of compliance
 - Securing top management's commitment and sufficient resources;
 - How SMEs can be best supported in achieving effective compliance;
 - Challenges associated with promoting competition compliance; and
 - Further guidance desired from competition agencies.

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The following competition agencies having taken part in the survey:

- Administrative Council for Economic Defense of Brazil (CADE)
- Bulgarian Commission on Protection of Competition (CPC)
- Competition Bureau of Canada (CBC)
- Superintendencia de Industria y Comercio of Colombia (SIC)
- Dominican Republic National Commission of Competition Defense (PRO-COMPETITION)
- Superintendencia de Competencia de El Salvador (SC)
- European Commission, Directorate General for Competition (DG Comp)
- Finnish Competition and Consumer Authority (FCCA)
- Bundeskartellamt of Germany (BKA)
- Hong Kong Competition Commission (HKCC)
- Hungarian Competition Authority (HCA)
- Israel Competition Authority (ICA)
- Italian Competition Authority (AGCM)
- Japan Fair Trade Commission (JFTC)
- Competition Authority of Kenya (CAK)
- Malaysia Competition Commission (MyCC)
- Mexican Federal Economic Competition Commission (COFECE)
- Norwegian Competition Authority (NCA)
- Consumer Protection and Competition Defense Authority of Panamá (ACODECO)
- Philippine Competition Commission (PCC)
- Federal Antimonopoly Service of the Russian Federation (FAS)
- Spanish National Authority for Markets and Competition (CNMC)
- Swedish Competition Authority
- Taiwan Fair Trade Commission (TFTC)
- Turkish Competition Authority (TCA)
- Competition and Markets Authority of the United Kingdom (CMA)
- Department of Justice of the United States (USDOJ)
- Federal Trade Commission of the United States (USFTC)

The following NGAs have also taken part in the survey:

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1. Critical elements of an effective compliance program for a business

We asked the same question to both agencies and NGAs, ‘*In your view, what are the critical elements of an effective compliance program for a business?*’ For NGAs, we added ‘*In other words, what distinguishes a mere “paper program” from a genuine, effective compliance framework?*’ Doing so allowed us to see both perspectives and identify similarities and differences. We conducted a comparative analysis.

Since the question is set in an open-ended fashion, to gather data for observation and reporting purposes, the answers were categorized in 19 codes as shown below.⁶ This table shows how many respondents mentioned a specific element in their responses. Out of 28 agency responses, 26 agencies (93%) and all 13 of the NGAs provided their views on the question.⁷

A. Results

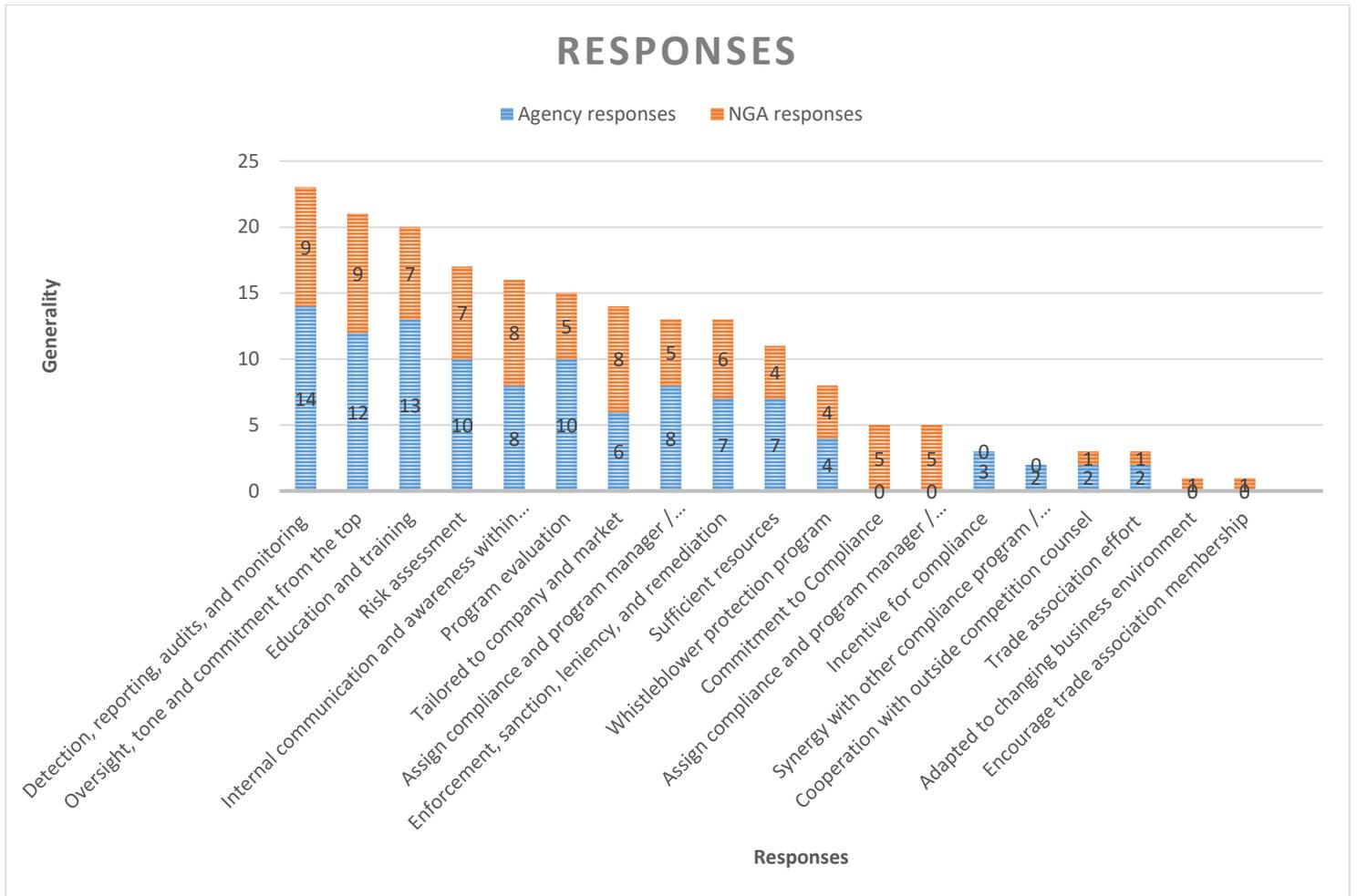
Critical elements of an effective compliance program	Agency responses	NGA responses	Combined total
Detection, reporting, audits, and monitoring	14 (50%)	9 (69%)	23 (56%)
Oversight, tone and commitment from the top	12 (43%)	9 (69%)	21 (51%)
Education and training	13 (46%)	7 (54%)	20 (49%)
Risk assessment	10 (36%)	7 (54%)	17 (41%)
Internal communication and awareness within the company	8 (29%)	8 (62%)	16 (39%)
Program evaluation	10 (36%)	5 (38%)	15 (37%)
Tailored to company and market	6 (21%)	8 (62%)	14 (34%)
Assign compliance and program manager / department	8 (29%)	5 (38%)	13 (32%)
Enforcement, sanction, leniency, and remediation	7 (25%)	6 (46%)	13 (32%)

⁶ Codes explanation

1. Each element mentioned in a response will only be counted once, the frequency, i.e. if an agency has stressed one element and mentioned it a few times, additional mentions are excluded here.
2. Some of the codes, strictly speaking, can be combined with other codes, for example, Synergy with other companies is similar to Trade association effort. We keep these codes to showcase some specific answers.

⁷ One agency indicated that they do not have sufficient experience to answer.

Sufficient resources	7 (25%)	4 (31%)	11 (27%)
Whistleblower protection program	4 (14%)	4 (31%)	8 (20%)
Commitment	0	5 (38%)	5 (12%)
Assign compliance and program manager / department	0	5 (38%)	5 (12%)
Incentive for compliance	3 (11%)	0	3 (7%)
Synergy with other compliance program / company	2 (7%)	0	2 (5%)
Cooperation with outside competition counsel	2 (7%)	1 (8%)	3 (7%)
Trade association effort	2 (7%)	1 (8%)	3 (7%)
Adapted to changing business environment	0	1 (8%)	1 (2%)
Encourage trade association membership	0	1 (8%)	1 (2%)



B. Observations

In an attempt to quantify feedback from the survey which solicited narrative responses, we grouped the answers into a total of 19 elements for statistical purposes. To avoid complications, we adopted a simple counting method where each element mentioned in a response was only counted once, i.e. if an agency has stressed one element and mentioned it a few times afterward, such element would still only be counted once. Also, while some elements have a higher number of count/ being mentioned by more respondents, it does not present a “ranking” in the sense that they are more important than the others.

‘Detection, reporting, audits, and monitoring’ (56%)

Agency (50%)

This is regarded by half of the agency respondents as a critical element for an effective compliance program. These respondents find that it is essential for a company’s management to have tools and

mechanisms to detect, report and monitor any potential law violations within the organization. As Japan Fair Trade Commission (JFTC) points out in its response, *'the degree of loss resulting from a conduct against the AMA (Anti-monopoly Act) depends significantly on whether or not such an act in an enterprise was discovered at an early stage and a countermeasure was implemented appropriately'*. CNMC of Spain also pinpointed the importance of having a *'control matrix'* specifying the mechanisms for prevention, detection and early reaction to identified risks. These actions should be measurable and verifiable and must be adapted to changing circumstances.

NGAs (69%)

The NGAs stressed how internal controls and monitoring mechanisms are essential to an effective compliance program. For example, applying systems to detect sensitive terms if there are agreements with competitors, and to analyse the extent of shared information should be examined very carefully.

'Oversight, tone and commitment at the top' (51%)

Agency (43%)

This was frequently mentioned, and just under half of agency respondents identified that *'Senior, board-level buy-in'* is critical. The UK Competition and Markets Authority (CMA) pinpoints that *'Directors set the tone for how an organization operates, they need to lead by example and make clear that everyone must understand and abide by competition rules'*. The European Commission's Directorate-General for Competition (DG COMP) also puts *'top managers' explicit endorsement, regardless of company size'* in the first line of their response. A clear and genuine commitment to competition compliance throughout the company is of the essence. While many mentioned commitment from top management in their responses, *'a visible commitment through all the levels of the company'* was also suggested by Mexico's COFECE.

NGAs (69%)

When asked what distinguishes a mere "paper program" from a genuine, effective compliance framework, 69% of NGAs indicates that unambiguous oversight and tone at the top makes compliance programs genuine and effective. The NGAs view top-down oversight and management level buy-in as essential to reducing the risk of wilful or unintended breaches of competition law. One NGA suggested that *'tone at the top'* can be *'demonstrated in regular clear messages and coherent sanctioning'*.

'Education and training' (49%)

Agency (46%)

Nearly half of the agency respondents find education and training crucial, and are of the view that companies should provide training / briefing to staff members of all levels about the importance and

knowledge of competition compliance when they first join the company and remind and train them periodically. As the UK's CMA reported, *'our research shows that awareness of activities [among businesses in the UK] which might breach competition law is poor', and 'regular training to keep risks front of mind for staff is also key'*. Mexico's Federal Economic Competition Commission (COFECE) suggests that *'compliance programs include continuous and tailored training especially for senior managers and other relevant staff. Training should explain the reasons behind the existence of the compliance program, as well as the consequences of not complying with it'*.

NGAs (54%)

Education and training are frequently brought up by the NGAs. They pointed out that basic compliance training is necessary, and such training should be provided on a regular basis to ensure all employee possesses an understanding of policies and fundamental compliance knowledge.

'Risk assessment' (41%)

Agency (36%)

This was another highly-ranked element by agencies when considering what amounts to an effective program. Taking steps to identify company departments or activities that may face current and potential antitrust risk is important. As explained by Brazil's Competition Authority (CADE), risk assessment *'allows the firm to understand in which areas it is most exposed, allowing the compliance program to prioritise high-risk activities'*, and can help companies to establish tailored and proportional controls and provide appropriate solutions. A risk-based approach to compliance was also discussed by the UK's CMA speaker at her presentation to the AWG Members at the compliance webinar on 25 February 2021. The UK CMA has published a *Risk Guide*⁸ to assist company directors and risk professionals in understanding, identifying, evaluating, managing and monitoring competition law risks.

NGAs (54%)

The NGAs also acknowledged the importance of risk assessment in compliance. Customised to different business-specific risk profiles, an effective compliance program must be able to identify risk in, for example, most exposed work functions or the employees that might be involved in any agreements on behalf of the company or most likely to interact with competitors. Effective programs also include monitoring how any change in business processes may lead to new competition compliance risks, and making sure new regulations or agency guidance are taken into account. As one NGA suggested, *'a well-designed compliance program should also align risk management with the company's strategy, allow the company to identify risks to contain them immediately, and accurately quantify the potential damage'*.

⁸ <https://www.gov.uk/government/publications/competition-law-risk-a-short-guide>

'Internal communication and awareness within the company' (39%)

Agency (29%)

Agencies are well aware of the importance of effective communication within the company in order to successfully implement a compliance program. When asked what the critical elements of an effective compliance program for a business are, Taiwan Fair Trade Commission (TFTC) mentioned the importance of the *'measures or activities that can effectively bring and improve businesses' awareness of competition law'*. Superintendence of Industry and Commerce (SIC) of Colombia suggested *'communicating the elements of the program throughout all the organization and raising awareness of competition compliance best practices'* as a critical element of an effective program.

NGAs (62%)

8 out of 13 NGA respondents stated that 'internal communication and awareness within the company' are essential to practical compliance programs. One NGA illustrated this point in detail:

'The right delivery of the contents, typically a combination of guidelines, live trainings, webinars and formats such as videos, postings on internal social media sites, games, etc. Good quality materials take legal expertise, strong communication (focused, short & simple) and presentation capacities. Often under-estimated is the importance of rigorous implementation – the best materials are useless if not rolled out to the various different relevant audiences – practically very challenging in big multinational organizations'.

As for internal communication, two NGAs mentioned how a strong relationship and communication between the legal / compliance and business department would be beneficial to effective compliance.

'Program evaluation' (37%)

Agency (36%)

Continuous 'program evaluation' and improvement of the compliance program are of the essence for it to remain effective and relevant. As Mexico's COFECE put it, *'subject the program to periodic evaluations in order to ensure that it is achieving its objective and, if necessary, implement updates and improvements'*. The Philippines Competition Commission (PCC) also submitted that it is pivotal to *'involve the process of ensuring that the compliance program is being implemented, updated, and improved to reflect the current circumstances of the business and the regulatory environment'*.

NGA (38%)

Five NGA respondents also mentioned this element and explained that a compliance program should be subject to periodic monitoring and assessment of the effectiveness post-implementation, in order to identify possible improvements and make adjustment of the program details.

Other approaches/ efforts made by competition agencies

- Competition Bureau of Canada (CBC): The bureau conducts competition law training with other government bodies that work directly with SMEs, especially in the digital economy, to help them spot competition issues in the market.
- Superintendencia de Industria y Comercio of Colombia (SIC): SIC participated in technical meetings with businesses from different sectors and sizes, academic institutions and other government bodies for the purpose of contributing to the development of a National Technical Standard containing the minimum and critical elements for an effective compliance program for businesses. The Colombian Institute of Technical Standards and Certification – ICONTEC as known in Spanish – issued in 2020 the National Technical Standard- NTC 6378:2020, available for all businesses including SMEs to voluntarily adopt.
- Bundeskartellamt of Germany (BKA): Bundeskartellamt’s Competition Register for Public Procurement is not a compliance initiative, but has a strong link to compliance. It provides public contracting authorities, sector contracting entities and concession grantors with information enabling them to assess whether a company must or can be excluded from an award procedure in Germany for having committed economic offences. Companies listed in the register will have the opportunity to apply for premature deletion from the register if they have taken self-cleaning measures, i.e. where the undertaking has proven, inter alia, that it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct, or in other words, where the undertaking has built up a compliance structure. More information on the Competition Register is available at: https://www.bundeskartellamt.de/EN/CompetitionRegister/CompReg_node.html
- Hong Kong Competition Commission (HKCC): The Commission requires as a condition of leniency/cooperation entering into an effective compliance programme. See, for example, paragraph 2.15(f) of the HKCC’s Leniency Policy for Undertakings Engaged in Cartel Conduct.
- Competition Authority of Kenya (CAK): The Authority previously (2015/2016) rolled a special compliance program that sought to provide amnesty to those trade associations in the agriculture and finance sectors who voluntarily provided information through records/memoranda and or their conduct and were willing to be subjected to scrutiny on the level of compliance to the competition law. This initiative attracted 11 associations from the two sectors and as a result of the said rollout, the Authority raised the level of awareness of competition law through review of their activities and records and provided advisory on problematic conducts without punishing them. This saved the Authority financial resources that would have otherwise gone to investigating the said associations. Secondly, the Authority issued compliance brochures to the said association members’ in-order to raise awareness levels on fair competition. As a result of the SCP, the Authority was able to develop a

network of competition champions across the two sectors of the economy who would create more awareness of competition to other sectors.

- Mexican Federal Economic Competition Commission (COFECE): In 2019, the Commission, in coordination with the Ministry of Public Administration and the International Chamber of Commerce carried out an event called *Compliance Programs. Fighting Corruption and Anticompetitive Practices: a shared responsibility between authorities and companies*. The purpose of this event was to share experiences, knowledge and best practices from the perspective of the authority, companies and society regarding the fight against corruption and promoting economic competition, as well as the implementation of successful compliance programs. The conference included panels on topics such as the strategies to design and implement effective compliance programs, actions within the company to prevent corruption and fighting corruption and promoting competition in public procurement. A summary of the event is available, in Spanish, at <https://www.cofece.mx/wp-content/uploads/2019/11/MemoriaForo.pdf>
- Norwegian Competition Authority (NCA): The NCA is planning to have breakfast webinars for branch associations at a regional/local level to enhance knowledge and compliance.
- Philippine Competition Commission (PCC): The PCC conducted public consultations on the Draft Rules of Procedure and Draft Merger Procedure.
- Federal Antimonopoly Service of the Russian Federation (FAS): FAS has found that antimonopoly compliance certainly contributes to an increase in the level of legitimacy of the activities of legal entities in the commodity markets, creates additional incentives for business entities to take measures to prevent violations of antimonopoly legislation, and is necessary to reduce the risks of negative consequences for the legal entities themselves.
- Spanish National Authority for Markets and Competition (CNMC): The CNMC has guides to improve competition culture among other stakeholders, especially public administrations. It has also published recently a guide for consumers⁹, including [innovative communications materials](#).
- Taiwan Fair Trade Commission (TFTC): To comprehensively raise businesses' awareness of legal compliance and judicial understanding of competition law, since 2016 the Commission has been inviting managers from top 100 companies in the service, manufacturing, and financial industries as well as public prosecutors and judges to participate in the "Elite Camp of the Fair Trade Act and Case Study," which was taught by the Commissioners and Directors of the TFTC. The themes of the camp covered competition law and regulations, economic theory and analysis, and law enforcement actions etc., to help participants understand the essentials of the Fair Trade Act and deepen awareness of legal compliance in the business community. The TFTC created a Fair Trade Commission's App for

⁹ Link to CNMC's guide for consumers: <https://www.cnmc.es/expedientes/g-2019-01>

mobile devices to help companies and the public fully understand competition law and regulations to avoid possible illegal practices.

- Competition and Markets Authority of the United Kingdom (CMA): The CMA regularly researches UK businesses' awareness and understanding of competition law and has worked with business representative groups to create business friendly advice materials as part of its ongoing 'Cheating or Competing' campaign. The CMA periodically publishes a Competition Law Risk Short Guide that includes a step-by-step guide for businesses and risk advisors on how to implement a compliance programme led from the top down. A series of the CMA's latest enforcement case studies also feature.

The CMA has recently embarked on a regional engagement pilot to get closer to businesses across the country beginning with the North West of England and which it will be expanding across the English regions alongside existing outreach in Northern Ireland, Scotland and Wales. The aim is to raise awareness of the CMA and share relevant advice with harder to reach businesses.

The CMA also provides advice, training and interactive presentations for central and local government procurement teams to raise awareness of bid rigging dangers while simultaneously making suppliers to the public sector aware of this engagement as a means of deterrence. The CMA has focussed on the construction sector in light of a number of recent cartel enforcement cases. .

- Department of Justice of the United States (USDOJ): In August 2020, the Antitrust Division formed a dedicated team to examine parties' obligations under court orders, including obligations to institute compliance programs. The announcement can be found here: <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil>

3. Insights from Non-Governmental Advisors

NGAs were asked their views on the following topics:

- A. Strategies to promote a culture of compliance;
- B. Securing top management’s commitment and sufficient resources;
- C. How SMEs can be best supported in achieving effective compliance;
- D. Challenges associated with promoting competition compliance; and
- E. Further assistance from competition agencies.

Their responses to each of these have been consolidated below.

A. Strategies to promote a culture of compliance

NGA respondents advised ensuring that compliance with competition rules constitutes an integral part of the corporate culture is key. To foster such a culture, apart from a robust policy and procedure being put in place, employees should also have an awareness of antitrust issues and an understanding of the antitrust risks related to their work. Companies should reinforce a strong “speak-up / feedback” culture and encourage employees to report concerns, not only with regard to compliance issues, but for all matters that would significantly impact the business.

Below is the summary of some of the aspects of compliance approaches that the NGAs found most effective.

i) Targeted, tailor-made training

Training and education are some of the most frequently mentioned tools for promoting compliance culture in a business, NGAs described how **the details in execution make all the difference**. For example, all compliance guidelines and training materials must be easily accessible to all employees, and be written in an easy-to-understand style, be updated on a regular basis, and most importantly, relevant to the business itself and specific to the company’s compliance needs. Training materials should be built with real-life scenarios to demonstrate competition law application and compliance in practice. One NGA respondent suggested that training should target employees at higher risk of infringement (such as those in frequent contact with customers, competitors, management and those involved in sales and marketing).

In short, a well-designed training should be engaging, dynamic and useful to employees that can easily relate compliance training to their day-to-day work and the company’s core business.

ii) *Clear communications that reflect a commitment to Compliance*

NGA respondents also stressed the importance of clear commitment to compliance in communications from a company's top management who, for example, should make formal statements that affirm their commitment to compliance. The message should be conveyed throughout all levels of the organization. Informal internal communications also foster a culture of compliance by setting the tone at the top. Informal internal communications from senior leaders should model a commitment to compliance and set the company's expectations with regards to compliance. An NGA also pointed out that when some longer-serving, well respected co-workers consistently demonstrate their compliance efforts, such behavior would become a norm of a company and serve as an excellent example for newcomers. This can be essential in promoting a compliance culture.

iii) *Robust policy and procedure*

In terms of policy and procedure, NGAs found most useful standard compliance programs that include risk assessment, internal auditing and a reporting mechanism. It should balance appropriate incentives for compliance with consequences that deter anti-competitive conduct. Meanwhile, it's also essential to establish whistleblower mechanisms that include protections for employees that make use of the reporting channels.

B. Securing top management's commitment and sufficient resources

As indicated in literature¹⁰ as well as the AWG's survey results, a genuine commitment from a company's board/ senior management and sufficient resources (budget/ human resources) are key to a strong compliance culture. NGAs provided some advice on how to secure these key inputs.

i) *Ability to demonstrate tangible benefits of compliance programs*

Most NGA respondents stated that being able to demonstrate the tangible benefits of a robust compliance program is conducive to securing board / top management's commitment and thus ensuring sufficient financial and human resources. In-house legal counsels / compliance officers should and would be best placed to take on a role in internal advocacy.

One NGA suggests **highlighting to the board/ top management the reputational risk** and harm to company image in case of law violations. In the NGA's experience, it is especially important for larger corporations which are often more concerned about broader reputational damage that would be done to the parent company should one of the subsidiaries contrives competition law. One respondent mentioned **embedding competition compliance into a business' wider sustainability strategy** to provide a positive "framing". Compliance can be set as one of the

¹⁰ See *supra* at footnotes 2 - 4.

company's long-term ESG (Environmental, Social, and Governance) goals and the CMS (Central Management System) performance in the company's remuneration and bonus schemes for the employees. It is also important to define clear criteria as part of a non-financial Key Performance Index and track the implementation of the compliance program, such as rollout status of policies and internal controls, training, etc.

When advocating compliance programs internally, in-house compliance officers could weave in the company's expectations with regards to **ethical and moral conduct**. One NGA suggested that a positive messaging underlining the company's purpose and commitment to "doing the right thing" may be just as powerful and impactful as the threat of fines or other legal penalties.

Another NGA stated that the more the compliance function is perceived as creating value to the business through its work, the stronger the buy-in from the board / top management. In any case, it is still important to ensure that a compliance program is pragmatic, tailored and business-friendly so that compliance remains relevant to and could be easily included in the business decision-making process.

ii) *Financial Incentives offered by authorities*

As recognized in the OECD report, '*[competition agencies] show significant differences in their approaches to rewards for compliance programs, and many agencies have changed their approach over the last decade*'.¹¹ Some NGA respondents suggest financial incentives should be considered. One NGA highlighted the US DOJ 2019 policy change to enable prosecutors to take into account a compliance program at the charging stage. That respondent suggested that the crediting mechanism should be applied to civil and criminal investigations and that guidance issued by agencies on effective compliance programs should address civil and criminal antitrust risk.

There was also a suggestion that financial incentives could be given through a tax regime which would recognize a company's effort and investment in compliance programs. However, such tax benefit should be denied to companies that have been found guilty of a competition law violation. Some NGAs opined that it can be difficult for the leadership of a company that has never been involved in an antitrust violation / investigation to appreciate the need to invest in compliance programs. **Financial incentives granted by the authorities may help in-house compliance officers to convince the board / top management to adopt compliance programs which may be perceived as expensive and resource-intensive.**

¹¹ [Competition Compliance Programmes](#), OECD, 2021

iii) Guidance from competition agencies

One NGA suggests that the issuing of guidance and other compliance-related materials by competition agencies would be a valuable tool for in-house counsels to persuade the board / top management to adopt compliance programs. For example, companies can make use of ICN guidance or best practices on structuring an effective competition program, and in-house counsels can utilize such guidance to tailor their program.

iv) Clear responsibility and understanding of the board / top management

A few NGAs suggest that it is important to clearly define who on the board / top management should bear the responsibility for competition and other compliance work. In the event of a conflict with other business objectives, clear decision-making procedures must be in place. Conflicting interests must be disclosed and discussed without reservation. The oversight of compliance work should be assigned to a designed individual(s) within the board/ top management who must have necessary authority, and be highly visible and respected throughout the company.

Members of the board / top management should have a good understanding of the content of compliance program as well as its implementation and effectiveness. The involvement of board/ top management should be demonstrated through an initial commitment (e.g. the development of a Code of Conduct). In addition, it is important to ensure their engagement and oversight over compliance work to be on an on-going, continuous basis.

C. How can SMEs be best supported in achieving effective compliance

It appears to be generally accepted that putting in place a comprehensive competition compliance program is costly for many smaller and medium sized companies (SMEs). It may require substantial resources, knowledge and outside expertise. While these costs, as a proportion of total spending on legal services or other forms of compliance, may be relatively small for very large companies, SMEs may find them cost-prohibitive or at least hard to justify.

The NGAs were asked to share their views on how SMEs can be best supported in achieving effective compliance. Respondents in general agreed that it may be more difficult for SMEs to adopt a broad, resource-intensive compliance program, as compared to their larger counterparts. One NGA explained that the smaller the size of the firm, the greater the relative cost, calling it the factor of inverse proportionality. A large part of the costs of setting up and developing a compliance system are fixed, and in any case do not reflect, in terms of exiguity, the small size of the company. As such, SMEs may need to prioritize risk assessments and use the learnings to develop a narrowly tailored program that's focused on the areas of highest risk for their company.

i) Risk assessment

Many respondents mentioned that a **risk assessment** would be most useful for SMEs as a starting point. A risk assessment would help SMEs to identify and map out the high-risk scenarios where in turn SMEs should focus their compliance efforts. Otherwise, less elaborate compliance program may be sufficient for low-risk areas.

Another NGA suggested that risk analysis can be complicated and cumbersome for SMEs that do not have in-house antitrust expertise or money to spend on outside counsel. If competition agencies could publish a simple excel sheet with a scoring model identifying the most relevant risk scenarios and risk factors, it may be a useful risk assessment tool that enables SMEs to understand and evaluate their compliance risks. This would be a good starting point that may help minimize the spend on external counsel.

ii) Action by competition agencies

Some NGA respondents suggest that **competition agencies should be more proactive and reach out** to support SMEs in undertaking compliance efforts. For example, agencies could organize meetings with market players in specific industrial sectors to raise the awareness of the law and remind them of the implications in case of non-compliance. In the meantime, SMEs should also be made aware of how to identify anti-competitive practices or unfair contract terms during commercial negotiations, and the available relief channels and options, e.g. applying for leniency, initiating a complaint with a competition agency, or using competition law as a ground to get out of the contract / claiming damages for breaches causing them harm.

iii) Role of trade associations

Some NGAs pointed out that **trade associations** may be in a pivotal position in supporting SME compliance because they understand industry-related procedures and potential risks better than others. One respondent suggested that competition agencies could work with SME trade associations to organize regular seminars with a view to increasing the level of awareness among SMEs. Trade associations could also support their members by providing periodical training for the SMEs' employees who are tasked with compliance / regulatory functions. Another NGA suggested that SME trade associations may develop a compliance template or risk assessment questionnaire for their members.

iv) External antitrust counsel providing pro bono advice

Some advisors also suggested that **antitrust counsels in private practice can consider pro bono work** and offer certain free advice for SMEs. It can be a win-win situation as it also provides a business development opportunity for lawyers and their firms. For instance, external counsels could put on free-of-charge events for SMEs (who could be their potential clients in the future) and invite speakers, including representatives from competition agencies, to speak on competition compliance, while these events nowadays can be done so in a more economic, effective manner with the help of technology, e.g. via video-conferencing system.

v) *Importance of international organizations*

One respondent finds that support and resources provided by international bodies, such as the ICN and International Chamber of Commerce (ICC) would be helpful to SMEs. In fact, the ICC has published an *SME Toolkit*¹² which “provides a brief overview of areas smaller businesses should be aware of and practical tips to assist them in building and reinforcing a credible approach to competition law compliance”. The NGA also pointed out that training materials should be as accessible as possible to SMEs, e.g., free training materials should be made available online so SMEs can view and use them throughout the year.

D. Challenges associated with promoting competition compliance

NGAs were asked to share their views on challenges associated with promoting competition compliance within a company, in particular the promotion of competition compliance versus other compliance issues such as anti-corruption and data protection.

i) *Perceived ambiguity of competition law*

Most NGAs noted, when compared with competition compliance, both data protection and anti-corruption compliance may be more straightforward. This was because the latter regimes were more structured and laws provided greater clarity. They noted competition law relied more heavily on case law and the authorities’ decisions. This meant it was more difficult to give clear-cut rules to employees without either giving them a false sense of security or risking “over-compliance” that would deter legitimate business behaviour. Moreover, the application of competition law to business practices requires evaluation for in-house or advising attorneys, the line between compliance and non-compliance can, at times, be thin and will often depend on factual evaluation by compliance officers.

ii) *Awareness and misconceptions*

Some NGAs also identified potential misconceptions about competition law and compliance. One NGA mentioned a false belief by businesses that competition law only applies to dominant / sizable firms, or that ‘technical’ agreements, such as technological standardization, would be free from competition concerns. Risk awareness may also be low in regard to information sharing or business communications to the public. Some business people may also perceive that, compared to data breaches, anticompetitive behavior is more difficult to detect.

¹² Link to the ICC SME Toolkit: <https://icwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business/>

iii) Competition compliance comes as less of a priority

Another challenge identified by NGAs was limited resources given to implement competition compliance measures. Corporations might find designing and implementing a competition compliance program to be time-consuming and not a priority, or even deem it as a roadblock to achieving business goals. Some business operators perceive strong competition in a market as a threat to a company's margin and profit. Some multinational companies may also put anti-corruption and data protection compliance before competition compliance, and may be of the view that competition compliance is optional rather than essential. One NGA expressed that a challenge may be the allocation of enough resources for the competition compliance program as compared to other compliance programs, especially for companies that have never been involved in an antitrust violation / investigation.

a. Integrated approach to compliance

A few NGAs suggested that the compliance programs in competition, anti-corruption and data protection can be designed and implemented in a connected, integrated and holistic fashion, rather than in silos. One NGA opined that the challenges are broadly the same for compliance programs dealing with issues such as bribery, fraud or money-laundering. She / he explained that bribery and cartels involve secrecy, and the compliance management systems will therefore need to look out for the same risk factors and tackle issues using similar methods and strategies. But data protection or IT compliance programs can put greater emphasis on technical controls and processes. In her / his opinion, it is therefore highly preferable to assign the responsibility for both programs to one compliance officer within an organization.

E. Further assistance from competition agencies

NGAs were also given an open-ended question about what, in their views, competition agencies can do to further assist general counsel / compliance officers of a company to promote a culture of compliance. NGA respondents' suggestions largely fall into two categories.

i) Clear "reward" system

Several NGA respondents highlighted the importance of competition authorities in recognizing a company's compliance program as an element that may mitigate liability and financial penalty in the event of an infringement. Financial and organizational efforts made by companies to achieve effective compliance should be taken into account in the assessment of fines or other sanctions. Competition agencies should be clear about their "reward mechanism", such as under which conditions immunity / discounts will be granted, and the criteria that will be used by agencies to evaluate the programs, and make these official and well-known to the public.

One respondent viewed that it is most important for competition agencies to recognize / reward both the cases of compliance programs already existing at the time of the infringement (ex ante)

and programs adopted after the uncovering of the violation (ex post). Should the relevance be accorded only to ex post programs, this would turn into a disincentive for companies to genuinely and constantly engage in preventive measures to achieve competition compliance.

ii) Stakeholder engagement

A number of NGA respondents opined that, in order to ensure a coherent and consistent approach to recognizing and “rewarding” businesses’ compliance programs, competition authorities should engage with the business sector and other stakeholders more closely. Some NGAs suggest, in particular, that competition agencies could provide more guidance on how to design and roll out a compliance program, what key elements to be included in the program, criteria to evaluate the program.

Some NGAs also mentioned that competition agencies should also make more educational and preventive stakeholder engagement efforts with a view to raising companies’ awareness and understanding of competition compliance. One NGA suggested hosting more conferences and events that focus on digital platforms, enabling businesses to better understand the potential compliance issues in these relatively new and emerging markets.

iii) Other suggestions

Other suggestions include: (a) competition agencies to advocate for legislative measures that require including competition compliance in a company’s non-financial/ ESG (i.e. Environmental, Social, and Governance) reporting and (b) a dedicated team to be set up within competition agencies for promoting use of compliance programs and to review companies’ compliance efforts.

4. Concluding remarks

This Report aggregates insights from competition agencies and NGAs on how to achieve a success in developing and maintaining a culture of competition compliance among businesses. While the two groups of respondents share a similar view on what are the most important elements of an effective compliance program, they place slightly different focuses on various elements. They also provide a variety of suggestions on what could be done in pursuit of a stronger compliance culture and compliance programs.

It is no doubt that competition agencies would find much value in continued cooperation, collaboration and consultation with the business sector and / or their advisers as they continue to undertake initiatives to encourage and support businesses' compliance efforts. As part of this, competition agencies may benefit from being able to better understand and evaluate the effectiveness of their advocacy efforts to promote the adoption of compliance programs and more generally a competition compliance culture. The AWG's work as part of the *Explaining the Benefits of Competition to Businesses*¹³ project can be useful for agencies to consult when developing messaging regarding compliance.

¹³ Link to the *Explaining the Benefits of Competition to Businesses*: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_ExplainingBenefitstoBuisnesses.pdf